



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



CROTHERS HALL
LAW LIBRARY



Gift of
GEORGE E. CROTHERS

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

CHARLES A. TUTTLE,
REPORTER.

VOLUME 23
WITH
NOTES ON CAL. REPORTS

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1906.

Entered according to Act of Congress, in the year of our Lord, 1864, by
CHARLES A. TUTTLE,
In the Clerk's Office of the District Court of the United States in and for the
Northern District of the State of California.

COPYRIGHT, 1898.

By BANCROFT—WHITNEY CO.

COPYRIGHT, 1905,

By BANCROFT—WHITNEY CO.

COPYRIGHT, 1906,

By BANCROFT—WHITNEY CO.

JUSTICES
OF
THE SUPREME COURT

DURING THE TERM OF THESE REPORTS.

HON. W. W. COPE.....CHIEF JUSTICE.

HON. EDWARD NORTON.....

HON. E. B. CROCKER.....

ASSOCIATE JUSTICES.



CASES REPORTED.

	Page.		Page.
Abrams v. Howard.....	388	Clark, Griggs v.....	427
Allen, Henderson v.....	519	Clements, Colman v.....	245
Allington, Welch v.....	322	Colman v. Clements	245
Amey v. Taber.....	370	Colmere, People v.....	631
Antoine Co. v. Ridge Co.	219	Commercial Mining Co., Treasurer v.	390
Arnold, Hamm v.....	373	Compton, Ricketson v.....	629
Ayers, Dawley v.....	106	Connor v. Morris.....	447
		Contra Costa Railroad Co. v. Moss..	323
Bader, Castle v.....	75	Coster v. Brown.....	142
Badger, McDonald v.....	393	Craig, McCrear v.....	522
Bailey, People v.....	577	Creanor v. Nelson.....	464
Baldwin v. Ferre.....	461	Cummings v. Scott	526
Banks v. Marshall.....	223		
Barnhisel, O'Grady v.....	287	Davis, Goldman v.....	256
Bartholomew v. Hook.....	277	Davis, Mitchell v.....	351
Baylla, Kalkman v.....	306	Dawley v. Ayers	108
Bishop v. Hubbard.....	514	Dawley v. Hovious.....	103
Blackman v. Pierce.....	506	De La Guerra v. Burton.....	592
Bliven, Gluckauf v.....	312	Devlin, Hughes v.....	501
Boles v. Johnston.....	226	DeUprey v. DeUprey.....	352
Borland, McNeil v.....	144	Doane, Spencer v.....	418
Boston, Wenborn v.....	321	Donner v. Palmer.....	40
Bradshaw, Dyson v.....	528	Doub, Gavitt v.	78
Brady, Hathaway v.....	121	Douglass, Draper v.....	347
Brady, O'Brien v.....	243	Downey, Flandreau v.....	354
Brady v. O'Brien.....	244	Draper v. Douglass.....	347
Brennan, Hale v.....	511	Dudley v. Thomas.....	365
Brown, Coster v.....	142	Duff, Hobbs v.....	506
Bullock v. Hubbard.....	406	Dyson v. Bradshaw.....	523
Burns v. McKensie.....	101		
Burton v. De La Guerra.....	592	Ebner, People v.....	158
		Ellis v. Hall.....	160
Calderwood, Haynes v.....	409	Ensminger v. McIntire.....	598
Calderwood v. Tevis.....	335	Estudillo, Mulford v.....	94
Camden v. Vall.....	683	Everett v. Hydraulic Flume Co....	225
Castle v. Bader.....	75		
Chan Tin Pen, Roberts v.....	260	Fall v. Palne.....	302
Chapman v. Thornburg.....	48	Faught, Tustin v.....	237
Chida, Wangerheim v.....	444	Ferguson, Marshall v.....	65

Page.	Page.
Ferre, Baldwin v..... 461	Hughes v. Devlin..... 501
Fitzgerald, Seaver v..... 86	Hull, Mills v..... 160
Flandreau v. Downey..... 354	Hussey v. McDermott..... 413
Fletcher, Phoenix Water Co. v..... 481	Hydraulic Plume Co., Everett v.... 225
Fogarty v. Sawyer..... 570	In Matter of Estate of Hidden..... 362
Forbes, Merrill v..... 379	In Matter of Estate of James..... 415
Fowler v. Harbin..... 630	In Matter of Estate of Pacheco ... 476
Franklin v. State Board of Examiners 173	In Matter of Estate of Reed..... 410
Fremont, McCarty v..... 103	In Matter of Romaine..... 585
	Irvine v. McKeon..... 472
Gallagher, McCue v..... 51	Jackson v. Sacramento Valley Rail- road Co. 268
Gallagher v. Williamson..... 331	James, In Matter of Estate of.... 415
Gassaway, People v..... 51	Johnson, Smith v..... 63
Gassner v. Patterson..... 299	Johnston, Boles v..... 226
Gatewood v. McLaughlin..... 178	
Gaunt, People v..... 156	Kalkman v. Baylis..... 303
Gavitt v. Doub..... 78	Kelly v. Taylor..... 11
Gluckauf v. Bliven..... 312	Keys, Preston v..... 193
Goldman v. Davis..... 256	Keystone Mining Co., Patterson v.. 575
Gordon, Northam v..... 255	Kile v. Tubbs..... 431
Gorham, Pelberg v..... 349	Kittredge v. Stevens..... 283
Grattan v. Wiggins..... 18	
Gray, People v. 125	Lachman, Skillman v..... 198
Grewell v. Walden..... 165	Ladd v. Ruggles..... 232
Griggs v. Clark..... 427	Lathrop v. Middleton..... 257
Guy v. Washburn..... 111	Leet, People v..... 161
Gyle v. Shoenbar..... 588	Lewis v. Tyler..... 364
	Linn, People v..... 150
Hale v. Brennan..... 511	Lowell, Heyman v..... 106
Hall, McGarvey v..... 140	
Hamm v. Arnold..... 573	Maison v. Vaughn..... 61
Harbin, Fowler v..... 630	Marshall, Banks v..... 223
Harris, Meeker v..... 285	Marshall v. Ferguson..... 65
Hathaway v. Brady..... 121	Marshall, Mayo v..... 594
Hayes v. Wells, Fargo & Co..... 135	Maye v. Yappen..... 306
Haynes v. Calderwood..... 409	Mayo v. Marshall..... 594
Henderson v. Allen..... 519	Mayo, Moss v..... 421
Herriter v. Porter..... 335	McCahill, Pierson v..... 249
Heyman v. Lowell..... 106	McCarty v. Fremont 196
Hicks v. Whiteside..... 404	McCoy, Natoma Water Co. v..... 490
Hidden, In Matter of Estate of.... 362	McCrea v. Craig..... 522
Higby, McDermott v..... 459	McCue v. Gallagher..... 51
Himmelmann v. Schmidt..... 117	McDermott v. Higby..... 489
Hobbs v. Duff..... 596	McDermott, Hussey v..... 413
Hodgkins v. Hook..... 581	McDonald v. Badger..... 393
Holmes v. Ohm 268	McDonald, Zoller v..... 136
Holmes, Schilling v..... 227	McEwen, People v..... 54
Hook, Bartholomew v..... 277	McGarvey v. Hall..... 140
Hook, Hodgkins v..... 581	McGregor, Verzan v..... 339
Hovious, Dawley v..... 103	McIntire, Ensminger v..... 596
Howard, Abrams v..... 388	McKensie, Burns v..... 101
Howard, Rowley v..... 401	
Hubbard, Bishop v..... 514	
Hubbard, Bullock v..... 495	

	Page.
McKeon, Irvine v.	472
McLaughlin, Gatewood v.	178
McNiel v. Borland	144
Meeker v. Harris.....	285
Merrill v. Forbes.....	379
Middleton, Lathrop v.....	257
Miller v. Newton.....	554
Mitchell v. Davis.....	381
Moore, Tibbetts v.....	208
Morris, Connor v.....	447
Moss, Contra Costa Railroad Co. v.	323
Moss v. Mayo	421
Mulford v. Estudillo.....	94
Murdoch, Walden v.....	540
Murray v. Board of Supervisors Mariposa County.....	492
Murray, Nelson v.....	338
Naglee, Neely v.....	152
Natoma Water Co. v. McCoy.....	490
Neely v. Naglee.....	152
Nelson, Creanor v.....	484
Nelson v. Murray.....	338
Newton, Miller v.....	554
Northam v. Gordon.....	265
O'Brien v. Brady.....	243
O'Brien, Brady v.....	244
O'Connell, People v.....	231
O'Grady v. Barnhisel.....	287
Ohm, Holmes v.....	268
Pacheco, In Matter of Estate of... ..	476
Palme, Fall v.....	302
Palmer, Donner v.....	40
Park, People v.....	138
Parsons v. City and County of San Francisco	463
Patterson, Gassner v.....	299
Patterson v. Keystone Mining Co..	375
Pehl, Riley v.....	70
Pelberg v. Gorham.....	349
People v. Bailey.....	577
People v. Colmère.....	631
People v. Ebner.....	158
People v. Gassaway.....	51
People v. Gaunt.....	156
People v. Gray.....	125
People v. Leet	161
People v. Linn.....	150
People v. McEwen.....	54
People v. O'Connell.....	231
People v. Park.....	138
People v. Rains.....	127

	Page.
People v. Rains, No. 2.....	131
People v. Smith.....	280
People v. Todd.....	181
People v. Wallace.....	93
Phoenix Water Co. v. Fletcher.....	481
Pierce, Blackman v.....	508
Pierson v. McCahill	249
Pond Co., Real del Monte Co. v....	82
Porter, Herriter v.....	386
Preston v. Keys.....	193
Preston, Ward v.....	468
Rains, People v.....	127
Rains, No. 2, People v.....	131
Real del Monte Co. v. Pond Co....	82
Reed, In Matter of Estate of.....	410
Ricketson v. Compton.....	633
Ridge Co., Antoine Co. v.....	319
Riley v. Pehl.....	70
Roberts v. Chan Tin Pen.....	359
Rogers, Swinford v.....	233
Romaine, In Matter of.....	585
Bowley v. Howard.....	401
Ruggles, Ladd v.....	232
Rupley v. Welch.....	452
Sacramento Valley Railroad Co., Jackson v.....	268
San Francisco, Parsons v.....	462
San Francisco, Satterlee v.....	314
Sargent v. Sturm.....	359
Satterlee v. San Francisco.....	314
Sawyer, Fogarty v.....	570
Schilling v. Holmes.....	227
Schmidt, Himmelmann v.....	117
Scott, Cummins v.....	526
Seaver v. Fitzgerald.....	85
Shoenbar, Gyle v.....	538
Skillman v. Lachman.....	198
Smith v. Johnson.....	68
Smith, People v.....	280
Spencer v. Doane.....	418
State Board of Examiners, Frank- lin v.....	173
Stevens, Kittredge v.....	233
Stone, Whitney v.....	275
Stow, Van Winkle v.....	457
Sturm, Sargent v.....	359
Supervisors Mariposa County— Board of, Murray v.....	492
Swinford v. Rogers.....	233
Taber, Amyx v.....	370
Taylor, Kelly v.....	11
Tebbs v. Weatherwax.....	58

	Page.		Page.
Tetis, Calderwood v.....	335	Watson v. Whitney.....	375
Thomas, Dudley v.....	365	Washburn, Guy v.....	111
Thornburg, Chapman v.....	48	Waugenheim v. Childs	444
Tibbetts v. Moore.....	208	Weatherwax, Tebbs v.....	58
Todd, People v.....	181	Wells, Fargo & Co., Hayes v.	185
Treasurer v. Commercial Mining Co.	390	Wells, Fargo & Co., Zeigler v.....	179
Tubbs, Kile v.....	431	Wenborn v. Boston.....	321
Tustin v. Faught.....	237	Welch v. Allington	322
Tyler, Lewis v.....	364	Welch, Rupley v.....	452
		Whiteside, Hicks v.....	404
Vail, Camden v.....	633	Whitney v. Stone.....	275
Van Winkle v. Stow.....	457	Whitney, Watson v.....	375
Vaughn, Malson v.....	61	Wiggins, Grattan v.....	18
Vernan v. McGregor.....	339	Williamson, Gallagher v.....	351
Walden, Grewell v.....	165	Yappen, Maye v.....	306
Walden v. Murdock.....	540		
Wallace, People v.....	93	Zeigler v. Wells, Fargo & Co.....	179
Ward v. Preston.....	468	Zoller v. McDonald.....	136

JULY TERM, 1863.



REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

JULY TERM, 1863.

KELLY *et al.* v. TAYLOR *et al.*

WHEREAS the location of a mining claim is made both by posting notices and by designating fixed objects such as trees, shafts, and ditches on or near its exterior boundaries, in an action between two companies involving the title to a portion of the ground witnesses are not confined in their testimony to a statement of the contents of the notices but may also state whether the location made included the ground in dispute.

The same rules of law relating to estoppel *in pais* apply to mining ground as any other real estate claimed under a similar kind of title.

APPEAL from the District Court of the Fourteenth Judicial District, County of Nevada.

Plaintiffs and defendants owned mining claims adjoining each other upon which they had been at work for several years. A dispute arose as to the precise location of the boundary line between them.

On the trial it appeared from the evidence that plaintiffs had at various times performed labor on the disputed ground by running drifts into it and performing other work upon it, and that the fact that plaintiffs were performing such labor was probably known to

Kelly v. Taylor.

defendants, and that defendants had not notified plaintiffs to cease such work.

Plaintiffs had judgment in the Court below and defendants appealed.

Searls & Niles, for Appellants.

The doctrine of estoppel by the act or silence of an owner of real estate has been fully and clearly settled by this Court in a series of decided cases. We need only refer to the principles laid down in those cases to see the error of the instructions given by the Court.

In the first place it was manifestly erroneous to say that in this regard a different rule applied to mining claims from that applicable to other species of real estate.

But the chief objection to the instruction is, not to that part of it which asserts that a different rule exists, but to that part which announces what the rule is.

1st. The instruction does not presuppose that the party so entering is anything more than a mere naked trespasser. We have supposed and this Court has held that the fraud which creates an estoppel "only exists where the owner knows that the other person is making the expenditures under the *bona fide* reasonable belief that he is the owner of the property." (*McGarrity v. Byington*, 12 Cal. 431.) This element the instruction entirely omitted.

2d. Again, for aught appearing in the instruction, the trespasser may have as perfect and thorough a knowledge of the nature and extent of the owner's claim as the owner himself.

3d. Again, although the boundaries of the claim are not visibly marked (as the instruction supposes), yet the trespasser may have ample means otherwise to ascertain the true title and ownership of the property. There may be a deed recorded, describing the land by courses and distances, or some local mining rule or custom may provide for a local record of description to take the place of stakes and landmarks.

4th. In the case of *Boggs v. The Merced Mining Co.*, where the doctrine of estoppel *in pais* was fully discussed, it was said that by the application of the principle it must appear:

Kelly v. Taylor.

1. That the party making the admission by his declarations or conduct was apprised of the true state of his own title.

2. That he made the admission with the express intention to deceive or with such careless and culpable negligence as to amount to constructive fraud.

3. That the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge.

4. That he relied directly upon such admission and will be injured by allowing its truth to be disproved.

Of these requisite elements to constitute an estoppel the instruction we are considering does not contain one; unless, perhaps, the first, if the word "knowingly" may be construed to mean in its connection a knowledge of his own title on the part of the owner. (*Boggs v. Merced M. Co.*, 14 Cal. 367.)

Henry K. Mitchell, for Respondents.

The first part of this instruction is explained by that which immediately follows, and could not therefore mislead the jury, or prejudice any of the rights of defendants, unless the matter in explanation is erroneous.

The explanatory part of this instruction contains all that is requisite to create a complete estoppel. The expenditure of money in running the tunnels, the knowledge of defendants of the claim of title of plaintiffs, the fraud of defendants in permitting plaintiffs to make such expenditure of money under the *bona fide*, reasonable belief that they were the owners, are all included in the instructions given, when taken together. Neither does such instruction necessarily give to the opposite party the character of trespasser. The same was given under the circumstances of the case as established by the evidence, and the jury in considering the instruction also took into consideration the evidence.

The rule is not applicable to trespassers upon lands, for the reason that they can ascertain the rights of any person by examination at the Recorder's Office. But in mining claims, in the years 1852-1856, and even later, no recordation was required. For aught this Court or the Court below can determine from the evi-

Kelly v. Taylor.

dence, the ground in dispute was not within any mining district; neither were there any laws or regulations of miners requiring a recordation. We presume that such was the meaning of the Court in saying that a different rule prevailed as to mining claims. .

But again, we contend that the instruction comes within the decision in the case of *Boggs v. Merced Mining Co.*: 1st. The defendants, by their conduct, were apprised of the true state of their title. The evidence of defendants and their sworn answer show the fact. 2d. The acts of defendants, if they permitted plaintiffs to proceed, and at great expense run tunnels in the disputed ground, well knowing plaintiffs' claim of title, is sufficient evidence to amount to a constructive fraud.

CROCKER, J., delivered the opinion of the Court — COPE, C. J., concurring.

This is an action to recover possession of certain mining ground, and damages for injuries thereto. The plaintiffs and defendants were each the owners of adjoining claims, and there was a dispute between them respecting the location of the division line, by which a portion of the mining ground was claimed by both parties. The plaintiffs had previously run their tunnel into and mined out a portion of the disputed ground, which was known to the defendants.

On the trial one Clark testified, as a witness for the plaintiffs, as to the acts of those who originally located the ground claimed by the plaintiffs, showing the posting of notices and the location of certain trees which marked the boundary lines, and of certain ditches and a shaft, and the location of the lines in relation thereto. He was then asked: "Did the location you made include the ground in dispute?" To which the defendants objected on the ground that the testimony showed that the location had been made by notices, and that they were the best evidence of the extent of the location. The objection was overruled, and the defendants excepted. The question was a proper one. The location does not seem to have been made by notices alone, and it was clearly proper for the witness, after stating the location of the lines of the claim, to state whether those lines included the ground in controversy.

After the evidence was closed the Court instructed the jury as

Kelly v. Taylor.

follows: "That in the matter of estoppel a different rule applies to mining claims from that applicable to other species of real estate; that an owner of a mining claim, the boundaries of which are not visibly marked, should notify strangers entering upon it of the nature and extent of his claim, and if he knowingly permits persons to enter upon his claim and expend money in working and improving it, without notifying such persons of his title, he is thereby estopped from setting up such title as against them."

The first branch of this instruction is erroneous. The rules of law relating to estoppel *in pais* apply to mining ground the same as any other real estate claimed under a similar kind of title. The rest of the instruction is also erroneous, as it omits entirely several important and essential qualifications of the rule upon this subject. Thus it should state that the party entering did so under a claim of right or title, and that the true owner remained silent under such circumstances that his silence operated as a fraud upon the other party, and that the latter was induced thereby to make valuable and permanent improvements, and would therefore be injured by allowing the true title to be set up against him. As was stated by this Court in the case of *Boggs v. The Merced Mining Company* (14 Cal. 368): "There must be some degree of turpitude in the conduct of a party, before a Court of Equity will estop him from the assertion of his title; the effect of the estoppel being to forfeit his property and transfer its enjoyment to another."

The respondents insist there was sufficient evidence to sustain the plaintiff's case, independent of these instructions, and that he did not rely upon the doctrine of estoppel in the Court below. The case was tried by a jury, and it is impossible for us to tell upon what particular portion of the evidence they founded their verdict, or what instructions controlled them. They may have found for the plaintiff entirely upon these erroneous instructions, or they may have disregarded them entirely. It is sufficient, however, if it appears that they might have been influenced thereby, to make it our duty to send the case back for a new trial, that the error may be corrected.

The judgment is reversed, and the cause remanded for further proceedings.

Grattan v. Wiggins.

GRATTAN *et al.* v. WIGGINS *et al.*

THE defense of the Statute of Limitations is a personal privilege of the debtor which he may assert or waive at his option, but it must be set up in some form either by demurrer or answer, or it will be deemed to have been waived. In an action to recover judgment for the amount of a debt secured by mortgage on real estate, and also to foreclose the mortgage, the grantees of the mortgagor, purchasers subsequent to the execution of the mortgage, have a right to plead the Statute of Limitations as to that part of the claim of plaintiff which asks for a decree foreclosing the mortgage and a sale of the mortgaged premises.

Sec. 260 of the Practice Act of 1851 which provides that "a mortgage of real property shall not be deemed a conveyance whatever its terms" etc., applies to all mortgages, as well those executed before as after its passage.

When a debt, secured by mortgage, is payable in installments, the mortgagee or his assignee has a right to bring an action to foreclose the mortgage when the first installment falls due and is not paid.

A debt due to the intestate is a personality, and does not descend to the heir like realty, but vests in the administrator, who has the sole right to maintain actions to collect the same, and it is error to join the heir as plaintiff with the administrator in an action to enforce its collection.

Where several notes have been given which are secured by one mortgage, and the notes are assigned to different persons, the assignor has a right, by agreement with the assignees, to fix the rights of the purchasers of the several notes to the mortgage security.

Where in such case the assignee of one note having the first right to the benefit of the mortgage security forecloses when the debt falls due, and obtains a decree under which all the mortgaged property is sold, such foreclosure and sale operate as an extinguishment of the mortgage.

The holders of the other notes secured by the mortgage, have a right to redeem from the sale made under such foreclosure, but when not made parties to the action must assert this right to redeem within four years, or it is barred by the Statute of Limitations.

The right to foreclose and the right to redeem are reciprocal, and the Statute of Limitations as to the right of redemption begins to run at the time the right of action accrues on the mortgage.

APPEAL from the Third Judicial District, Santa Clara County.

The facts are fully stated in the opinion of the Court.

John B. Hall, for Appellants, Grattan *et al.*

The mortgage was a common law conveyance, and vested the legal title in the mortgagee.

Grattan v. Wiggins.

Immediately upon the delivery of the deed, Cook was entitled to the possession, and could maintain ejectment for the same; and Wiggins became, and was thereafter, the mere tenant at sufferance of his grantee, and not entitled to notice to quit before suit for possession. (4 Kent's Com. 155 *et seq.*; *Goodwin v. Richardson*, Adm'r, 11 Mass. 469; *Perkins et al. v. Petts et al.*, 11 Id. 125; Adams on Eject. 60 *et seq.* and notes; Id. 33, 520, 521; Smith's Leading Cases, 666; 10 Mo. 229, 230; 2 Parsons on Contracts, 379.)

And once in possession the rule was that the mortgagee could not be evicted until the debt was paid. (*Waring v. Long*, 2 Barb. Ch. 135.)

No statutes have been, or indeed could constitutionally, have passed, which would have altered that relation of Cook to the premises.

The common law was the rule of decision when this conveyance was executed and delivered (Act of 1850, Ch. 90), and from that law the instrument derived its character, and the parties became invested with their several rights. (*Van Maren et al. v. Johnson et al.*, 15 Cal. 308.)

If a change has been wrought in the legal effect of deeds of mortgage, it has been brought about solely in virtue of Sec. 260 of the Civil Practice Act, passed April, 1851, and which can by no principle of law, right, or justice, be held to take from Cook and his representatives, that which was firmly fixed long before, as his and their rights and estate. (*People v. Hays*, 4 Cal. 127; *Fogarty v. Sawyer*, 17 Id. 589.)

At the common law, and treating the deed of July, 1850, as conveying to the grantee, Cook, the substantial title and ownership, there is no bar by lapse of time to the relief sought, or any part of that relief. The period of twenty years, by analogy to the rule at law, was adopted in equity as the time after which a presumption of payment and of a reconveyance of the title was allowed. But that length of time has not elapsed, and so no impediment arises from that cause. (4 Kent's Com. 189, note *a*, and the authorities there cited.)

But it may be claimed, that by analogy to the statute of our

Grattan v. Wiggins.

State, the period should be reduced to five years. (Wood's Digest, Arts. 6, 7.) If adopted, however, it would still leave open and operative the rule everywhere recognized, that as the lapse of time only raises a presumption, that presumption may be rebutted by direct proof or by circumstantial evidence showing the fact to be otherwise. (4 Kent's Com. 190; *Hughes v. Edwards*, 9 Wheat. 489.) There was no person *in esse*, when all the payments after that of January, 1853, became due, to whom the right of action accrued. There was no personal representative of Cook from May 26th, 1853, to December 4th, 1856. Therefore the limitation of the statute never commenced to run as to the five payments maturing at different dates within this space of time. (*Smith v. Hall*, 19 Cal. 85; *Quivey v. Hall*, Id. 97.)

If the legal estate passed by virtue of the mortgage, and the mortgagee became the owner, this relation of the parties to the property will be considered by the Court as continuing, and their rights will be determined according to this relation, and will not suffer any impairment by reason of our act prescribing a specific judgment in every case of this class. This bill prays for a decree of strict foreclosure; and yet if this be not grantable, the Court will render a decree in the designated form.

Wallace, for Appellants Laurencel and Eldredge.

There is a misjoinder of parties plaintiff in the complaint. Rebecca Grattan was the widow and heir at law of Grove C. Cook, but she was not an administratrix of the estate; the administrators alone (Hall & Huggins) had the right to maintain a suit respecting the matters set forth in the complaint. If the plaintiff Rebecca could jointly with the plaintiffs Hall & Huggins maintain this suit, then a payment made to her would satisfy the demand, and the estate would be deprived of its assets. She is not entitled to anything or to receive anything, except her distributive share of the estate after it passes through the hands of the administrator in the Probate Court; in other words, the whole complaint may be true, and yet she be entitled to receive nothing, because *non constat* that the whole of the money sued for may not be applied in the Probate Court to the payment of the debts of the estate. (*Meeks v. Hahn*, 20 Cal. 627.)

Grattan v. Wiggins.

By the terms of the mortgage, Cook was authorized, as the holder of these notes, to foreclose the mortgage if "any one" of the notes should not be "duly and punctually paid." On the first day of December, 1851, when Foster commenced the foreclosure suit against Wiggins, Foster was the holder of the only one of these notes which was not at that time "duly and punctually paid." One note falling due before that time had been paid; none of the other notes, except Foster's note, was due at that time. No right, then, existed to foreclose the mortgage for any note but the Foster note. Now, in order to determine the right which Foster had as assignee of Cook, let us inquire how it would have been if Cook had never assigned the Foster note at all, but had filed his complaint in December, 1851, to foreclose the mortgage as holder of the note and mortgagee. In such a case, is it not clear that Cook might have maintained his suit properly against Wiggins, the mortgagor, upon the allegation that one of the notes was due and unpaid? Would he have been called on in such a bill of complaint to account for the other notes which were not due, and in respect to which no relief was or could be asked? Certainly not. He had a right to sell the whole of the mortgaged premises to pay the note that was due. The terms of the mortgage in this case are precisely similar to the provisions of the Statute of Indiana in relation to the foreclosure of mortgages. (*Andrews v. Jones*, 3 Blackford, 440; *State Bank v. Tweedy*, 8 Id. 449.) And it is held in those cases that the whole of the mortgaged property may be sold, and the sale money applied to the payment of the note or installment then due. (See also the dissenting opinion of Ch. J. Gibson, in *Donly v. Hayes*, 17 S. & R. 400; and the case of *Cullum v. Erwin*, 4 Alabama, 452.) The dissenting opinion of Ch. J. Gibson, in the case of *Donly v. Hayes*, *supra*, is a clear and able exposition of the law in the case at bar. He says: "My position is that the assignee is a purchaser for a valuable consideration of all the securities of the assignor and of all the remedies, and may use them in any way he may think proper as freely and as beneficially as could the assignor himself, to whom it was indisputably competent at the time of the assignment to order the mortgage to stand as a security in the first place for the installment due on the particular bond."

Grattan, v. Wiggins.

In the case of *Slee v. Manhattan Company* (1 Paige's Ch.), it is held in a case similar to this at bar, that the assignee (who was proven in that case to be a new mortgagee) had power to foreclose and sell the mortgaged property, and that such a sale was binding upon the assignor, though he was not made a party to the proceeding. In that case, as the assignee was in fact a mortgagee of the assigned note and mortgage, and became at the sale a purchaser of the mortgaged premises, he was decreed to be a trustee of the assignor; but it was declared that if a stranger had purchased at such a foreclosure, he would have taken the title free from any question; and that in that event the right of the assignor (which sprung from the fact of his assignment being only to secure a debt that he owed to his assignee, and therefore being only a mortgage) would have rested solely upon the money which was raised by the sale of the land. Here a stranger (Fossatt) did purchase, and has since sold. Cook, therefore, had no interest upon which he ought to have been made a party, except an interest in the surplus of the payment of the Foster note; and until it was ascertained that there was a surplus, he had no business in Court. (*The Union Insurance Co. v. Van Rensselaer*, 4 Paige, 85.) The right of Cook to redeem (if he had any such right) from the sale in the suit of *Foster v. Wiggins*, was barred of limitation. The cause of action accrued to Cook during his lifetime, and could not have existed beyond four years of its accrual. (Wood's Dig. Art. 17, p. 47.) The statute having commenced to run during Cook's lifetime, did not stop running on account of his death, and, as a consequence, was barred in the year 1856.

It is admitted in the pleadings, that Laurencel and Eldredge (these appellants) necessarily expended \$200,000 in obtaining a confirmation of this claim. Except for this expenditure and effort of theirs, the title to this land was forfeited under the Act of 1851. Will the principles of equity permit these representatives of Cook, who have lain by and quietly witnessed these efforts and expenditures of the appellants, to step forward now and appropriate the results and fruits of that protracted and expensive litigation without any provision or condition for the repayment of that \$200,000 claimed and admitted in the face of the Court to have been neces-

Grattan v. Wiggins.

early expended in good faith by Laurencel and Eldredge! The law of the land having clothed them with the superior legal title to this land, is there a superior equity on the part of the plaintiffs to subject the land to the payment of their stale claim?

William Barber, also, for Respondents Laurencel and Eldredge.

Giving the plaintiffs the benefit of the common law doctrine respecting mortgages, their right of entry would in this case be barred by lapse of time. Our Statute of Limitations was passed April 22d, 1850, and was consequently in operation prior to and at the time of the execution of the mortgage in question. The present suit was commenced January 22d, 1859. The mortgage was executed July 22d, 1850, eight years and a half before this suit was commenced. The right of entry accrued on the execution of the mortgage (*McMillan v. Richards*, 9 Cal. 407), and the statute began to run from that time. (*Doe v. Lightfoot*, 8 Mees. & Wels. 553.) As the statute began to run during Cook's lifetime, his decease, February 15th, 1852, did not stop it. (*Quivey v. Hall*, 19 Cal. 100; *Angell on Limitations*, 57; *Jackson v. Moore*, 13 Johns. 513.) This Court decided, in the case of *Lord v. Morris* (18 Cal. 486), that "in this State the statute applies equally to actions at law and suits in equity."

So far as concerns the remedy of the plaintiffs on the notes of Wiggins, Laurencel and Eldredge have no control over it. But when the plaintiffs seek to obtain satisfaction of their demands against Wiggins personally, by foreclosing a mortgage on which the cause of action accrued more than eight years before they commenced their suit, the present holders and owners of the mortgaged property certainly have a right to insist that this part of the remedy is barred by the statute. The case of *Lord v. Morris* (18 Cal. 482) decides the principle of this branch of the case.

At the time when the installment of July 21st, 1851, became due, and the right of foreclosure accrued, our statute regulating the foreclosure of mortgages was in operation. (Practice Act of April 29th, 1851, Secs. 246-248; *Wood's Digest*, 260, Secs. 980-982.) The practice to be pursued where only part of the debt is due is pointed out in the last section of this act: "So soon

Grattan v. Wiggins.

as sufficient of the property has been sold to pay the amount due, with costs, the sale shall cease; and afterwards as often as more becomes due for principal or interest, the Court may, on motion, order more to be sold. But if the property cannot be sold in portions without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper."

CROOKER, J. delivered the opinion of the Court — NORTON, J. and COPE, C. J. concurring.

This is an action to foreclose a mortgage upon the undivided one-half of the "Rancho de los Capitancillos," in Santa Clara County, executed by Wiggins to one Cook, dated July 22d, 1850, to secure the payment of the sum of \$50,000, payable in ten equal installments of \$5,000 each, due every six months from the date of the mortgage, with power to the mortgagee to foreclose the mortgage if any one of the payments should not be duly paid. Notes were given at the same date for the several installments. The suit was commenced on the twenty-second day of January, 1859, and the Court held that the action as to all the notes, except the two last, which fell due the twenty-second of January and July, 1855, was barred by the Statute of Limitations, and rendered a judgment, which, after reciting that there was due on these notes for principal and interest the sum of \$17,097.24, ordered the mortgaged premises to be sold and the proceeds applied to the payment of this debt and the costs of suit, and if the same should be insufficient to pay the debt, then a judgment should be docketed in favor of the plaintiff Hall, administrator of Cook's estate, against the defendant Wiggins, for such deficiency, and foreclosing the equity of redemption as to the defendants Wiggins, Foster, Laurencel, and Eldredge, and all persons claiming under them, after the twenty-second day of January, 1859, the date of the filing of notice of the pendency of the suit. From this judgment the plaintiffs have appealed, on the ground that the Statute of Limitations was no bar to any of the unpaid notes. The defendants Laurencel and Eldredge, who claim to be the owners of the mortgaged premises, also appeal from the judgment and the order refusing a new trial, on various grounds.

Grattan v. Wiggins.

The record shows that the first of the notes executed by Wiggins to Cook, and which fell due January 22d, 1851, was paid. The second note, which fell due July 22d, 1851, was, on the fifteenth day of May, 1851, assigned by Cook to Foster, one of the defendants, together with the mortgage, which was also delivered, to secure Foster in the payment of the \$5,000 called for by the note. The third, fifth, sixth, ninth, and tenth notes have been lost or destroyed. The fourth note, which fell due July 22d, 1852, was, on the twenty-seventh day of June, 1851, assigned by Cook to the defendant Smith, to secure a note for seven hundred and seventy-one dollars and thirty cents, bearing interest at ten per cent. per month, executed by Cook and one McKinney; and Cook also assigned by deed the \$50,000 mortgage as further security. The seventh and eighth notes, due January and July 22d, 1854, are in the possession of the defendant Laurencel; but the Court found that he had no interest in or title to them. Cook died February 15th, 1852, and at that time he had all the notes in his possession, except the first, second, and fourth, the two last having been assigned to Foster and Smith. On the ninth day of August, 1858, the defendant Smith assigned the fourth note and the mortgage to Laurencel. The original mortgage was lost by Foster some time about November, 1851.

On the twenty-fifth day of April, 1851, Wiggins conveyed by deed, duly executed, acknowledged, and recorded, all his interest in the mortgaged premises to one Berrian, who, on the thirtieth day of October, 1858, conveyed the same to Laurencel and Eldredge, two of the defendants. On the first day of December, 1851, Foster commenced an action in the proper Court against Wiggins, who was the sole defendant, to recover judgment on the second note, which had been assigned to him, and to foreclose the mortgage; and on the eighteenth day of December, 1851, he recovered a personal judgment therein against Wiggins, and a decree for the sale of the mortgaged premises to pay that judgment and foreclosing the equity of redemption. Under this judgment the mortgaged premises were duly sold by the Sheriff to the defendant Fossatt, and on the twenty-sixth day of January, 1852, he executed to Fossatt a deed therefor. Fossatt paid \$5,500 for this purchase,

Grattan v. Wiggins.

which was applied to the payment of the judgment against Wiggins, and the small balance remaining was applied upon an execution in favor of Fossatt against Wiggins; and Fossatt afterward conveyed the premises to Laurencel and Eldredge.

Cook died on the fifteenth day of February, 1852, leaving his wife Rebecca surviving him, and one infant child, who died in June, 1854—and Rebecca intermarried with C. Grattan, August 17th, 1854. The Public Administrator of Santa Clara County was appointed administrator of Cook's estate, June 17th, 1852, and resigned the trust May 26th, 1853, and letters of administration were issued to Hall & Huggins, December 4th, 1856. Huggins died November 19th, 1861. This action was commenced January 22d, 1859, by Rebecca Grattan, as heir at law, and Hall & Huggins as administrators of the estate of Cook.

Fossatt, at the date of the Sheriff's deed, January 26th, 1852, took possession of the mortgaged premises under his deed, and he and Laurencel and Eldredge, his grantees, have been in possession ever since, claiming to be the owners of the premises under the Sheriff's sale and deed. The title of the premises mortgaged by Wiggins was under a Mexican grant, and Fossatt, after his purchase, filed a claim as the owner of this undivided half of the rancho, before the Board of United States Land Commissioners, and prosecuted the same at great expense, and procured a final confirmation of the same to himself on the 18th day of October, 1858. This claim, which also included another undivided one-fourth interest in the rancho, was prosecuted at the request of Laurencel and Eldredge, and at a cost of \$200,000.

We will first examine the questions raised by the appeal taken by the plaintiffs. They complain of the judgment, because it was not rendered for the amount of the principal and interest due on all the unpaid notes, to wit: all but the *first* and *second*; the *first* they admit having been paid Wiggins, and the *second* by the sale under the decree of foreclosure. They claim that none of these unpaid notes are barred by the Statute of Limitations, and that the Court below erred in holding the contrary.

The complaint in this case prays for a personal judgment against Wiggins for the amount of these unpaid notes. Wiggins appeared

Grattan v. Wiggins.

and demurred to the complaint upon several grounds, but the Statute of Limitations is not one of them. The demurrer was overruled, and no answer appears to have been filed by him, nor does it appear that any default for failing to answer was ever entered against him. The defense of the Statute of Limitations is a personal privilege of the debtor, which he may assert or waive at his option, but it must be set up in some form, either by demurrer or answer, or it will be deemed to have been waived. Under the pleadings in this case, the plaintiffs were entitled to a personal judgment against Wiggins for the whole amount of the unpaid notes, and the Court erred in not rendering judgment accordingly.

The defendants Laurencel and Eldredge, however, set up the Statute of Limitations both by demurrer and answer, but the plaintiffs insist that the right to plead the statute is personal to the debtor, and that therefore they have no right to set it up. It is true, that so far as relates to the personal liability of Wiggins to pay the debt, they cannot plead the statute so as to affect that right. But the plaintiffs ask for other relief; that is, the sale of the mortgaged premises to pay the debt. The defendants Laurencel and Eldredge, claiming the title to these premises as grantees of the estate of the mortgagor, as well as under the decree of foreclosure in the suit of Foster, have a direct interest in defeating the claim of the plaintiffs to a decree of foreclosure and sale of the mortgaged premises, and have a clear right to plead the statute against that part of the claim of the plaintiffs. (*Lord v. Morris*, 18 Cal. 482; *McCarthy v. White*, 21 Id. 425.) The waiver of this defense by Wiggins could not operate as a waiver by the other defendants, or affect their rights in any way.

But the plaintiffs insist that as the mortgage was executed on the twenty-second of July, 1850, before the two hundred and sixtieth section of the Practice Act of 1851 was in force, therefore they have the same rights and remedies as are provided at common law for the enforcement of the mortgage, among which is the right of the mortgagee to the possession of the premises. Sec. 260 provides that "a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover the possession of the real property,

Grattan v. Wiggins.

without a foreclosure and sale." It clearly applies to all mortgages, as well those executed before as after its passage. It relates substantially to the remedy for the enforcement of the rights of the mortgagee; for although by the strict rules of the common law a mortgage was deemed to vest a conditional estate in the realty in the mortgagee, which became absolute upon a failure to perform the conditions, yet equity always treated it substantially as a security for a debt; and if the mortgagee took possession under his common law right, equity compelled him to account for the rents and profits which were applied in liquidation of the mortgage debt. So that this section of the Act of 1851 cannot, so far as it applies to mortgages passed prior to its passage, be held as divesting a vested right of property, but as merely taking away, or rather, changing the form of the remedy, to enforce a right. Indeed, the provisions of the Practice Act of 1850, which were in force at the making of this mortgage, have substantially the same effect. Secs. 309, 310, and 311 of that act provide that in proceeding to enforce a mortgage it shall not be necessary to make other incumbrancers parties, but the action may be against the mortgagor alone, alleging in the complaint the existence of the debt and of the mortgage, and praying a sale of the property; that the judgment by which a mortgage is enforced *shall* be for the sale of the property for the satisfaction of the debt, and if the proceeds be insufficient to pay it, execution shall be issued for the residue; and that upon this judgment an order of sale shall issue, and the property be sold thereon in the same manner as under executions. Under this statute, if a mortgagee should bring an action to enforce his mortgage by a recovery of the possession of the mortgaged property under this common law right, the Court would be compelled in rendering judgment to follow the provisions of Sec. 310, which says that "the judgment by which a mortgage is enforced *shall* be," etc. In considering this question Chief Justice Field, in his opinion in the case of *Dutton v. Warschauer* (21 Cal. 623), after a full examination of the authorities, says: "Mortgages, therefore, executed before the statute (of 1851) can only be treated as conveyances when that character is essential to protect the just rights of the mortgagee; mortgages since the statute are regarded

Grattan v. Wiggins.

at all times as mere securities, creating only a lien or incumbrance, and not passing any estate in the premises." And he accordingly ruled that a mortgagee, although in possession after condition broken, could not convey the legal title. The other Judges specially concurred in the judgment, and the opinion can therefore have no weight as an authoritative decision of the law.

Whatever may be the construction of these sections of the Practice Act of 1850, or of Sec. 260 of the Act of 1851, it is a sufficient answer to this position of the plaintiffs that this is not an action to enforce any asserted right of possession in the mortgagee, but an action founded entirely upon and seeking to enforce the remedies provided by the present statute for the foreclosure of mortgages, and must, of course, be governed by the same rules of law as all other actions of like character. By those rules, as repeatedly held by this Court, the mortgage is barred by the same lapse of time as other contracts in writing. The same result follows when it is considered that the Statute of Limitations, which bars actions upon contracts or liabilities, founded upon instruments in writing after the lapse of four years, was in force prior to the execution of these notes and mortgages; though we would not wish to be understood by this as holding that, if it had not been adopted until afterwards, it would not equally operate as a bar.

The plaintiffs, however, claim that although the action is for a foreclosure of the mortgage, yet the Court could treat it as an action for the possession of the land, under the common law right of possession vested in the mortgagee. Although we consider that form of remedy as no longer existing, and that it is doubtful whether the Court can thus radically change the character of the action, yet there are conclusive answers to this claim. 1st. As an action for the possession, the date of the right of action is the date of the mortgage, and more than five years elapsed from that time before the commencement of the suit. In answer to this, the plaintiffs say that the possession of the mortgagor and those claiming under him was as tenants at sufferance of the mortgagee; that their possession was not, therefore, adverse, and so the statute did not apply. Even if this were so, their possession was clearly adverse when they took possession under the Sheriff's deed, for then they

claimed a right of possession superior to and adverse to the claim of the mortgagee, and more than five years had elapsed since the date of that deed. 2d. The assignment of the mortgage to Foster and the deed from Cook to Smith would operate at common law as a transfer of this right of possession in the mortgagee to those parties, and thus defeat the right of the present plaintiffs to recover the possession under this asserted common law right.

There was no administrator on Cook's estate from May 26th, 1853, to December 4th, 1856, during which time the last five notes fell due, and it is now insisted that as there was no person authorized to bring actions on these notes when they fell due, therefore the Statute of Limitations did not commence running until December 4th, 1856, and so the time had not expired when this suit was commenced, and the plaintiffs were entitled to recover on all these five notes, instead of the two last, which alone were allowed by the Court. Upon this point we are referred to the cases of *Smith v. Hall* (19 Cal. 85) and *Quivey v. Hall* (Id. 97). But in those cases the administrator was *defendant*, and not the plaintiff as in the present, and the rule of law is entirely different in the two classes of cases. Sec. 24 of the statute regulates both, and there is nothing in that section which relieves the plaintiffs in this case from the bar of the statute. Besides, there were administrators of the estate before any of these five last notes had been barred who could have commenced actions thereon.

The mortgagee and those claiming under him had a clear right to bring an action to foreclose the mortgage when any one installment fell due and was unpaid, both by the terms of the mortgage and the provisions of Sec. 248 of the Practice Act, the latter of which regulates fully the proceedings in cases where the mortgage debt is payable in installments. It is urged that the heir at law was ignorant of the law which rendered the proceedings of Foster to foreclose the mortgage invalid, and this is a good excuse for not bringing this action sooner, and a good reason why the Court should hold the statute no bar; but we do not deem that a valid ground for setting aside a plain provision of the law. As to the hardship of the case, arising from ignorance of the law relating to necessary parties to foreclosure suits, it can be plead with much greater

Grattan v. Wiggins.

force and reason by the defendants than the plaintiffs. We have carefully examined the points made by the plaintiffs in their appeal from the judgment, and have come to the conclusion that the Court below did not err in holding the statute, as plead by the defendants Laurencel and Eldridge, a bar to all the notes falling due prior to the two last so far as relates to the mortgage.

II. The next questions to examine are those raised by the defendants Laurencel and Eldredge by their appeal. The first point is, that the Court below erred in overruling the demurrer to the complaint filed by those defendants. One of the grounds of the demurrer was, that there was a misjoinder of parties plaintiff, in this, that Rebecca Grattan should not have been joined with the administrators in the suit. She is the heir at law of her deceased husband and child. This ground of demurrer was well taken, and the Court erred in not sustaining it. The action is to recover a debt alleged to be due to the estate, and relates entirely to the personality, which does not descend to the heir like realty, but vests in the administrator, who has the sole right to maintain actions, to collect debts due the deceased. (Wood's Dig. 400, 411.) And until the estate is finally settled he has the right to maintain all suits for the possession of the real property of the estate. (*Meeks v. Hahn*, 20 Cal. 620.)

The appellants also insist that under the pleadings and the findings of the Court the plaintiffs were not entitled to any judgment whatever against Laurencel and Eldredge; and this necessarily requires an investigation of the merits of the whole case. The first question we propose to examine is the effect of the foreclosure of the mortgage by Foster upon the rights of the parties. The plaintiffs insist that those proceedings were utterly null and void, and did not affect the rights of the parties in any way (except, perhaps, to operate as a satisfaction of the second note), because Smith, the holder of the fourth note, and Cook, the mortgagee and the holder of all the other notes, and Berrian, the grantee of the mortgagor, were not made parties to the action. On the contrary, the defendants claim that the three hundred and ninth section of the Practice Act of 1850, which provided that "in proceedings to enforce a mortgage it shall not be necessary to make other incum-

Grattan v. Wiggins.

brancers parties, but the creditor may maintain his action against the mortgagor alone," etc., governed the action, and therefore it was not necessary to make them parties.

In this the defendants are mistaken. The action was commenced December 1st, 1851, after the Practice Act of 1851, which repealed the Act of 1850, had taken effect; and the proceedings were, therefore, governed by the Act of 1851, which contained no provision of a like character.

The action to foreclose the mortgage was brought by Foster upon the second note, the first having been paid; and it is an important question what his rights were relative to the holders of the other notes. Where several notes have been given which are secured by one mortgage, and they are assigned to different persons, it has been a question whether each holder of a note is entitled to a *pro rata* interest in the mortgage, or whether the holder of the note first falling due, or of the note first assigned, has priority over the others and can apply the proceeds of the mortgaged property to the full payment of his note, to the exclusion of the others when the same is insufficient to pay all. In the absence of any special agreement with the mortgagee, it would seem to be but just and equitable that each should be entitled to a *pro rata* share, upon the principle that equity delights in equality. (*Phelans v. Olney*, 6 Cal. 480; *Donly v. Hays*, 17 S. & R. 400; *Henderson v. Herrod*, 10 S. & M. 681; *McVay v. Bloodgood*, 9 Porter, 547.)

Yet there are several authorities which hold that the rule of priority prevails. (*State Bank v. Towdy*, 8 Blackford, 447; *Colburn v. Irwin*, 4 Ala. 452; *Bank of U. S. v. Covert*, 18 Ohio, 240; *Hunt v. Stiles*, 10 N. H. 466.)

But it is clear that the mortgagee has the right by agreement to fix the rights of the holders of the several notes to the mortgage security, and such an agreement may be implied from the circumstances of the transfer. (*Sherwood v. Dunbar*, 6 Cal. 53; *Keyes v. Wood*, 21 Vermont, 339; *Langdon v. Keith*, 9 Id. 299; *Wright v. Parker*, 2 Aikins, 212; *Pattison v. Hull*, 9 Cowen, 752; *McVay v. Bloodgood*, 9 Porter, 547; *Banks v. Tarleton*, 23 Miss. 173.)

Sec. 248 of the Practice Act provides that a mortgage given to secure installments due at different times may be foreclosed

Grattan v. Wiggins.

when any one or more installments are due, and if the property cannot be sold in portions without injury to the parties, the whole may be sold. A foreclosure and sale in such case would clearly operate as an extinguishment of the mortgage, whether the proceeds were sufficient to pay the whole debt or not. (*Kimmel v. Willard*, 1 Doug. Mich. 217; *McGrew v. Lanahan*, 1 Penn. 44; *Salmon v. Clagett*, 3 Bland. Oh. 180; *Brinkerhoff v. Thallheimer*, 2 J. C. 485; *Campbell v. Macomb*, 4 Id. 534; *Banks v. Chester*, 1 Jones, 290.)

In this case, the Court found "that at the time of the transfer and delivery of the note to Foster, Cook also assigned and delivered the mortgage to Foster to secure him in the payment of the \$5,000 called for by the note." This shows a special agreement between Cook, who then held all the notes, and Foster, by which the latter was to hold the mortgage as security for the payment of the note then assigned to him, thereby giving him a right to full payment from the proceeds of the mortgage. This agreement, as we have shown, the parties had a right to make, and the Courts will enforce it.

It follows, therefore, that Foster had the right to foreclose the mortgage and sell the whole of the mortgaged property, or so much thereof as might be necessary for the payment of that part of the mortgage debt held by him; that the holders of the other notes had no right to require him to pay them a *pro rata* portion of the proceeds of the sale, and if it required a sale of the whole of the mortgaged property to pay his debt, it would leave nothing upon which they could claim any lien or incumbrance. The interest of the holders of the other notes was not that of subsequent incumbrancers to Foster, but simply as parties having an interest in the same incumbrance upon such portion of the mortgaged premises as might remain after the satisfaction of that portion of the debt held by Foster. They could not properly be designated as the holders of a junior incumbrance, because they claim under the same mortgage, and not by a junior one. They had an interest in a portion of the mortgaged debt; that is, that portion of it held by them, but not in that portion held by Foster. They would have been proper parties as co-plaintiffs with Foster, in the suit to fore-

Grattan v. Wiggins.

close, so that they could receive any overplus of the proceeds of the sale of the mortgaged property which might remain after the payment of Foster's debt, but they were not *necessary* parties in the sense that no decree of foreclosure could be made without bringing them in. They could not insist upon having their claim to this surplus litigated until it was ascertained that there would be a surplus. (*Union Ins. Co. v. Van Rensselaer*, 4 Paige, 83.) It is true that their interest in the mortgaged debt and lien could not be affected by a decree rendered in a suit to which they were not made parties; still, if, as we have shown, that interest only extended to a right to have the surplus proceeds of the sale applied to their debt, it would have made very little difference in this case whether they were made parties or not, for the surplus remaining amounted to only about five hundred dollars. That surplus Smith, as the assignee of the *fourth* note and of the mortgage, had a right to have applied on his note, and upon a proper application to the Court would have ordered that surplus to be paid to him. But neither Cook nor the present plaintiffs have any claim upon this surplus, and have no just right to complain that they were not made parties to the foreclosure suit, for the result has shown that they would have received no benefit from it, as the proceeds of the sale were entirely insufficient to reach the notes held by Cook. Whatever claim or interest Smith may have had in the mortgage or the mortgage debt he transferred to the defendants Laurencel and Eldredge, which would at least transfer the right to this surplus.

But even if they ought properly to have been treated as the holders of incumbrances subsequent to that of Foster, we do not see that the plaintiffs would be in any better position. The law seems to be pretty well settled, that junior incumbrancers are not *necessary*, though proper parties to an action to foreclose a mortgage. (*Kirkham v. Dupont*, 14 Cal. 559; Story's Eq. Pl. Sec. 193, note; Calvert Parties in Equity, 132-137.) They have a right to redeem the prior mortgage, and if they are not made parties to the action to foreclose the mortgage, that right of redemption still remains unaffected by the decree and sale under it. By the transfer of the *fourth* note and the mortgage to Smith, he stood

Grattan v. Wiggins

next to Foster, as the holder of that part of the incumbrance to be first paid after Foster, and his rights, whatever they were, were afterwards transferred to Laurencel and Eldredge. The present plaintiffs have no right to object to the proceedings in the foreclosure suit, that Smith was not made a party, for they are not in any way injured by it. (*Whiting v. Bank of the United States*, 13 Peters, 14.) Then as to Cook and his legal representatives, he had a right, as such subsequent incumbrancer, to commence his action to redeem the prior mortgage of Foster, and this right of action accrued at the date of the assignment of the note and mortgage by him to Foster, May 15th, 1851. This right of redemption accrued at that date, and as he was not made a party to the foreclosure suit it continued unaffected by those proceedings. But this right of action was liable to be barred by the lapse of time, if not prosecuted within the time fixed by the Statute of Limitations. This action was not commenced until the twenty-second day of January, 1859, nearly seven years after the date of the deed to Fossatt, and the possession of the mortgaged premises by him under it. Fossatt and those holding under him had thus held the undisturbed and undisputed possession of the premises, claiming title thereto exclusive of all others, founded upon a written instrument purporting to be a conveyance of the premises in question, from the twenty-sixth day of January, 1852, to the commencement of this action. Treating this right of redemption, asserted by the plaintiffs in their complaint, as founded upon an instrument of writing, or as included among actions for relief not specially provided for, and therefore as included under Secs. 17-19 of the statute, in either case the action, so far as it is founded upon this right of redemption, is barred, not having been commenced within four years.

In England it was held that Courts of Equity were not within the statute, because its words applied only to particular legal forms of action; but they still applied the statute to suits in equity, in obedience to the law. Thus, as an action for the recovery of real estate was barred by twenty years' adverse possession, it was held that where the mortgagee had for twenty years held possession of the mortgaged premises, without acknowledging the existence of

Grattan v. Wiggins.

the mortgage, equity would presume that the mortgage had been foreclosed, and that he held by an absolute title, and these facts were a positive bar to relief. (Angell on Limit. 24, 25; 2 Story's Eq. Jur. Sec. 1520.) In *Slee v. Manhattan Co.* (1 Paige, 48), Slee had assigned a mortgage to secure a debt to the defendants, which they had foreclosed as to the mortgagors, and bid in the property, and then refused to let him redeem; it was held that as the defendants had purchased the property he had a right to redeem the land, but if it had been purchased by a stranger he could only have redeemed the proceeds of the sale in the hands of the defendants; and that this right of redemption was liable to be barred by the lapse of time. (*Moore v. Cable*, 1 J. C. 385; *Cook v. Arnham*, 3 P. Wm. 283; 3 Atk. 313.) Even if our statute had not included equitable actions, it is clear, under the English rule, that as it has fixed five years for the limitation of actions for the recovery of real estate, the adverse possession by a mortgagee for that period would operate as a bar. So too, Courts of Equity always proceeded, upon general principles of their own, even where there was no analogous statutable bar, and refused relief to stale demands, where a party had slept upon his right and acquiesced for a great length of time. And in thus refusing relief equity often allowed a much shorter time than that fixed by the Statute of Limitations to operate as a bar. (2 Story's Eq. Juris. Sec. 1520, and note.) And the same principle has been fully recognized by this Court. (*Dominguez v. Dominguez*, 7 Cal. 424; *Green v. Covillaud*, 10 Id. 329.)

But our Statute of Limitations applies to suits in equity as well as actions of law. While the English statute applied only to particular forms of action, such as assumpsit, trespass, and the like, the law of this State applies to the subject matter of the suit, regardless of the form or name of the action, or the forum in which it is brought. This Court has, therefore, held that it applies to suits in equity equally with actions in law. (*Lord v. Morris*, 18 Cal. 482; *McCarthy v. White*, 21 Id. 496; *Pearis v. Covillaud*, 6 Id. 617.)

In the first two of the above cases the action was by the mortgagee to foreclose the mortgage, and it was held that the action

Grattan v. Wiggins.

must be brought within four years from the time the right of action accrued. It is held that "the right to foreclose and the right to redeem are reciprocal and commensurable," and if one cannot be enforced, that is regarded as sufficient to preclude a claim for the other. Thus if the right to foreclose is barred by the lapse of time, the right to redeem is equally barred. (2 Hilliard on Mortgages, 2, 3, 14, 15.) We therefore hold that the right to redeem, asserted by the plaintiffs in this case, was barred by the Statute of Limitations, as well as by the staleness of the claim and the acquiescence of the parties.

The decree of foreclosure was not absolutely void. It was valid as against the mortgagor, who was the sole defendant. He was a necessary party to the suit to foreclose, for although he had previously conveyed the mortgaged premises yet it does not appear that his vendee had assumed to pay the mortgage debts. (*Shaw v. Hoadley*, 8 B. & C. 165; *Swift v. Edson*, 5 Conn. 551; *Brown v. Stead*, 5 Simons, 535; Story's Eq. Pl. Sec. 196.) "The decree concluded the rights of the parties to the action, and the sale under it, consummated by the Sheriff's deed, passed, as against them, the entire estate held by the mortgagor at the date of the mortgage." (*Montgomery v. Middlemiss*, 21 Cal. 106.) Where a party in possession was made a party to the foreclosure suit, his rights, whatever they may have been, are cut off by the decree. (*Shores v. Scott River Co.*, 21 Cal. 139.)

But while the decree was valid and effectual as against the mortgagor, and bound all the right, title, and interest he may have had in the premises, if any, and also barred his right and equity of redemption, yet it did not affect the rights of his vendee, Berrian. The latter still held the equity of redemption, which, as against him, was not foreclosed by the decree, he not having been made a party. He still retained the right, notwithstanding the decree of sale, to pay the amount of the mortgage debt held by Foster, and thus clear the premises from the incumbrance to that extent. The title acquired by Fossatt, the purchaser at the Sheriff's sale, was subject to this right of redemption, and thus open to the contingency of being entirely defeated by such redemption. (Story's Eq. Pl. Sec. 75.) But this right of redemption should, as we have

Grattan v. Wiggins.

already shown, have been asserted by action brought within the time fixed by the Statute of Limitations. No action of the kind appears ever to have been brought. The present action is brought by the legal representatives of the original mortgagee, and the plaintiffs do not pretend to claim any rights derived from the mortgagor or his grantees. The latter is the only person who has the right to disturb the title acquired by Fossatt and those claiming under him, on the ground of this unforeclosed right of redemption. The present plaintiffs have no right to make the objection or to attack the purchaser's title on that ground. If Berrian saw fit to waive or sleep on his rights and allow them to be barred, he alone is injured, and no other person can assert rights thus lost. The Statute of Limitations has been well said to be a statute of repose, putting an end to strife and litigation and bringing peace and security to the community. This applies especially to titles to real estate. Nothing so much retards the growth and prosperity of a country as insecurity of titles to real estate. During litigation respecting them the land becomes waste and unproductive, for parties will not improve while their title is doubtful. Consequently, no legislation has been more generally approved than that relating to the quieting of land titles and the limitation of actions respecting them. (Angell on Lim. 7, 8.) It is in this view that the Legislature of this State has prescribed the short period of five years as the most extended period of limitation of actions relating to real estate, and it is the plain duty of the Court to strictly enforce it for the good of society and as conservators of the law.

Lapse of time not only applies as a defense to an action, but it forms the basis of a new title acquired by prescription which is founded upon the statute. The term "limitation" is held to mean "the *time* which is prescribed by the authority of the law, during which a title may be acquired to property by virtue of a simple adverse possession and enjoyment; or, the time at the end of which no action at law or suit in equity can be maintained." (Angell on Lim. 1.) "As a general doctrine it has too long been established to be now in the least degree controverted, that what the law deems a perfect possession, if continued without interruption during the whole period which is prescribed by the statute for the

Grattan v. Wiggins.

enforcement of the right of entry, is evidence of a fee." (Id. 396.) "It is also unquestionable, that where land has been sold under a claim to the fee for the time prescribed by the statute, and an entry is made by the party who has the written title, such party may be dispossessed by an ejectment brought by him who so held and claimed." (Id. 398.) "*A fortiori*, will the doctrine as above laid down be acted upon by Courts of Equity." (Id. 399.)

In the present case Fossatt entered into possession in good faith, in the belief that he had a good right and title to the property, with the intention to hold it against all the world. This possession was taken under and in pursuance of a deed which purported to convey the title under a claim of title in fee, and this possession was adverse not only to Cook and those claiming under him, but to all other persons, at its commencement, and so continued in Fossatt and those claiming under him for more than five years. We think it clear that these facts constitute a full defense to the claim sought to be enforced by the present plaintiffs, under the Statute of Limitations, though all of them may not be essential to constitute an adverse possession.

It is urged by Laurencel and Eldredge, that as Fossatt, under whom they claim, was the confinee in the Courts of the United States, under the proceedings instituted by him therein, and as Cook never filed any claim in the National Courts, the title thus acquired by Fossatt cannot be affected by any claim of Cook or his legal representatives, referring us to the case of *Estrada v. Murphy* (19 Cal. 248.) Under the view we have taken we deem it unnecessary to determine this question. But the fact that Cook and his legal representatives stood by for years and permitted Fossatt, under his purchase, to prosecute this claim, and expend a large sum of money in perfecting the title, without giving notice of his claim, or offering to bear the expense, or incur the risk and uncertainty of the litigation, is such fraudulent conduct and concealment as would induce a Court of Equity to refuse them all aid, at least, until they had fully indemnified Fossatt and those claiming under him for all these expenditures. (1 Story's Equity, 385, 388; *Bryan v. Ramirez*, 8 Cal. 467; *Farley v. Vaughn*, 11 Id. 237.) And it was clearly error in the decree, that this right of

Grattan v. Wiggins.

the defendants to be reimbursed these expenditures was not provided for.

The respondents insist that as the mortgage was executed prior to the passage of the Practice Act of 1851, the mortgagee was vested with all the rights of a mortgagee at common law, including the right to a decree of strict foreclosure—that is, a decree foreclosing all the equities of redemption, and declaring the absolute title vested in them, without any sale of the mortgaged premises. It is clear, however, that in no view of the case are they entitled to such a decree. The mortgage was executed after the passage of the Practice Act of 1850, and is therefore governed by it. The three hundred and ninth, three hundred and tenth, and three hundred and eleventh sections of that act, provide how a mortgage shall be enforced, and that the judgment “shall be, that the property mortgaged be sold for the satisfaction of the debt,” which clearly takes away the right to a judgment of strict foreclosure under the common law.

They also claim that Cook was not affected with the notice of the suit of *Foster v. Wiggins*, because no notice of *lis pendens* was filed in the Recorder's office, in accordance with Sec. 27 of the Practice Act. Cook was not a purchaser or incumbrancer of the property, pending the action, and it is doubtful, therefore, whether this section applies to him. In *Richardson v. White* (18 Cal. 106) it was held to apply to those purchasing or taking incumbrances upon the property during the pendency of the action. (*Ault v. Gassaway*, 18 Cal. 205.) But this section applies only to actions pending, and not to judgments and decrees rendered, which at common law, it would seem, were notice to all persons. (*Sorrell v. Carpenter*, 2 P. Wm. 482; *Searle v. Lane*, 2 Vernon, 37, 88; *Monell v. Lawrence*, 12 Johns. 534; *Wattington v. Howley*, 1 Dessausurre, 170.) In the present case, the attorney of Foster, who foreclosed the mortgage, testified that before he brought the suit he informed Cook that he was about to do so, to which Cook replied that he did not care, or something to that effect. Whether this was notice or not, it was sufficient to put him upon inquiry. The recording of the Sheriff's deed to Fossatt and the possession taken by Fossatt under it, were at least notice of his claim, but it

Grattan v. Wiggins.

was nearly seven years afterwards that this action was commenced. The Statute of Limitations, in its effects upon the rights of the parties in this case, does not depend upon any question of notice to Cook of the pendency of the foreclosure suit.

On the twenty-third day of April, 1851, Wiggins, the mortgagor, conveyed all his right, title, and interest in the property to Berrian, who, on the thirtieth day of October, 1858, conveyed the same to Laurencel and Eldredge, and the respondents insist that by taking this conveyance the title of the latter became subject to the mortgage, and that they are estopped from contesting it. The record does not disclose whether the deed to Laurencel and Eldredge was a warranty or a mere quitclaim. In the absence of proof we could not presume that it contained any covenants of warranty. There is, however, no evidence that the latter ever agreed with Berrian, or any else, to pay the mortgage, or in any way recognized it as a lien upon the property. At the date of this deed to them, Foster and they had been in the undisturbed possession of the premises, claiming the same as owners against all the world, for nearly seven years; a sufficient length of time, as we have shown, to bar all equities of redemption. They did not acquire the possession with or under this deed, and are not estopped from denying that they acquired any title under it. By taking the deed they neither parted with nor lost any rights they had acquired under Fossatt, and by lapse of time either as against Berrian or the representatives of Cook; nor did they thereby subject themselves to any obligations or burdens that did not exist against them before. A similar principle was established by this Court in *San Francisco v. Lawton* (18 Cal. 466).

It follows that the Court below erred in rendering the decree against the defendants who appeal. The judgment is therefore reversed, and the Court below is directed to enter a judgment dismissing the action as against all the defendants, except Wiggins, and in favor of said defendants for their costs, and the cause is remanded for further proceedings against the defendant Wiggins.

Donner v. Palmer.

DONNER v. PALMER—BRADLEY, INTERVENOR.

UPON filing a certified copy of a judgment with a County Recorder it becomes a lien upon the debtor's real property in that county for two years from the date of the filing, notwithstanding a lien by virtue of the same judgment has previously existed and expired by lapse of time in another county. The amendment of 1862 to Sec. 193 of the Practice Act, allowing the affidavits of jurors to be received to impeach their own verdict, relates merely to the remedy and governs in all applications for new trial made after its passage, although the verdict and judgment sought to be set aside were rendered previously.

A verdict to which the assent of any of the jurors was obtained by a resort to chance will be set aside.

APPEAL from the Twelfth Judicial District.

The facts are stated in the opinion of the Court.

S. O. Houghton, for Plaintiff.

Sec. 207 should not be construed alone nor according to its strict letter, but must be construed together with the other provisions of the statute relating to the same subject.

Sec. 209 provides "that execution may issue at any time within five years after the entry of judgment. After that time the judgment has no vitality and has ceased to exist.

If the position of respondent is correct, and the effect of Sec. 207 is to permit the lien of a judgment to be revived in any county other than that in which it is docketed, after the lapse of more than two years from the time of the docketing thereof, it may be done at any time within five years after the entry of judgment, and a judgment lien can be created and made to continue a considerable period of time beyond the life of the judgment itself. For to accomplish that result, it would only be necessary to file the transcript in another county a few days, even one day, before the expiration of five years, and create a lien to run two years from the date of such filing, thus producing the extraordinary result of having a judgment lien where no judgment exists to be enforced. This would be utterly absurd, yet such must be the case if that section must be construed according to its very letter.

Donner a. Palmer.

Or the transcript might be filed in another county a day before the judgment expired, and an execution issued and levied the same day, and a sale had by virtue thereof after the judgment had ceased to have any force. This would be equally absurd, and demonstrates clearly the incorrectness of the view taken of the law by our opponents.

It is a familiar rule of interpretation of statutes, that the intent of the lawmaker must be carried out, when it can be ascertained, and that intent allowed to prevail over the literal sense of the terms employed, and control the strict letter of the law, where the letter would lead to possible absurdity. Smith on stat. and constit. law, 662, Sec. 515.

This rule has been applied by this Court to Sec. 207 under consideration, in the case of *Bowman v. Hovious* (17 Cal. 471).

In that case effect was not given to the strict letter, for the reason that it would have led to the absurdity of reviving and extending a lien two years upon the same property, after it had been already subjected to the lien of the same judgment for one term of two years.

It was evidently the intent of the Legislature, that, where a judgment debtor had property in other counties than that in which the judgment was entered, the creditor would immediately after the entry of judgment cause a transcript thereof to be filed in such other counties, and create liens thereon. And it was evidently intended that these liens should not be continued for any great period; that the creditor should within a reasonable time subject the property of his debtor to the satisfaction of his demand, and not tie it up from other creditors. And with that object the continuance of the lien was limited to two years in the county where the judgment should be entered.

E. A. Lawrence, for Respondent Bradley.

The only point is, whether the taking out of the transcript of the judgment in the case of *Cobb v. Yontz*, in Santa Clara County, after the two years had expired, and filing it in San Francisco, created any lien upon the premises. If it did, then the charge of the Court was clearly erroneous, and intervenor is entitled to a new trial.

Donner v. Palmer.

I find no authorities on the point. The nearest approach to an authority is *Bowman v. Hovious* (17 Cal. 471). But although this point was alluded to in the briefs of counsel, that case passed off on other grounds. In New York the lien only runs ten years from the date of docketing of the judgment in the county where rendered. (Voorhies' N. Y. Code, Sec. 282.) With us the lien runs two years from filing the transcript. (Pr. Act, Sec. 207.)

If a judgment is rendered to-day in San Francisco, it at once becomes a lien; but if a transcript is sent to San Bernardino, to be filed, it may be two months before it is filed there, and yet the lien will hold in that county two months after it has expired in this county. It does not become a lien in any other county until filed there. It is not required to be filed there forthwith, or within two years, and it is plain the statute intended to give the party the benefit of a two years' lien, wherever he might file the transcript, so that he did within the life of the judgment. If it were otherwise, the Legislature would have adopted the language of Sec. 282 of the N. Y. Code, from which our Practice Act is taken, which would have the view contended for by the learned counsel. But the Legislature, in this section, have studiously avoided reenacting the N. Y. Code.

The statute imposes no limit upon the time in which the transcript shall be filed, and the Court can impose none. The only penalty for not filing it is, that the lien will not attach until it is filed, and the law has wisely left it to the convenience and the discretion of the party to determine when he shall secure the lien.

When the lien has once attached it can only run for two years. It is not in the power of the Court or of the parties to extend it beyond that time, and for the Court to declare that the lien shall not attach, where the transcript has been filed after two years from the date of the judgment, is virtually to repeal the statute.

I do not perceive the absurdity of having a lien, after the five years' limitation has run upon a judgment. That was a mere limitation of right to bring suit upon the judgment — *non constat* that the judgment was dead. On the contrary until Sec. 214 was repealed, execution might issue after five years and during the whole time of limitation at common law, by an order of the Court.

Donner v. Palmer.

But that point has no bearing in this case, because the last clause of Sec. 207 is a complete answer to appellant's objection: "The lien shall continue for two years, unless the judgment be previously satisfied."

If, then, as appellant contends, the judgment is satisfied by the five years' limitation, the lien falls with it. If he files his transcript in another county four years after the date of the judgment, he has a lien for only one year. At any time within three years from date of the judgment he can have a lien for two years, "unless the judgment be previously satisfied."

Neither can this section be impaired or defeated by construing it with other sections of the statute, but gains additional plausibility from such construction.

If, as it is contended, it was the intention of the Legislature that the transcript should be filed in another county forthwith, or at any rate within two years, it would have been very natural for them to have put it into the statute. If, however, they intended to let the party who held the judgment, suit his own time and convenience for filing the same, as we contend, they would undoubtedly have used the very language of the act. The absurdity of respondent's proposition is apparent when you apply it to a Justice's judgment, which may become a lien by complying with Sec. 599 of the Practice Act. The statute prescribes no limitation of time within which to file the transcript of the Justice's judgment, and yet upon the theory of respondents, it could not be filed after two years.

At common law there was no lien. It is purely the creature of statute. (*Ackley et al. v. Chamberlin*, 16 Cal. 181.) And where that statute in plain and simple terms prescribes how the lien may be acquired, it would be unwise and unjust for the Court to involve it in any mysticism. A large number of titles in this State depend upon the construction for which we contend. Until the decision of Judge Campbell in this case, the searchers of titles always passed them upon the hypothesis, that filing the transcript in another county, even after the lien had expired in the first county, created a lien for two years thereafter.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

Donner v. Palmer.

This is an action to recover the possession of a one hundred vara lot in the City of San Francisco, the plaintiff claiming to be the owner of the entire estate. During the pendency of the action Bradley intervened, claiming, as against both plaintiff and defendant, that he was the owner of the undivided one-fourth of the lot, and entitled to the possession to that extent. The issue between plaintiff and the intervenor was submitted upon an agreed statement of facts. The issues between the plaintiff and the defendants were tried by a jury, except those relating to certain tax titles, which were submitted to the Court. The jury returned a verdict in favor of the plaintiff against the defendants and the intervenor; the Court found in favor of the plaintiff upon the questions relating to the tax titles, and on the first day of March, 1862, judgment was accordingly entered in favor of the plaintiff against the defendants and the intervenor, dismissing the complaint of the intervenor, and for the recovery of the possession of the premises and costs. On the sixth day of March, 1862, the defendants and the intervenor each served and filed notices of motions for a new trial, and on the twentieth day of December, 1862, the Court made an order denying defendants' motion, and granting the motion of the intervenor, adding, "or that the judgment be modified as to him." On the sixteenth day of January, 1863, the Court, on motion of the plaintiff's attorney, made an order setting aside and vacating the order of December 20th, and entered a new order, as of the last date, which, after reciting that the defendants' motion for a new trial was made upon a certain statement and certain affidavits describing them, and that it was opposed with certain affidavits on the part of the plaintiff, and that the intervenor had also moved for a new trial, upon a statement filed, ordered that the motion of the defendants be denied, and that of the intervenor be granted. From this judgment and these orders, the defendants appeal; and from the order granting the intervenor a new trial, the plaintiff appeals. Each of these appeals are prosecuted separately, but we have preferred to consider them together.

The claim of the intervenor is founded upon this state of facts: On the tenth day of April, 1858, Donner conveyed the undivided one-third of the premises to John Yontz; on the fifteenth day of

Donner v. Palmer.

August, 1856, one Cobb recovered a judgment in the District Court for Santa Clara County, for seven hundred and ninety-six dollars, against Yontz, a transcript of which was duly recorded in the County Recorder's office of San Francisco, on the tenth day of December, 1858; an execution duly issued on said judgment on the fifteenth day of November, 1859, directed to the Sheriff of the County of San Francisco, which was levied on the interest of said Yontz on the premises, and the same was sold under the same execution on the twenty-eighth day of March, 1860, to one Eastland, and a Sheriff's deed was executed to him at the expiration of the time of redemption, and afterwards Eastland conveyed the same to Bradley, the intervenor. Mary Williams instituted a suit against said Yontz in the District Court of Santa Clara County, in which an attachment was issued and levied upon the premises upon the eighth day of January, 1859; a judgment was recovered in said action, on which an execution was issued under which all the interest of said Yontz in the premises was, on the ninth day of March, 1861, sold to the plaintiff and a deed therefor made in pursuance of said sale, after the expiration of the time for redemption. Under this state of facts the simple question is, which of these two parties, the intervenor or the plaintiff, has the better right and title to this interest of Yontz. The plaintiff contends that as the judgment of Cobb was not filed in the Recorder's office of San Francisco until more than two years after it was rendered and docketed in Santa Clara County, and after the lien there had expired by limitation, the judgment was no lien upon any property in San Francisco. In this he is mistaken. The lien in such cases is clearly defined by the provisions of Sec. 207 of the Practice Act, which reads as follows: "A transcript of the original docket, certified by the Clerk, may be filed with the Recorder of any other county; and from the time of the filing, the judgment shall be a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterwards acquire, until the said lien expires. The lien shall continue for two years, unless the judgment be previously satisfied." The statute is plain that the lien commences at the time of the filing of the transcript in the Recorder's office, and

Donner v. Palmer.

continues for two years from that time, unless the judgment be satisfied before that time expires. No language could more clearly express that to be the meaning and intention of the Legislature, and we can perceive no injustice or hardship in it. The fact that a lien under the judgment has existed and expired in another county, can make no difference. The intention is to give a judgment creditor the right to acquire a lien in any county when and where he pleases, and then it gives him two years thereafter in which to enforce that lien. If he fails or neglects, or can find no property in one county on which to enforce it, that is no just cause why he should not exercise his right of enforcing it in another county where he may be able to find property of the judgment debtor.

But Sec. 209 provides than an execution to enforce this lien can only issue within five years after the date of the judgment, and if the judgment creditor suffers that time to elapse without having enforced his lien, he cannot procure an execution, since the repeal of Sec. 214, with which to enforce it. So, too, all right of action upon the judgment is barred by the seventeenth section of the Statute of Limitations, unless commenced within five years of the date of its rendition. Whether a lien can exist in any county after the expiration of five years from the date of the judgment by filing a transcript in the Recorder's office just within the two years, is a question not properly before us in this case; but it is clear that if a lien could exist in such case, it would be merely nominal, unless an execution is issued within the five years with which to enforce it.

It follows from these views that the interest of Yontz was vested in the intervenor, and there was therefore no error in granting him a new trial. The order granting him such new trial is therefore affirmed.

One ground of the motion for a new trial made by the defendants was misconduct of the jury, the sole evidence of which was the affidavits of a portion of the jurors. The respondents contend that at common law, jurors could not give evidence impeaching their own verdict, and that the amendment of Sec. 193, allowing affidavits of jurors to be used for that purpose, does not apply to this case, because it was not passed until after the rendition of the judgment. It is unnecessary to examine what the rule upon this subject may

Donner v. Palmer.

have been at common law, as we consider that the statute governs this case. The judgment was rendered March 1st, 1862; the law amending Sec. 193 so as to allow misconduct on the part of the jury to be proved by the affidavits or any one or more of the jurors, was passed March 5th, and took effect immediately; and the motion for a new trial was not heard and submitted until some time in August, 1862. The statute related merely to the remedy, declaring the rule of evidence to govern the Courts in hearing and determining motions for new trials, founded upon alleged misconduct of the jury, and it clearly applies to all motions for new trials heard after it took effect. In no sense can it be said to affect any vested interest plaintiff had in his judgment. If that judgment was entered upon a verdict rendered under circumstances showing misconduct on the part of the jury, the law in existence at the time of the trial, verdict, and judgment, gave the defendants a right to have the judgment vacated and a new trial granted, and the Legislature had an undoubted right to prescribe the rule of evidence in motions for that purpose, whether the judgment was rendered before or after the passage of the law. The law relates to and affects the motion for a new trial, and not the judgment.

The affidavit of one of the jurors, Day, after stating generally what occurred in the jury room, in the way of discussions and votes, states that after a time a vote unanimous for the plaintiff was taken, but immediately thereafter Heller and Fortune, who are charged with the misconduct, recanted, and said their vote was not according to their convictions; and soon after the affiant saw Fortune approach Heller, and heard him propose to the latter that he would place a piece of money, and the latter should guess, heads or tails, and if he guessed right then their verdict should be for the plaintiff, or they would go with the others for the plaintiff; that Heller assented; that Fortune then placed a piece of money and covered it so that the former could not see it; he guessed, and they announced that he had guessed right, and they thereupon agreed to a verdict for the plaintiff, but both said it was still contrary to their convictions. The affidavit of Oalkin, another juror, is substantially to the same effect. The plaintiff introduced the affidavits of several other jurors, in rebuttal, who corroborate the general

Chapman v. Thornburg.

statements of the occurrences in the jury room, but they state that they heard or saw nothing of this particular transaction between Fortune and Heller. The circumstances detailed by Day and Calkin show that it might well have occurred, and the other jurors have neither seen nor heard it, and we think the affidavits show with sufficient certainty that the transaction occurred substantially as stated by Day and Calkin. It is insisted, however, that the defendants should have procured the affidavits of the jurors guilty of the misconduct. It seems that one of the defendants applied to them for that purpose, and they refused. We know of no rule of law which requires these facts to be proved by the affidavits of the jurors charged with the misconduct.

That the conduct of these jurors was such as to vitiate the verdict there can be no doubt. The rule of law upon this subject is well settled. (1 *Graham & Waterman on New Trials*, 103; *Wilson v. Berryman*, 5 Cal. 44.) The Court therefore erred in denying the defendants' motion for a new trial. Several other questions are raised by the parties, but as they do not relate to the merits of the case, and as their determination is not important to guide the future action of the Court below on the new trial, we do not deem it necessary to pass upon them.

The judgment is reversed and a new trial ordered as to the defendants and the intervenor.

CHAPMAN v. THORNBURG.

Prior to the passage of the Act of May 18th, 1861, Judges of Courts had no power to issue writs of assistance to place the purchaser of property sold under a decree of foreclosure in possession of the same.

APPEAL from the Tenth Judicial District, Yuba County.

Chapman, the plaintiff, on the twenty-fourth day of January, 1857, obtained a judgment and decree in the District Court of Yuba County against Clark and wife, for the foreclosure of a mortgage upon certain real estate in Marysville, and directing the sale of the mortgaged property to satisfy the judgment. The property

Chapman v. Thornburg.

was sold by the Sheriff on the twenty-third of February, 1857, and Chapman became the purchaser, and on the first of August, 1857, received the Sheriff's deed.

On the fourth of September, 1857, plaintiff obtained an order from the Judge at chambers for a writ of assistance, which was issued by the Clerk of the fifth, and placed in the hands of the Sheriff, defendant Thornburg.

Henry K. Mitchell, for Appellant.

By Sec. 22, District Courts have the power to render a judgment and decree, because it is conferred upon them. District Courts and District Judges have power to issue all writs necessary or proper to the complete exercise of the power conferred upon District Courts and District Judges. District Judges have the power to transact such business at their chambers as may be done out of Court, etc.

The mere fact that the statute defines certain duties that may be done by them out of Court, does not render void an act of a Judge at chambers not particularly mentioned, but which is necessary and proper to the complete exercise of the power conferred upon him as a Judge, that is, to enforce the judgment and decrees of the Court.

Mesick & Van Voorhies, for Respondent.

NORTON, J. delivered the opinion of the Court—**CORN, C. J.** concurring. **CROCKER, J.** delivered the dissenting opinion.

This action is brought to recover damages for the injury done to certain real estate during the time that the defendant, as Sheriff, delayed to execute a writ of assistance which had been placed in his hands.

It appeared on the trial that the application for the writ was made to the Judge, and granted by him at chambers during vacation, and thereupon a motion for nonsuit was made and granted, "upon the ground that the Judge at chambers could not hear the application for a writ of assistance or issue the order thereon, nor could the writ issue upon such order."

Chapman v. Thornburg.

From this decision the plaintiff appeals, and claims that by virtue of Sec. 22 of "An Act concerning the Courts of Justice of this State and Judicial Officers," passed May 19th, 1853, a Judge at chambers is authorized to issue any writ which may be issued by a Court. The language of this section is as follows: "These Courts, and the Judges thereof, shall have power to issue all writs necessary or proper to the complete exercise of the power conferred upon them by the Constitution, and by this and other statutes." We do not think it was the intention, nor is the effect of this section to confer upon Judges, merely as Judges, the power to issue writs which had theretofore only been issued by Courts, but that it merely gives direct statutory authority to Courts to issue writs to carry into effect the powers conferred upon Courts, and to Judges to issue writs to carry into effect the powers conferred upon Judges. It says the power conferred upon "them." Literally, this would only refer to some power conferred upon them jointly—but, of course, this is not the rational meaning, nor, on the other hand, is it the meaning that each shall have the right to issue writs to carry into effect the powers conferred upon either. The practical importance of the point raised in this case has been removed, by the Legislature having expressly conferred the power to hear applications for writs of assistance upon Judges at chambers by an amendment to Sec. 25, enacted in 1861. (Laws of 1861, 512.)

The judgment is affirmed.

I am compelled to dissent from the opinion of my associates. Sec. 22 relates to the power of Courts and Judges over remedial writs, and should, therefore, be liberally construed to extend the remedy. Under this rule the proper construction of the section, in my opinion, is that the Judges as well as the Courts have full power to issue all writs necessary or proper to the complete exercise of the power conferred by the Constitution or the statutes, upon either the Court or the Judge. And the writ of assistance is one properly included within the provisions of this section.

People v. Gassaway.

THE PEOPLE v. GASSAWAY.

In the absence of evidence of good character, the recent possession of stolen property, unexplained, is not *prima facie* evidence that the possessor is guilty of larceny.

APPEAL from the Court of Sessions of El Dorado County.

The facts are stated in the opinion of the Court.

J. G. McCallum, for Appellant.

The instruction as to the recent possession of stolen property, is contrary to the rule of law as settled by this Court. (*The People v. Chambers*, 18 Cal. 383; *The People v. Ah Ki*, 20 Id. 177.)

Frank M. Pixley, Attorney-General, for Respondent.

CROCKER, J. delivered the opinion of the Court—NORTON, J. and COPE, C. J. concurring.

This is an appeal from a judgment convicting the defendant of the crime of robbery. On the trial the Court charged the jury, among other things, as follows: "In the absence of evidence of good character, the recent possession of stolen property, unexplained, is *prima facie* evidence that the possessor is guilty of larceny." The defendant excepted to this charge, and it is now assigned for error on this appeal. The charge is directly in conflict with the rule upon this question laid down by this Court in the cases of *The People v. Chambers* (18 Cal. 383); *The People v. Ah Ki* (20 Id. 177.)

The judgment is therefore reversed and the cause remanded.

McCUE v. GALLAGHER *et al.*

WHEREAS A purchases land with his own funds, but before the execution of the deed enters into a verbal contract with B by which the deed from the grantor is executed directly to B, and B is at some future time to pay A the purchase money: Held, that a resulting trust is not created in favor of A.

McCue v. Gallagher.

APPEAL from the Sixteenth Judicial District, Amador County.

The complaint avers that about the second day of April, 1861, plaintiff, Francis McCue, purchased of one Flesham a lot of land, for which he paid said Flesham three hundred and fifty dollars, and that after the purchase Michael McCue, since deceased, requested of plaintiff that his name might be inserted in the deed as the grantee, and stated that he would, at some future time, purchase the property of plaintiff and pay him therefor said sum of three hundred and fifty dollars, and that plaintiff then directed the deed from Flesham to be made to said Michael, and that there was an express understanding at the time that plaintiff should be the owner of the property until it was paid for. Complaint further avers, that about the first of August, 1861, plaintiff demanded of said Michael the money or a deed of the property, and that he failed to pay the money and refused to execute a deed, and that Michael has since died, and defendant Gallagher is the administrator of his estate, and the other defendant was the wife of Michael at the time of his death, and claims the property as his heir.

Defendant demurred to the complaint, and the Court sustained the demurrer, and plaintiff appeals.

John W. Armstrong, for Appellant.

The statute for the prevention of frauds, provides: "No estate or interest in lands, other than for leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing." (Wood's Dig. 106, Sec. 6.)

This section of the law has received an authoritative construction in the case of *Osborn v. Endicot* (6 Cal. 154), where it is said: "Before the passage of the English statute, trusts were created (except, probably, in a few cases) and proved by parol; and after the statute resulting trusts, or trusts by operation of law, were held to be exceptions from the operation of the rule. Our statute does not change the common law on this subject, and trusts of this

McCue v. Gallagher.

nature may be proved as they could before its passage." I refer the Court to the case of *Russ v. Mebius* (16 Cal. 355), which is directly in point.

Parol evidence is admissible to prove the facts from which a trust arises by the operation of law, *vide*: Greenl. Ev. 266; 1 John. Ch. 586; 2 Id. 409. Ch. Kent, in his Commentaries, says: "The payment of the money, at the time, is indispensable to the creation of the trust;" and this fact may be established, or the resulting trust rebutted by parol proof. (4 Kent, 338.)

S. B. Atzell, for Respondent.

It clearly appears that the land was intended for Michael, and that all Francis wanted was his money, and that all he wanted of the land was a lien upon it for three hundred and fifty dollars. If I am trusted by operation of law, I cannot, by my own volition, change myself into a grantee. I cannot, by the payment of money, defeat the estate of my *cestui que trust*. Appellant agreed that respondent should own the land absolutely, upon the payment of three hundred and fifty dollars. This shows that he considered the money loaned to his brother. (Sanderson's Uses, 227.)

Had Francis been the actual owner, and conveyed to Michael, his brother, saying: "Take this land, and pay me when you are able," and Michael replied: "I will consider it yours till it is paid for," he is evidently a trusted man, but not a trustee one.

CORN, C. J. delivered the opinion of the Court—NORRIS, J. concurring.

We think the facts stated in the complaint in this case do not establish a resulting trust. The property was purchased by the plaintiff, but before the conveyance was executed he transferred to his brother the benefit of the purchase, the latter agreeing to pay the purchase money. The conveyance was made directly to the brother, and the only inference from the facts stated is that it was intended for his use. The facts of the case are incompatible with the idea of a resulting trust in favor of the plaintiff. Such trusts are created by implication of law, and not upon the presumption that he who pays the purchase money intends the purchase for his

People v. McEwen.

own benefit. The presumption may be rebutted, however, and a contrary intention shown; and the intention at the time of the conveyance must necessarily control. The trust must exist then, or not at all.

It is possible that the plaintiff may enforce his claim as a lien upon the property; but this question is not before us, and it is unnecessary to decide it.

The judgment is affirmed.

THE PEOPLE *ex rel.* PRESBURG v. McEWEN.

UNDER the Revenue Law of 1860 lands owned by several persons as tenants in common may be assessed to them jointly.

Where lands are thus assessed to several persons jointly by the Revenue Law of 1860, the owner of an undivided portion may pay his proportion of the tax and thus release his portion of the land from the lien of the tax; but unless he makes this payment before a sale is made of the land under a judgment recovered for the tax this right is gone, and a redemption can only be effected by a payment of the entire judgment and all charges.

After a sale of lands under a judgment recovered for taxes a redemption cannot be made by paying a portion of the bid equal to the interest of the redemption in the parcel sold.

If the land is sold in separate parcels by the officer a redemption of distinct parcels can only be made by paying the whole sum bid on any distinct piece sold separately.

APPEAL from the Fourth Judicial District, Contra Costa County.

The facts are stated in the opinion of the Court.

H. Mills, for Appellant.

This being a proceeding growing out of collection of revenue, in order to rightly decide upon the question at issue, it becomes necessary to inquire into the liabilities of owners of property under the revenue laws of this State.

This liability is simply to pay a just proportion of the expenses of Government, and in order to determine that proportion an assessment is directed to be made. This assessment law directs that each individual's property shall be assessed separately. There

is no law in existence which recognizes the idea of a joint assessment. (See Revenue Laws of various years under head of "Assessors and their Duties.") From this we argue that it never was the intention of the Legislature to make parties jointly liable for payment of taxes; it is not the person who shall pay the taxes, but the property of each person in its due proportion shall be held liable to pay, etc.

By the various revenue laws the right is given to pay taxes on undivided real estate by paying on any interest the owner may claim therein. (See Law 1861, 430, Sec. 33; Law 1857; Wood's Dig. 622, Sec. 31.)

Can you by the recovery of a judgment for the tax and selling interests (owned separately) jointly compel A to pay the taxes due upon lands of B, or in default of such payment forfeit his own estate? Can the rights of property under our laws be divested in this manner? (*Billings v. Hall*, 7 Cal. 3-16; *Taylor v. Porter*, 4 Hill.)

The Statute of April 8th, 1861, Sec. 6, provides, "that when the property belongs to minors or persons under legal disability, they shall have until six months after said disability is removed to redeem said property, by paying the whole bid and all subsequent taxes and interest."

In this part of the act provision seems to be made where minors own the entire property and "they" seek to redeem it all, not a part. Otherwise, if there be a number of children arriving at age at different periods, the first redeems the whole and keeps it until the next junior arrives at age and redeems the whole, and so on, each being bound to pay to the other the whole bid, etc., until the youngest had arrived at age, and within six months thereafter it must take another start to go round. Clearly, as heretofore argued, such was never the object of the Legislature by this provision, but they, the Legislature, took it for granted that each person's interest in lands should and would be assessed separately, sold separately, and redeemed separately.

H. W. Carpentier, for Respondent.

The right to redeem is given by a proviso to the fifth section of

People v. McEwen.

the act in the following words: "And *provided*, further, that where the property sold belongs to minors or persons under legal disability, they shall have until six months after said disability is removed to redeem said property, by paying the whole bid and all subsequent taxes and interest." (Laws of 1861, 120.)

The language of the act does not admit of construction. It is perfectly clear and unequivocal, and any attempt to elucidate the matter by argument would be as vain a thing as to demonstrate that twice two make four.

NORRIS, J. delivered the opinion of the Court—CROCKER, J. and COPE, C. J. concurring.

This is an appeal from an order directing a *mandamus* to issue to the defendant, commanding him to execute a deed to the relator under the following circumstances: An undivided half of a tract of land in Contra Costa County, comprising something more than 6,000 acres, was assessed for the taxes of the year 1860 to three persons. By an Act of the Legislature of 1861 the assessment of taxes for the years 1860 and 1861 for that county were legalized and confirmed, and the District Attorney directed to bring actions to recover the unpaid taxes. (Law of 1861, 119.) Under this law an action was brought against the three persons to whom the said premises were assessed, and a judgment recovered, and the premises sold to the relator by the defendant as Tax Collector. Within six months after the sale one of the defendants, Reyes Vasques, paid to the Tax Collector one-eighth part of the taxes, with costs and per centage allowed by law, for the purpose of redeeming one undivided eighth part of said premises, of which undivided eighth part she claimed to be the owner. At the time of the said sale she was a minor and a married woman. After the expiration of six months from the day of sale the relator demanded a deed of the whole premises, which the Tax Collector declined to give, but offered a deed of seven-eighths. Thereupon the present application was made to the District Court for a *mandamus*, which was granted, requiring the Collector to execute a deed for the whole premises sold. From this order Reyes Vasques appeals.

The argument on the part of the appellant is, that the law under

People v. McEwan.

which the assessment was made does not authorize or contemplate an assessment jointly to tenants in common, but, on the contrary, each owner is to be assessed for his share, and may, consequently, redeem his share, and that a part owner is expressly authorized to pay his proportion of a tax, and that the obtaining a judgment and effecting a sale under the special Act of 1861 does not change this right to pay a portion of the tax and redeem an undivided share.

The Revenue Act of 1860, under which the assessment in question was made, does not directly authorize a joint assessment, unless the property is owned by a firm or association, but under the designation "person" it would doubtless be competent to assess land to several persons, and it seems to be contemplated that such assessments would be made, since it is provided that the owner of an undivided portion may pay his portion of the tax.

But if there was any irregularity or illegality in the assessment in this respect it was remedied by the special confirmatory Act of 1861. Whatever may have been the right of an owner of an undivided share to pay his portion of a joint tax it was a right which could only be exercised before a sale by the law under which an assessment was made, or before a judgment under the special Law of 1861. The Revenue Law of 1860, which allows an owner of an undivided portion of a tract of land to pay his portion of the tax, nevertheless only allows a redemption after sale by a payment of the whole tax and charges, and provides no mode of redeeming an undivided portion. And the special Law of 1861 in like manner requires a payment of the whole judgment in order to effect a redemption, and provides no mode of redeeming a portion. The provisions of the Civil Practice Act are made applicable to judgments under this special act, but if a redemption can be made under those provisions it can only be done by paying the whole sum bid on any distinct piece sold separately. A redemption cannot be made by paying a portion of the bid equal to the interest of the redemptioner in the parcel sold.

The appellant urges that it will work injustice and hardship to allow undivided interests to be assessed jointly, and require a part owner to pay the whole tax in order to save his own portion of the property, however small that may be; and he also points out some

Tebbs v. Weatherwax.

embarrassments that will attend the right of minors to redeem as they successively arrive at their majority. The answer is, that such is the law. In the effort to enact effective laws to compel property owners to pay their taxes full provision may not have been made for all contingencies, but the law as it stands is plain in its terms and must be enforced, if there is no valid objection to the power of the Legislature to pass it. The power to pass laws of this character was considered and upheld in the case of *The People v. Seymour* (16 Cal. 332). The force of the argument on the ground of the hardship of this case is diminished by the fact that under the Revenue Act of 1860 the appellant might have paid her portion of the tax before the time fixed for a sale.

The order appealed from is affirmed.

TEBBS v. WEATHERWAX *et al.*

THE Supreme Court will not disturb the findings of fact of the Court below when the testimony is conflicting.

When parol testimony to vary the terms of a written agreement is offered and received in the Court below without objection, the objection cannot be raised in the Supreme Court that the testimony was inadmissible.

APPEAL from the Eleventh Judicial District, El Dorado County.

The complaint avers that the defendants were indebted to one James E. Wolfe, and that Wolfe, on the 9th of April 1858, drew the following order on defendants in favor of Fiske & Diehl:

“Messrs. J. M. B. WEATHERWAX & Co.—Gents:

“Please pay to Messrs. Fiske & Diehl the sum of twelve hundred dollars, being the amount due me for a certain note signed by Fiske & Diehl dated March 23d, 1858, and which note was given in consideration of services at Empire Mill, and which said note I transferred to you on said 23d day of March aforesaid, and for which attachments were issued on the property of said Fiske & Diehl, and oblige yours,
JAMES E. WOLFE.”

That on the 10th day of April, 1858, Fiske & Diehl presented

Tebbs v. Weatherwax.

the order to defendants, who indorsed on it the following acceptance:

“Accepted, April 10th, 1858.

“J. M. B. WEATHERWAX & Co.”

That on the 28th of June, 1858, Fiske & Diehl indorsed the order to plaintiff, Tebbs, in the following words and figures:

“EL DORADO, June 28, 1858.

‘For a reasonable consideration, we transfer the within order (accepted) to Moses Tebbs. FISCHE & DIEHL, by Fiske.”

The answer sets up that in the spring of 1858, Fiske & Diehl had given Wolfe their promissory note for twelve hundred dollars for labor, and that at the same time Fiske & Diehl were indebted to defendant for goods, and that defendants agreed to bring an action against Fiske & Diehl for their own demand, as well as Wolfe's note, and to enable them to do so, Wolfe indorsed his note to defendants with the understanding that the defendants should commence suit on both demands in one action, and if any money was collected by the suit, it should be divided between Wolfe and defendants, *pro rata*, according to the amount each owned in the judgment recovered, and that nothing had been realized from the suit, and that Fiske & Diehl obtained the order on defendants with the understanding that it was only to be paid out of any moneys collected in said suit, and defendants accepted it with that agreement and understanding, and that plaintiff knew all of these facts before it was indorsed to him.

Defendants had judgment and plaintiff appealed.

Charles Meredith, for Appellant.

The acceptance in writing is unconditional, and we hold that no parol evidence can be received to show a contemporaneous parol agreement different.

Hersford & Williams, also, for Appellant.

Taking the facts as stated in the answer and found by the Court as true, the defense is good in law. (*Aud v. McGruder*, 10 Cal. 282; *Conner v. Clark*, 12 Id. 168.)

Tebbs v. Weatherwax.

Objections to the competency of evidence, or of a witness, must be taken at the trial; but objections to the sufficiency of testimony may be taken at any time.

John Hume, for Respondents.

Plaintiff having failed in the Court below to object to the parol testimony upon which the Court founded its findings and judgments, cannot in the Appellate Court take advantage of the error, which was his own, and not the error of the Court. (*McCloud v. O'Neill*, 16 Cal. 392; *Hobart v. Dumerits*, 3 Ind. 346-348.)

NORTON, J. delivered the opinion of the Court—COPE, C. J. and CROCKER, J. concurring.

The Court by whom this action was tried without a jury finds as one of the facts that the order was accepted with the understanding at the time that it was to be paid out of any money that might be collected on the note of twelve hundred dollars. The testimony as to this fact is conflicting, and in such cases the finding is conclusive. The objection that the evidence to prove this fact was parol and inadmissible to vary the terms of the written acceptance cannot be raised here for the first time, after the evidence had been given in the Court below without objection. (*Hobart v. Dumerits*, 3 Ind. 346; *McCloud v. O'Neill*, 16 Cal. 392.)

It is also found as one of the facts that no part of the money out of which the order was to be paid had been collected by the defendants. The fact that the defendants had at one time assigned all their right, title, and interest in the judgment of which this money formed a part, as collateral security for a debt, without designating which part was held by them for the account of Wolfe, and the fact that one of the firm in his schedule in insolvency mentioned this judgment as assets of the firm, without any reservation of the portion for which they were accountable to Wolfe, do not prove that any money was in fact collected on the Judgment by the defendants, nor are they facts of a character which estop them from showing the truth in that respect. Nor is the fact that the defendants at the time of the transfer of the order to the plaintiff claimed an offset of six hundred dollars inconsistent with the fact

Malson v. Vaughn.

that they were only to be liable on their acceptance for so much as they should collect on the note. The offset would be applicable whenever their indebtedness should become fixed by a collection of the amount of the note, and the claim of the offset then made was proper as a notice to the plaintiff that any liability that might arise against the defendants would be subject to that deduction.

The judgment is affirmed.

MALSON v. VAUGHN *et al.*

UNDER the Constitution before the amendments which went into effect January 1st, 1864, an appeal could be taken to the Supreme Court from a judgment of the County Court, when the judgment appealed from, including principal and interest exceeded two hundred dollars.

IN an action in a Justice's Court upon a money demand, the defendant cannot set up in his answer, as a counter claim of set-off, a demand, amounting, exclusive of interest, to more than two hundred dollars.

A Justice of the Peace has no jurisdiction to pass upon a counter claim or set-off unless it be for such a sum as the defendant might have maintained an action on against the plaintiff, in a Justice's Court.

APPEAL from the County Court of Butte County.

The note sued on was dated March 28th, 1857; due thirty days after date; bearing interest at three per cent. per month, and was payable to Vaughn or order. May 22d, 1860, Vaughn indorsed it to the plaintiff. May 28th, 1860, the suit was commenced. Bristol answered pleading as a set-off the five hundred and ninety-three dollars and forty cents referred to in the opinion of the Court. This set-off was for money received by Vaughn for the use of Bristol after the execution of the note and before Vaughn indorsed it to Malson. The County Court allowed the set-off, and rendered judgment in favor of defendant Bristol. From this judgment Malson, the plaintiff, appealed.

Jos. G. N. Lewis, for Appellant.

The Court exceeded its jurisdiction in entertaining the defendant Bristol's plea of counter claim or set-off. Bristol could not have

Malson v. Vaughn.

brought an action against plaintiff in a Justice's Court on the counter claim. (Pr. Act, Sec. 574.)

H. O. Beatty, for Respondent.

The Court has no jurisdiction of the appeal. The principal of the note is only one hundred and forty-five dollars and sixty-four cents, but the interest swells the amount due to more than two hundred dollars. The old Constitution, Art. 6, Sec. 4, provides: "The Supreme Court shall have appellate jurisdiction in all cases where the matter in dispute exceeds two hundred dollars." What is the matter in dispute? The one hundred and forty-five dollars and sixty-four cents, or the one hundred and forty-five dollars and sixty-four cents with interest added. (*Dumphy & Hildrith v. Guindon*, 13 Cal. 30; *Simmons v. Brainard*, 14 Id. 278.)

No affirmative relief was asked for by defendant Bristol for any portion of the set-off, but merely a defense made against the claim of plaintiff.

СВОСКЕР, J. delivered the opinion of the Court—**СОРН, C. J.** concurring.

This is an action brought upon a promissory note against Bristol, as maker, and Vaughn, as indorser, before a Justice of the Peace. The defendant Bristol plead in defense a set-off against Vaughn, the payee of the note, amounting to five hundred dollars. The plaintiff recovered judgment before the Justice of the Peace, from which the defendants appealed to the County Court, where the Court found for the defendants and rendered a judgment dismissing the suit, from which the plaintiff appeals.

The note sued on was for the sum of one hundred and forty-five dollars and sixty-four cents, but the amount due thereon at the date of the judgment, including interest, greatly exceeded two hundred dollars. The respondent objects that this Court has no jurisdiction of the appeal, and contends that the interest due on the note cannot be added to the principal in estimating the "matter in dispute." In this he is mistaken. The interest should properly be included in the estimate.

The set-off or counter claim set up by the defendant Bristol, in

 Smith v. Johnson.

his answer, amounted to the sum of five hundred and ninety-three dollars and forty cents, and it is insisted that the amount being beyond the jurisdiction of the Justice of the Peace, the objection of the plaintiff to the filing of the answer on that ground should have been sustained by the Justice, and by the County Court when it was renewed. Sec. 574 of the Practice Act provides that in proceedings before Justices of the Peace "the answer may contain a denial of any of the material facts stated in the complaint, which the defendant believes to be untrue, and also a statement, in a plain and direct manner, of any other facts constituting a defense or counter claim, upon which an action may be brought by the defendant against the plaintiff in a Justice's Court." It is clear that the defendant could not have brought an action against the plaintiff in a Justice's Court, upon the demand set forth in his answer by way of counter claim, and the Justice and County Court therefore erred in not sustaining the objection of the plaintiff. (*Lamonn v. Caryl*, 4 Denio, 370.)

The judgment is therefore reversed and the cause remanded.

See *Hamilton v. McDonald* (18 Cal. 123).—REPORTER.

SMITH v. JOHNSON.

When A executes a promissory note to B bearing interest at three per cent. per month, and C, D, and E sign the note as sureties for A, and B afterwards recovers judgment on the note against A, the maker and the sureties, and the sureties pay the judgment, in an action by the sureties against the maker for the money thus paid, they can only recover judgment for the amount of money paid, with interest at the rate of ten per cent. per annum from the time of payment.

Where there is no agreement or contract in writing, fixing a different rate of interest, parties are limited in their recovery to ten per cent. per annum.

The rate of interest fixed in a promissory note is not a contract or agreement in writing between the maker of and sureties on the note.

APPEAL from the Seventh Judicial District, Mendocino County.

The facts are stated in the opinion of the Court.

Smith v. Johnson.

R. McGarvey, for Appellant.

Holden & Lamar, for Respondent.

[No briefs on file.]

CROOKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is an action to recover a sum of money paid by James M. Ellis and Bennett Ellis (under whom the plaintiff claims by assignment), as sureties for the defendant, on a judgment rendered against the defendant, one Latimer, and the said Ellis. The defendant demurred to the complaint, on the grounds that it did not state facts sufficient to constitute a cause of action, and that several causes of action had been improperly united. The Court overruled the demurrer, and rendered judgment against the defendant, from which he appeals.

The complaint alleges that one Myers recovered a judgment against the defendant, Latimer, and the said J. M. and B. Ellis, for three hundred and ninety-two dollars and fifty cents, with interest at three per cent. per month, and costs; that the judgment was rendered upon a promissory note executed by the defendant, as maker, and by Latimer and the Ellis's as sureties for the defendant; that the sureties paid the judgment on the twenty-seventh day of April, 1861, the Ellis's paying thereon the sum of two hundred and thirty-one dollars and thirteen cents; that they assigned their claim against the defendant for repayment to one Caldwell, who assigned to the plaintiff, and that he is entitled to a judgment against the defendant for two hundred and thirty-one dollars and thirteen cents, with interest thereon at the rate of three per cent. per month, and the judgment rendered includes interest at that rate.

The statute regulating the interest of money provides that parties may agree in writing for the payment of any rate of interest whatever on money due or to become due on any contract, and when there is no express contract fixing a different rate of interest, interest shall be allowed at the rate of ten per cent. per annum. There does not appear to have been any contract or agreement in writing

 Marshall v. Ferguson.

between the defendant and the sureties as to the repayment of the money they might be compelled to pay as such sureties, or fixing any rate of interest to which they should be entitled upon the money they might thus be compelled to pay, and in the absence of any agreement in writing they would not be entitled to recover interest at a rate greater than ten per cent. per annum. The rate of interest in the note does not affect the question, because the note, or the judgment rendered on it, is not the contract sued on, but it is the implied contract, that the defendant shall pay to his sureties the amount paid by them for his use, that forms the basis of the action.

It follows that the Court erred in rendering judgment for a sum including interest at a rate exceeding ten per cent. per annum. The excess amounts to one hundred and six dollars and fifty cents, and it should have been for two hundred and seventy-four dollars and seventy-eight cents instead of three hundred and eighty-one dollars and twenty-eight cents.

The judgment is therefore reversed and the cause remanded.

Afterwards, on motion of the respondent, and upon his remitting the excess of the judgment, the same was amended and reduced to the sum of two hundred and seventy-four dollars and seventy-eight cents, and affirmed as thus amended, with a judgment in favor of the appellant for the costs of the appeal.—*REPORTER.*

MARSHALL v. FERGUSON.

A SALE of growing crops, the product of periodical planting and cultivation, does not come within the provisions of the Statute of Frauds, relating to sales of an interest in real estate, and therefore, though not in writing, is valid. Where A purchases personal property worth more than two hundred dollars of B, but B does not deliver him possession of the same, and A then sells the goods to C, a third party, and receives his pay for the same, the sale by A to C is a sufficient delivery by B, and A cannot avoid the payment of the purchase money for want of delivery, or a note or memorandum in writing. An agreement to pay a fixed sum in grain, at the market price on a day specified, if not fulfilled by the delivery of the grain at the time fixed, becomes a debt payable in money.

Marshall v. Ferguson.

Where such an agreement exists, no demand of the grain is necessary, but a failure to deliver, makes the sum fixed, a money debt.

When the case made by plaintiff's proof differs from the averments of the complaint, and defendant makes no objection to the introduction of the evidence on this ground, the Supreme Court will not reverse the judgment on account of the variance.

APPEAL from the Fifth Judicial District, San Joaquin County.

Comstock died, leaving lands in San Joaquin County, and Hestres was appointed his administrator. A crop of grain was growing on the lands, but it was in the possession of other parties, the administrator not having reduced it to possession. The administrator gave Marshall, the plaintiff, a written lease of the land, and Marshall, about three weeks before the grain ripened, sold the growing crop to Ferguson, the defendant; Ferguson agreeing to pay him therefor six hundred and fifty dollars in grain. No note or memorandum in writing was made of the agreement. There was no delivery of possession either by the administrator to Marshall, or by Marshall to Ferguson. Ferguson, after his purchase, sold the growing crop to the parties who were in possession of the land, and received his pay therefor. The complaint averred the sale of barley and wheat to defendant at his request, and his promise to pay therefor. The answer was a specific denial of each allegation.

Cobb and Tyler, for Appellant.

No delivery alleged, and nothing alleged to show waiver of delivery. (Wood's Dig. Art. 404.)

If plaintiff's case came within either of the exceptions mentioned, the complaint should allege it. (*Thurman v. Stevens*, 2 Duer, 610; *LeRoy v. Shaw*, Id. 626.)

The contract upon which plaintiff seeks to recover should have been in writing in order to be actionable, and should have been so set forth in the complaint. (See cases above cited.)

Plaintiff's case as proved is not the case alleged, and as proved does not constitute a cause of action. Case alleged is for sale of barley and wheat for six hundred and fifty dollars. Case proved is a sale of growing crop. A growing crop is an interest in lands. (Wood's Dig. Arts. 394, 396.)

Marshall v. Ferguson.

Again, the case alleged is a promise to pay six hundred and fifty dollars in money, on the first of October, 1862. The case proved is a promise to pay six hundred and fifty dollars in grain at the market price on the first of October, 1862. (Sugden on Vendors, 162; *Robertson v. Robertson*, 9 Watts, 62; *Jervis v. Smith*, 1 Hoff. Ch. Cases, 470.)

“Formerly a delivery of goods by the seller was held sufficient to take the contract out of the Statute of Frauds. But it is now clearly settled that in order to satisfy the statute there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee, and there must be an actual receiving and acceptance by the latter, with the intention of taking possession as owner. It lies upon the plaintiff to make out there was such delivery and acceptance. And it must be an ultimate acceptance, such as completely affirms the contract.” (Hilliard on Sales, 161; *Redington v. Roberts*, 25 Vt. 693.)

IV. Plaintiff should have demanded delivery of grain of defendant. Where no particular place of delivery is named, the demand and delivery must be at the debtor's residence, or where the property was at the time of contract. (2 Kent's Com. 691, marg. 508.)

A contract payable in portable specific articles at a day certain, not at any specific place, is payable at the creditor's residence. In the case of a merchant or a mechanic who gives an engagement to pay in merchandise, or in his manufactures, the shop of the debtor is the place of payment. (Chip. on Contracts, 28-30.) And there must be a demand at his place of residence. (Id. 49.)

Tod Robinson, for Respondent.

The first point made in support of the motion for a nonsuit was, the sale of growing crops was the sale of an interest in lands, and to be effective must be in writing. This proposition is denied, I believe, by all the authorities, and certainly by the two here quoted. (*Green v. Armstrong*, 1 Denio, 554; *Bank of — v. Crary*, 1 Barb., S. C., 544.)

The second ground for nonsuit was, that there was no delivery, no memorandum in writing, nor any part of the purchase money

Marshall v. Ferguson.

paid, and so the sale was void under the statute. The fact that defendant sold the growing crops to others, and received the money therefor, is fatal to this objection. The rule of law is, where payment is to be made in a specific article at a certain time, it is the duty of the debtor to seek the creditor and make the tender in whatsoever manner it is susceptible of being made at the time stipulated, and failing this, the amount fixed becomes due and payable in money. (2 Kent, 690, marg. 507.)

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action to recover six hundred and fifty dollars, for barley and wheat alleged in the complaint to have been sold by the plaintiff to the defendant. The case was tried by the Court, and after the plaintiff had closed his evidence the defendant moved for a nonsuit, which was refused. The Court, after hearing all the evidence, ordered judgment to be entered for the plaintiff, from which defendant appeals.

The first error assigned is that the Court erred in refusing the nonsuit. The evidence showed that the sale to the defendant was of growing crops of barley and wheat, and not of grain of those kinds, as alleged in the complaint; that these crops were growing on lands in the possession of various persons, and that after his purchase the defendant had resold the same to the parties in possession of the land, and had received his pay therefor, from all except one of them. It further appeared that the defendant's agreement was to pay the six hundred and fifty dollars in grain at the market price, on the first day of October, 1862, but he had failed to deliver the grain at that date.

The grounds of the motion for the nonsuit were that the sale of growing crops was of an interest in land, and therefore it must be in writing, under the Statute of Frauds; that as a sale of goods and chattels it was void, being for a sum exceeding two hundred dollars, and not in writing, and no delivery having been made; that the plaintiff had failed to prove any title to the property, and that there was no proof that the grain the defendant had agreed to pay for had ever been demanded of him.

Marshall c. Ferguson.

The crops contracted for in this case are the product of periodical planting and cultivation, and the law appears to be well settled, both in the English and American Courts, that sales of growing crops of that character do not come within the provision of the Statute of Frauds relating to sales of an interest in real estate, and therefore such sales, though not in writing, are valid. (Browne on Stat. of Frauds, Secs. 250-258; *Green v. Armstrong*, 1 Denio, 550; *Smith v. Bryan*, 5 Maryland, 141; *Safford v. Annis*, 7 Maine, 168; *Bostwick v. Leach*, 3 Day, 476.) The objection that the sale was of an interest in real estate, and must be in writing, is therefore untenable.

The next point is, that as a sale of goods and chattels it was void for want of delivery and a written memorandum of the sale. The fact that defendant sold the crops to other parties was a sufficient delivery within the statute. (Browne on Stat. of Frauds, Sec. 322; *Chaplin v. Rogers*, 1 East. 192.)

There was sufficient evidence of plaintiff's title to the crops, and his right to sell them. Even if there had been a defect of proof on this point, the defendant could not avail himself of it after he had sold the property and received the pay therefor.

The next question is, was it necessary for the plaintiff to demand of the defendant the grain he agreed to deliver for the growing crops before commencing suit? The defendant agreed to pay the six hundred and fifty dollars in grain at the market price, on the first day of October, 1862. It was not an agreement to deliver any specific parcel or quantity of grain, but he was to deliver a sufficient quantity which at the market price would amount to the sum of six hundred and fifty dollars. It is to be observed, too, that the time of delivery was fixed. The grain was not to be delivered on demand, but on a certain day that was named. Under these circumstances it was the duty of the defendant to deliver the grain, on or before the day named, to the plaintiff, and his failure to do so made him liable to pay the sum named in money. After the day named, the plaintiff was under no obligation to receive payment in grain, and no demand of the grain by him was necessary. (*Goodwin v. Holbrook*, 4 Wend. 377; *Peck v. Hubbard*, 11 Vermont, 612; *Townsend v. Wells*, 3 Day, 327; 2 Parsons on Contracts, 163.)

Riley v. Pehl.

It is further objected that the proof varied from the allegations of the complaint. This objection would have been good had the defendant made it at the proper time, which was when the evidence was introduced. The case made by the proof differs from the averments of the complaint in almost every essential particular; and if the defendant had objected to its introduction it would have been the duty of the Court to have excluded it until the pleadings had been made to conform to the real facts of the case. But the defendant made no objection on this ground, either at the time of the introduction of the evidence or at any other time, in the Court below, nor is it included in his grounds of appeal or assignments of error filed in this Court. Under these circumstances we cannot entertain this question. It is too late to present it here for the first time; for if it had been suggested in the Court below at the proper time, the Court might have allowed the plaintiff to amend his complaint, so as to make it conform to the proof.

The last point raised is, that the action was tried by the Court, who filed no findings in the case. Sec. 2 of the Statute of 1861, page 589, provides that, "In cases tried by the Court, without a jury, no judgment shall be reversed for the want of a finding, or for a defective finding of the facts, unless exceptions be made in the Court below to the finding, or to the want of a finding." No exception was taken by the defendant for want of a finding, nor did he ask or require the Court to file any findings in the case. It comes clearly within the provisions of this statute, and this Court cannot, therefore, reverse the judgment on that ground.

We have examined all the questions presented by the appellant, and find no valid ground for reversing the judgment, and it is therefore affirmed.

RILEY v. PEHL. AND WIFE.

WHEREAS a homestead right had been acquired prior to the passage of the amendment to the Homestead Law in 1860, a declaration of homestead could be made and recorded at any time prior to June 1st, 1862, and no right of homestead was lost by a failure to make the declaration before that time.

Riley v. Pehl.

Where property is conveyed to a wife and the deed shows upon its face a consideration paid, it becomes the common property of both husband and wife, and not the separate property of the wife.

Query — Can the separate property of the wife become the homestead?

Where a homestead is sold by the Sheriff on an execution against the husband, or husband and wife, and a deed given to the purchaser therefor, it is a cloud upon the title, and a Court of Equity will remove it.

APPEAL from the Fourth Judicial District, Contra Costa County.

The facts are stated in the opinion of the Court.

M. S. Chase, for Appellants.

The deed to the wife expresses a money consideration. The demanded premises then, whether considered as conveyed directly to the husband as the prior grantee or as conveyed to the wife, were by the statute and uniform adjudications upon the subject common property. (See Husband and Wife, Dig. Art. 2606; *Tryson v. Sutton*, 13 Cal. 493; *Pixley v. Huggins*, 15 Id. 127; *Mott v. Smith*, 16 Id. 557; *Myer v. Keizer*, 12 Id. 253.)

As common property it was susceptible of homestead dedication. (Homestead Act 1851, Sec. 1; *Taylor v. Hargués*, 4 Cal. 273.)

It is contended on the part of the respondent that the homestead claim is waived by the acts of the defendant's wife, and that the husband is "estopped" from any assertion of the claim by reason of the wife having filed her declaration of intention to do business as a sole trader, and having filed also an inventory in which she sets forth as part of her separate property the demanded premises.

1st. As to the wife's rights as affected by these acts, under the Sole Trader Act (Wood's Dig. 490, Sec. 3) it is provided that such sole trader "shall be allowed all the privileges and be liable to all legal processes now or hereafter provided by law against debtors and creditors."

Now were the husband a trader, doing business on the credit of his ownership of this very property (the demanded premises), could it be contended that he could not claim the same as a homestead, and as exempt from a judgment debt contracted, it may be, on the faith of such ownership? If so, surely the wife as a trader on her own account cannot stand in a more unfavorable position as to her

Elley & Pehl

claim of homestead. There was no estoppel as to husband or wife. (See doctrine of estoppel in *Boggs v. Merced Mining Co.*, 14 Cal. 367; affirmed in *Green v. Prettyman*, 17 Id. 401; see, also, *Feris v. Coover*, 10 Id. 631.)

The Sheriff's deed to plaintiff was a cloud upon defendant's title to homestead in the demanded premises, for it required evidence, *aliunde*, the record to defeat recovery based on the deed. (*Pixley v. Huggins*, 15 Cal. 127; *Dunn v. Tozer*, 10 Id. 172; *Dorsey v. McFarland*, 7 Id. 346.)

Thomas A. Brown, for Respondent.

The homestead declaration made by Mrs. Pehl on the sixteenth of February, after the Sheriff's sale, cannot defeat the plaintiff. Defendants' title to the homestead, if any they had at the time of the sale, they held under the Homestead Act of 1851. (*Cohen v. Davis*, 20 Cal. 194; *Farmer v. Sampson*, 6 Texas, 310.) The defendants are by their acts and declarations estopped from denying that the lots of land in controversy at the time of the levy and sale by the Sheriff, were the separate property of the defendant Sarah Pehl, and as such, liable for debts contracted by her as sole trader.

The third section of the act defining the rights of Husband and Wife (Wood's Dig. 487), provides, that: "A full and complete inventory of the separate property of the wife shall be made out and signed by the wife and acknowledged or proved, in the manner required by the law for the acknowledgment of proof of conveyances of land, and recorded in the office of the Recorder of the county in which the parties reside;" and section five of the same act provides, that the filing of the inventory in the Recorder's office shall be notice of title of the wife, and all property belonging to her included in the inventory shall be exempt from seizure on execution for the debts of her husband.

The inventory of her separate property, filed and recorded by the defendant Sarah Pehl, was intended to and did impart notice to all persons, that the property described therein was her separate property, and was not liable for her husband's debts. The law will hold her responsible for the truth of the statements made and con-

Riley v. Pehl

tained in her inventory, in respect to her title to the property in controversy, whether those statements be true or false. She will not be permitted to record her statement for her own protection, and when convenient, deny its truth. (Cowen & Hill's Notes to 3 Philips' Ev., Part 1, 369; 1 Greenl. Ev. 22, 207, 208; *Mitchell v. Reed*, 9 Cal. 206; *Hostetter v. Haas*, 3 Id. 307; *Cravens v. Booth*, 8 Texas, 249; *Bien et al. v. Heath*, 6 How. 247; 1 Story's Eq. Jur. Sec. 385.)

The defendant William Pehl, is in no better condition. His wife was doing business as sole trader with his consent. She had assumed to act in his place with his permission, and the presumption is, from his relation towards her, that he knew better than any other person what she was doing.

Thomas A. Brown, for Respondent.

CROCKER, J. delivered the opinion of the Court — CORA, C. J. and NORTON, J. concurring.

This is an action to recover the possession of two village lots, claimed by the defendants as a homestead. The wife filed her declaration as a sole trader on the fifth day of December, 1859, and on the second day of August, 1860, the plaintiff commenced an action against her, as such sole trader, and her husband, in which the property claimed as a homestead was attached. He afterward obtained judgment in the action, on which an execution duly issued, under which the property was sold and purchased by the plaintiff on the nineteenth day of January, 1861, and in due time he received a deed from the Sheriff therefor. Notice of the homestead claim appears to have been served on the Sheriff after the levy under the execution, and before the sale of the property. On the sixteenth day of February, and after the Sheriff's sale, the wife filed a declaration of homestead in the Recorder's office. The defendants had occupied the premises as a homestead for some time prior to any of these dates, and have so continued to occupy them ever since. The Court found for the plaintiff, and judgment was rendered accordingly, from which the defendants appeal.

The homestead right in this case was acquired by the defendants

Riley v. Pehl.

prior to the passage of the amended Homestead Law of 1860, by which act the time fixed for filing the declaration of homestead was one year, to wit: April 28th, 1861. This time was extended by the Act of 1861, to April 28th, 1862, and by the Act of 1862 it was still further extended to June 1st, 1862. The declaration of homestead in this case was filed on the sixteenth day of February, 1861, fully within the time fixed by the statute, and they are therefore entitled to its full benefits, having lost no rights whatever by a neglect to file it before. The fact that it was not filed until after the Sheriff's sale can make no difference. If any notice had been necessary, that served on the Sheriff, as well as the occupancy of the premises by the defendants, was sufficient for that purpose.

The respondent insists that the premises are the separate property of the wife, and therefore liable to be sold on execution for her debts, and no homestead claim can be established thereon. It appears that after the marriage these lots were conveyed to the husband by two separate deeds made at different times; but the same grantors, on the sixteenth day of July, 1859, the date of the last deed, also made a quitclaim deed to the wife for the same lots for the consideration of fifty dollars. She also filed in the Recorder's office an inventory of her separate property, dated December 5th, 1859, including the premises in controversy. The conveyance to her, being a deed of purchase and not of gift, did not constitute it separate property, but it was the common property of both. It is not, therefore, necessary for us to determine the question whether the separate estate of the wife can become the homestead, respecting which some doubts have been heretofore expressed by this Court. (8 Cal. 71; 14 Id. 474; 16 Id. 217.) The fact that she included it in her inventory of her separate estate does not operate as an estoppel upon her, even if the doctrine of estoppel applies to a married woman. The plaintiff was not thereby defrauded or injured in any way.

The pleadings and evidence sufficiently established the occupancy of the premises by the defendants as their home, but upon this point the findings of the Court are entirely silent. It seems that on a portion of the premises is a building used as a billiard saloon, bar-room, and theater, and it may be questionable whether that portion

Castle v. Bader.

can be properly held as a homestead; but the remaining portion of the lots are clearly exempt from the execution, and the Court therefore erred in holding that the plaintiff was entitled to the possession of all the premises. The case will therefore have to be retried by the Court below, and this question can be duly investigated and determined.

The defendants, in their answer, set up that the Sheriff's deed to the plaintiff was a cloud upon their title, which they asked to have removed by the decree of the Court. This relief they will be entitled to when it is established what portion of the premises can be and what cannot be claimed by them as exempt under the Homestead Law. As to that portion found to be exempt, the decree should declare the Sheriff's deed invalid.

The judgment is reversed and the cause remanded.

CASTLE *et al.* v. BADER *et al.*

In order to set aside a judgment or conveyance on the ground of fraud, it is not sufficient to aver in general terms that such judgment or conveyance was fraudulent, but the facts and circumstances constituting the alleged fraud must be set forth.

Where a creditor files a bill to cancel and set aside a judgment, rendered against his debtor, on the ground that it is fraudulent, and to reach the property of the debtor and have it applied in satisfaction of his demand, the complaint must aver, either that the plaintiff has acquired a lien on the property he seeks to reach, or that he has recovered a judgment upon which an execution has been issued and returned no property found.

APPEAL from the Fifteenth Judicial District, Butte County.

The facts are stated in the opinion of the Court.

J. M. Burt, for Appellants.

The complaint admits the judgment of John Bader against Charles Bader, and avers no fact or circumstance to establish its invalidity. The complaint does not charge that the attachment or execution in plaintiffs' respective cases had been levied upon the property that had been attached in the case of *Bader v. Bader*. Without a levy they, nor either of them, could have any lien on

Castle v. Bader.

the property, and without a lien on the property, they could not attack the judgment, or the lien, or the execution in Bader's case.

H. O. Beatty, for Respondents.

[No brief on file.]

CROCKER, J. delivered the opinion of the Court—CORP, C. J. and NORTON, J. concurring.

This is an action brought by the plaintiffs, creditors of the defendant Charles Bader, to set aside and cancel a judgment rendered in favor of the defendant John Bader, against Charles Bader, and to apply certain property, levied upon by the Sheriff under the latter judgment, in payment of the plaintiffs' claims. The action was tried by the Court, who found for the plaintiffs, and rendered judgment accordingly, from which, and from an order overruling a motion for a new trial, the defendants appeal.

One error assigned by the appellants is that the complaint does not state facts sufficient to constitute a cause of action. It avers that the plaintiffs, Castle & Freeborn, commenced suit against Charles Bader, January 16th, 1862, and caused an attachment to issue, which was placed in the hands of the Sheriff, and on the twenty-eighth day of January, 1862, they recovered judgment therein; that on the sixth day of February, 1862, the other plaintiffs, Tandler & Co., commenced a suit against Charles Bader, in which an attachment was also issued and placed in the hands of the Sheriff; that on the sixteenth day of January, 1862, John Bader, conspiring with Charles Bader to defraud the creditors of the latter, commenced a suit against him, caused an attachment to issue therein by which the Sheriff attached all the property, real and personal, of the defendant therein, and on the thirty-first day of January the clerk entered judgment therein by default for \$1,306.64 and eighty-four dollars costs, and they aver that they are informed and believe that Charles Bader is not indebted to John Bader in said sum of \$1,306.64, or any other sum whatever, and that the judgment was obtained to hinder, delay, and defraud the plaintiffs. They also aver that the Sheriff threatens to sell the

Castle v. Bader.

property and pay the proceeds on the judgment of John Bader, and that Charles Bader has no other property.

In order to set aside a judgment or conveyance on the ground of fraud, it is not sufficient to aver in general terms that such judgment or conveyance was fraudulent, but the facts and circumstances constituting the alleged fraud must be set forth. (*Kinder v. Macy*, 7 Cal. 206.) The only fact charged to sustain the allegations of fraud is, "that Charles Bader is not indebted to John Bader" in the amount of the judgment or any other sum. It does not charge that he was not justly indebted in that sum at the commencement of John Bader's suit, or at the time of the rendition of the judgment; nor does it aver that John Bader's debt has been paid, satisfied, or discharged in any way.

The findings of the Court on this point are entirely insufficient to sustain the charge of fraud. They are, that the promissory notes on which the principal part of the judgment was rendered "were never filed with the Clerk, nor have they ever been produced in Court;" and "that a part of the eighty-four dollars' costs, to wit: the sum of forty-five dollars, is for receiver's fees, a charge not allowed by law, and for which the Clerk had no authority to enter judgment." The Court does not find that no such promissory notes ever existed, or that there was no debt due John Bader at the time the suit was commenced, or the judgment rendered, or the commencement of this action, which were the facts essential to sustain the charge of fraud made in the complaint. The mere fact that the notes were never filed with the Clerk or produced in Court, did not show or tend to show that no debt existed in favor of John Bader against Charles Bader. If the complaint had charged that no such notes were ever made or ever existed, then the defendants would have known that they would be required to produce them, or prove that they existed; but no such charge was made.

The fact that the attorney of John Bader, in making up the bill of costs, included an item of forty-five dollars, which he may not have been entitled to charge as part of the costs, is no evidence that the debt on which the judgment was rendered was fraudulent. It was merely a collateral matter, a mere incident of the debt. A

Gavitt v. Doub.

mere error or irregularity in making out a bill of costs cannot have the effect of invalidating a judgment otherwise correct. This item of forty-five dollars seems to have been a payment made to the Sheriff for keeping the attached property, and the statute allows the Sheriff compensation for such services, to such an amount as the Court shall certify to be just and reasonable. (Wood's Dig. 443, 444, Sec. 29.) And such compensation the plaintiff had a clear right to tax as part of his costs. No objection seems to have been made that the sum thus paid to the Sheriff was unreasonable. Besides, the defendant John Bader offered to remit this sum of forty-five dollars and deduct it from the costs in his judgment, but it was not allowed. It results that neither the facts alleged in the complaint or as found by the Court, are sufficient to sustain the charge of fraud.

There is also another objection to the complaint, that it does not aver or show that the plaintiffs have acquired any lien upon the property they seek to reach and have applied in satisfaction of their debts, or that they have obtained judgments on their debts on which executions have been issued which have been returned no property found. (*Hyneman v. Danenburg*, 6 Cal. 376; *Thornbury v. Hand*, 7 Id. 554.) The complaint does not state whether the property levied upon by the Sheriff was real or personal, or consisted of both kinds; nor does it aver that the attachments issued by the plaintiffs were ever levied upon the property by which they would have acquired an attachment lien. In these respects the complaint is defective.

The judgment is reversed and the cause remanded.

GAVITT v. DOUB.

It is not error for a Court to allow pleadings to be amended so as to supply a defect or omission even after the commencement of a trial.

Courts should exercise great liberality in allowing Sheriffs to amend their returns so as to make them conform to the true state of facts and to correct errors and mistakes.

The case of *Borland v. O'Neal* (22 Cal.) affirmed.

APPEAL from the Seventh Judicial District, Marin County.

The complaint alleges that about the twenty-sixth day of August, 1858, defendant with force and arms entered upon plaintiff's premises and forcibly took from plaintiff's possession, and drove and carried away, and converted to his own use, a yoke of oxen and two cows, the property of plaintiff.

The action was commenced February 19th, 1859. Defendant answered March 3d, 1859, setting up that he made the seizure as Sheriff by virtue of an attachment issued against the property of plaintiff March 6th, 1858, and sold the property on the twenty-sixth of August, 1858, by virtue of an execution dated August 16th, 1858, issued on a judgment recovered against plaintiff in the same action.

March 7th, 1860, the cause came on for trial and a jury was impaneled. After plaintiff had introduced part of his testimony defendant asked and obtained leave of the Court to amend his answer so as to set up a levy on the property by virtue of the execution made August 17th, 1858. On the sixth day of August, 1860, the day before the trial, the defendant asked and obtained leave of the Court to amend his return on the execution made in 1858 so as to include the property sued for.

Defendant had judgment and plaintiff appealed.

H. J. Wells, for Appellant.

Although it is a matter of discretion in the Court to allow amendments yet there must be reasonable grounds upon which to base the discretion. Here no showing is made, no reason shown why an amendment is made necessary at the time.

The object of introducing the Sheriff's amended return was to include a yoke of oxen and two cows (which plaintiff had claimed as exempt from execution as a farmer), which were not specified in first return, and which had been sold by the defendant.

Plaintiff claims that defendant could not make testimony for himself in that manner, and that the Court erred in allowing him to do so. The return of the Sheriff is evidence for him, created by himself, yet a complete defense to the action. It is relied on as such

Gavitt v. Doub.

here. The return of an officer is conclusive evidence in his favor. (*Lias v. Badger*, 6 N. H. 393.)

This conclusiveness of the officer's return must arise in part at least from his character as such officer, and the presumption is that when he makes his return he is acting indifferently and without any anticipation of a suit. But to hold that after suit is brought and on the very day of the trial, and a year and a half after his return had been made and filed, and he had conducted his defense for so long a time on the theory of his first return, he may make a return and give it in evidence to constitute his defense, would be to set at naught almost all the principles upon which the rule is based which makes a Sheriff's return evidence for himself.

T. H. Hanson, for Respondent.

No brief on file.

CROCKER, J. delivered the opinion of the Court — CORRE, C. J. concurring.

This is an action against the defendant, Sheriff of Marin County, to recover damages for the sale of certain personal property on an execution against the plaintiff, and claimed by him as exempt from levy and sale. The defendant recovered judgment, from which, and from an order refusing a new trial, the plaintiff appeals.

The Court below permitted the defendant to amend his answer by adding an averment of the levy upon the property, and this is assigned as error. The amendment was properly allowed, and this point is therefore overruled.

On the trial the defendant offered in evidence an amendment to his return upon the execution, which had been made in pursuance of an order of the Court, on that day or the day before, to which the plaintiff objected. The material part of the amendment to the return was that which included in the levy and notice of sale a yoke of oxen and two cows, which the plaintiff claims were exempt from execution. It is not contended that this property was not in fact levied upon and sold under the execution, or that the return as amended, is not in strict accordance with the facts; nor does it

Gavitt v. Doub.

appear that the plaintiff was injured in any way by allowing the amendment to be made. Courts exercise great liberality in allowing officers to amend their returns so as to make them conform to the true facts, and to correct errors and mistakes; and if in thus amending the officer makes a false return, he is liable therefor, and such amendments are often allowed after a great lapse of time. (*Thatcher v. Miller*, 11 Mass. 413; *Adams v. Robinson*, 1 Pick. 461; *Haven v. Snow*, 14 Id. 28; *Johnson v. Day*, 17 Id. 106; *Burk v. Hardy*, 6 Greenl. 162; *Gilman v. Stetson*, 4 Me. 124; *Williams v. Rogers*, 5 J. R. 163; *Malone v. Samuel*, 3 A. K. Marsh, 350; *Woodward v. Harbin*, 4 Ala. 534.) In one of these cases a return was allowed to be amended after the lapse of twenty years, and in another after six years.

In *Maherin v. Brackett* (5 N. H. 9) an officer having an execution in a case where bail had been given, returned that he had given notice to the bail, but omitted to make a return of *non est incoetus* as to the principal, and it was held that he might amend, and insert a return to that effect in order to charge the bail. In *Smith v. Hudson* (1 Cowan, 430) the Sheriff had sold three parcels of land under an execution, but in the certificate of sale which he had made and filed, he omitted one of them by mistake, and the Court ordered him to amend by inserting therein the omitted tract. In *Smith v. Daniel's Executors* (3 Murphy, 128) the Sheriff had sold some property on execution, which in fact belonged to a third party, who had sued him and recovered the value, and the Court allowed him to amend his return by striking out the levy and sale of the property, and return the execution "no property found," and withdraw the sale money which he had paid into Court. In the present case the Court properly allowed the amendment.

The plaintiff claimed to be a farmer, and that the property was exempt under the third clause of the two hundred and nineteenth section of the Practice Act. The property was levied on by the attachment March 10th, 1858, and it was not sold until the twenty-sixth day of August—a lapse of more than five months. The evidence shows that the plaintiff kept a sort of tavern or drinking saloon, and cultivated about twenty acres of land adjacent thereto in vegetables. He also owned a sloop which he navigated, and one

Real Del Monte Mining Co. v. Pond Mining Co.

question appears to have been, the kind of business or occupation he was engaged in, and under which he could properly claim exemption. No evidence appears to have been given of any selection, or notice to the Sheriff that he claimed the property as exempt at the time of the levy or at any time before the day of sale, nor is any reason or excuse given for the delay. The instructions of the Court upon this question of exemption do not appear in the statement, but the appellant assigns for error that the verdict is against the law and the evidence.

In the case of *Borland v. O'Neal* (22 Cal. 504), we have laid down the rules of law upon this subject. In that case we held that it was the duty of the debtor to make his selection and notify the Sheriff within a reasonable time after notice of the levy. Under the circumstances of this case, the jury might very properly have concluded that the plaintiff waived his right to claim the exemption by his delay, and the verdict and judgment ought not therefore to be disturbed on this ground. The presumption is that the Court gave the jury proper instructions as to the law governing the case.

The judgment is affirmed.

**THE REAL DEL MONTE CONSOLIDATED GOLD AND
SILVER MINING COMPANY v. THE POND GOLD
AND SILVER MINING COMPANY.**

WHEREAS an injunction is granted without notice, upon the filing of a complaint, and an answer is afterwards filed denying all the equities of the complaint, the injunction will be dissolved on motion.

If the plaintiffs permit the defendants to remain in possession of a mining claim several months without interference, working it as their own and expending large sums of money in developing it, a Court of Equity will require a very clear and strong showing to induce it to grant or sustain a preliminary injunction to stop the work.

When the title to the property is in dispute, the question, whether the creditors are solvent and able to respond in damages, forms an important element in passing upon an application for an injunction pending the litigation.

APPEAL from the Sixteenth Judicial District, Mono County.

Real Del Monte Mining Co. v. Pond Mining Co.

The complaint was filed August 10th, 1863, and avers that on the ninth day of February, 1863, the plaintiffs were the owners of, in the actual possession, and entitled to the possession of a gold and silver quartz lode, known as the Aurora Mine Ledge, commencing at a point distant fourteen feet in a direction north fifty-six degrees west from the cut in the ledge at the mouth of the shaft known as the old Aurora Shaft, and from said point of commencement extending in a westerly direction eight hundred feet on the ledge, and in an easterly direction eight hundred feet on the ledge; and that defendants on the said day and on divers days from that time until the commencement of the suit, and while plaintiffs were still the owners of and in possession of the ledge, with force and arms sunk pits and shafts upon, and excavated drifts and tunnels into the ledge, and took, removed, and carried away from the ledge large quantities of gold and silver-bearing rock, etc.

An injunction was granted by the County Judge the same day the complaint was filed on plaintiffs' application, without notice to defendants.

August 12th, 1863, the defendants filed their answer, and thereupon moved that the injunction be dissolved. The County Judge refused to dissolve the injunction, and from this order denying the motion to dissolve defendants appeal.

Kendall & Quint and Gough & Allen, for Appellants.

The injunction should have been dissolved. All the equities of the complaint are denied by the answer.

O. J. Hillyer, also, for Appellants.

Upon the pleadings the injunction should have been dissolved. (*Johnson v. Wide West Co.*, 22 Cal. 479; *Burnett v. Whitesides*, 18 Id. 156.)

Mesick and Van Voorhies, for Respondent.

[No brief on file.]

CHOCKER, J. delivered the opinion of the Court—NORRIS, J. concurring.

Repl Del Monte Mining Co. v. Pond Mining Co.

This is an appeal from an order refusing to dissolve an injunction which had been granted upon the complaint, without notice to the defendants. The defendants filed an answer denying all the material allegations of the complaint, and moved thereon to dissolve the injunction, which was denied. The main question at issue is the ownership of the quartz ledge which the defendants are engaged in working—the plaintiffs claiming that it is a part of the “Aurora Ledge,” owned by them; and the defendants denying that it is part of the “Aurora Ledge,” aver that it is a part of the “Pond Lode,” owned by them, and that they are engaged in working the same as the rightful owners thereof.

The rule has been settled by this Court, that where a motion is made to dissolve an injunction upon complaint and answer, the injunction will be dissolved if the answer denies all the equities of the complaint, unless the complaint is supported by additional affidavits. (*Gardiner v. Perkins*, 9 Cal. 553; *Burnett v. Whitesides*, 13 Id. 156; *Curtis v. Sutter*, 15 Id. 263; *Johnson v. The Wide West Co.*, 22 Id. 479.)

It appears that the defendants have been in possession of the quartz ledge in question for several months, have expended large sums of money in developing and working the same, and were, at the time of the granting of the injunction, and had, for some time previously, been working the mine as their own. In such case it requires a very clear and strong showing to induce a Court of Equity to grant or sustain an injunction to stop the work. There must be an urgent necessity, and, as a general rule, the title and right of the plaintiffs should be shown to be clear, well established and not in dispute. The application should also be made promptly, and not delayed until large expenditures have been made by the defendants. (*Clavering v. Clavering*, 2 Pierre Wm. 388; *Anonymous*, Ambler, 209; 18 Vesey, 515; *Norway v. Rowe*, 19 Id. 144; *Field v. Beaumont*, 1 Swanston, 203; *Hilton v. Granville*, 1 Craig & Phillips, 283.)

When the title to the property is in dispute between the parties, the extent of inconvenience and expense to which the defendant would be subjected by the granting of the injunction, as compared with the injury the plaintiff would be likely to suffer if refused,

Seaver v. Fitzgerald.

often forms an important consideration in determining the right to an injunction. (*Hicks v. Compton*, 18 Cal. 210; 3 Daniel's Ch. Pr. 1860; *Adams' Eq.* 357; *Bruce v. Delaware & Hudson Canal Co.*, 119 Barb., S. C., 371.) The question whether the defendants are solvent, and able to respond in the damages they may cause by their acts or not, is often an important one in such cases. (*Burnett v. Whitesides*, 13 Cal. 156; 2 Story's Eq. Sec. 925; *Waldron v. Marsh*, 5 Cal. 119.) The plaintiffs in this case have set up no circumstances of this kind to sustain their application for the injunction.

The injunction is dissolved.

SEAEVER *v.* FITZGERALD.

In a suit commenced before a Justice of the Peace, if the summons be returned by the officer with his indorsement thereon that no service has been made because defendant cannot be found, and on the return day thereof it is further made to appear by affidavit that the defendant conceals himself to avoid service of process, the suit does not thereby abate, but the magistrate may continue the cause, issue a new summons, and make an order for its service by publication, and fix the return day of the new summons at a time sufficiently remote to have the service by publication completed before the return day, even if the period between the issuance of the new summons and its return day exceeds ten days.

In such case when an attachment is regularly issued by the Justice, at the time of the issuance of the first summons, the attachment is not vitiated by the failure to serve the first summons and the issuance of a second one, nor is the validity of attachment in any way affected by the proceedings.

The affidavit stated that the "defendant, D. C. Seaver, was at the time a resident of the first township in the County of Contra Costa; that he had occupied a house on a tract of land claimed to be his own and which he had cultivated up to the commencement of the suit and for a long time previous; that on the twenty-second day of October, the day before the commencement of the suit, he left his residence informing his servant that he would be back that evening or the next day; that the summons in the suit was put in the hands of a proper constable, who made diligent search and was wholly unable to serve it; that Seaver had not returned to his residence, and that he believed he concealed himself for the purpose of avoiding the service of the summons, and that the claim sued on is a just debt."

Held, to be sufficient to authorize the service by publication, and when publication made to give the Court jurisdiction.

Seaver v. Fitzgerald.

An order of publication of summons, made by a Justice, need not state that the paper designated "is the one most likely to give notice to the person to be served."

The publication of summons may be proved by the affidavit of the Clerk of the publisher of the paper, and the fact that the summons was deposited in a post-office may also be proved by affidavit; nor is it necessary that the constable state in his return on the summons that such publication was made and such deposit made in the post-office.

When the contract sued on is a joint contract of two defendants, and judgment is entered up against one only, it is not such an error as renders the judgment void so that it can be attacked in a collateral proceeding.

APPEAL from the Seventh Judicial District, Contra Costa County.

At the time of the issuance of the attachment by the Justice, the constable in whose hands it was placed levied on several head of cattle and horses as the property of D. C. Seaver. Judgment was rendered by the Justice, November 17th, 1860. November 10th, 1860, Robert Seaver commenced an action against the constable, Fitzgerald, to recover possession of the property attached. The defendant answered, justifying under the attachment. Defendant recovered judgment, and plaintiff appealed. The remainder of the facts appear in the opinion of the Court.

Merrill, Clement, and White, for Appellants.

A void judgment—and consequently a void attachment, since attachment is only a means to secure the payment of the judgment, is unavailable for any purpose. It constitutes no justification, and all persons concerned in executing it are trespassers. (*Doty v. Brown*, 4 How. 429; *Elliott v. Piersoll*, 1 Pet. 328.) Especially is this the case when the party against whom it is sought to be enforced is a stranger to it. (*Downs v. Fuller*, 2 Metcalf, 138.) A void attachment gives an officer no lien upon the property. (*Low v. Henry*, 9 Cal. 552.) It gives the officer no right to take the property from the party against whom it is issued; surely it cannot give him any right to take it from an innocent party in possession under claim of ownership.

There was no attachment in the action in which judgment was rendered against D. C. Seaver. The writ issued on the twenty-

Seaver v. Fitzgerald.

third of October was void, so far as that action was concerned. It was issued before the summons. An attachment issued before summons is void, and the subsequent issuance of summons cannot cure it. (*Low v. Henry*, 9 Cal. 552; Pr. Act, Sec. 551.) The writ of attachment was issued on the twenty-third of October, subsequent to the issuance of a summons on that day. On the twenty-seventh, the return day, no service of the summons having been made, and no jurisdiction of the defendants in the action having been acquired, the Justice could not and did not proceed against them, but issued another summons, bearing date of that day, the twenty-seventh, and being returnable on the seventh of November — eleven days thereafter.

The issuance of summons is one of the acts to be performed upon the commencement of an action in a Justice's Court. An action is not commenced until summons is issued. There is no provision in the Practice Act for more than one summons in an action, and the issuance of the one is the commencement of the action. The attachment was issued and levied four days before the issuance of the summons. The new action commenced on the twenty-seventh in a manner to enable the Justice to acquire jurisdiction of the defendants by publication of summons and could not relate back to the twenty-third.

The affidavit was not sufficient to authorize service by publication. (Pr. Act, Sec. 543.) It does not show that any effort was made to find the defendants. It states that diligent search was made, but does not state what acts constituted that diligent search. (*Swain et al. v. Chase*, 12 Cal. 283.) There are no facts stated which show that the defendants concealed themselves to avoid service of process. The affiant's belief that they so concealed themselves was no fact upon which the Justice was authorized to act. (Same case as above.) It does not properly appear that a cause of action existed against the defendants. The facts constituting the cause of action should have been stated. The facts necessary to authorize publication are required to appear to the satisfaction of the Justice; and the Justice has no right to be "satisfied" upon the mere opinions of others, nor upon any less evidence than a man of ordinary intelligence and discretion would require in proof of

Seaver v. Fitzgerald.

any fact upon which he was called upon to act in the ordinary business of life. (*Crandall v. Bryan*, 15 How. 41.)

The order of publication is insufficient. It does not show that the paper designated was the one most likely to give notice to the persons to be served. (Pr. Act, Sec. 543.)

There is no return of the last summons—no sufficient evidence of service by publication. The law does not provide for a return of process by any person other than the officer or person to whom it was delivered for service. The return of the officer is as much a part of the record as the docket itself; and if such return fail to show personal service, the recital in the docket based upon such return alone can not be relied upon as giving validity and effect to the judgment. (*Lowe v. Alexander*, 15 Cal. 300.) The affidavit of the printer is not, in Justice's Courts, sufficient proof of service by publication. Sec. 33 of the Practice Act is not made applicable to Justice's Courts. (Secs. 533, 555.)

A Justice can no more make a summons returnable eleven days after date, than he could make it returnable in eleven months. (Secs. 541, 543, Pr. Act; *Diedesheimer v. Browne*, 8 Cal. 339.) A process unknown to the law, or prohibited by the law, makes the case no better than where there is an absence of all process and appearance. (*Sanders v. Raines*, 10 Missouri, 770.)

The Justice could acquire no jurisdiction of Seaver by a summons to Seaver, except upon personal service, and proof that the person served was the one named in the process, or intended to be named. (*Sutter v. Cox*, 6 Cal. 415.)

Blake & Wright, for Respondent.

The affidavit was sufficient to authorize the order of publication. (6 Cal. 197; 12 Id. 100; Pr. Act, Sec. 543.) The order complied with the statute. (Pr. Act, Sec. 543.) The affidavit of the Clerk shows a substantial compliance with the order. The published summons was issued on the twenty-seventh of October and was made returnable on the seventh of November. The publication commenced on the twenty-ninth of October, and the affidavit made on the seventh of November shows a publication of one week. Sec. 543 of the Practice Act authorizes a Justice to make his summons

Seaver v. Fitzgerald.

returnable more than ten days after date. The docket shows that the case was called for trial on November 7th, the return day mentioned in the summons. (Cow. Treat. 4th Ed. 664.) A copy of the summons was deposited in the post-office. The respondent was constable, and held the property by virtue of an attachment issued from Justice Dyer's Court, at the time it was replevied by appellant.

We contend that the attachment being regularly issued gave the respondent a standing in Court, to attack the sale between the Seavers for fraud. (*Thornburgh v. Hand*, 7 Cal. 554.)

CROOKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is an action to recover the possession of certain personal property. The plaintiff claims title thereto by virtue of a bill of sale from D. C. Seaver, the former owner; but before a change of possession had been effected, under the bill of sale, the property was levied upon by the defendant, a constable, under an attachment issued by a Justice of the Peace in an action of Hagy & Gill against D. C. Seaver & J. W. Crosby, and the defendant claims the right to hold the property by virtue of the levy under this attachment. The Court below held this levy and attachment to be valid, and a verdict was rendered for the defendant, from which the plaintiff appeals.

It appears that at the time the attachment issued, a summons was also issued in the action, dated October 23d, 1860, and made returnable October 27th, 1860. On the return day this summons was returned not served. Thereupon the Justice of the Peace, upon an affidavit that the defendant concealed himself to avoid the service of summons, made an order that the summons be served by publication for one week, and a new summons was issued, dated October 27th, and made returnable November 7th. Upon proof of the publication of this summons a judgment by default was entered against the defendant, D. C. Seaver. Before any execution was issued on this judgment the present action was commenced.

The plaintiff contends that the second summons was the summons in the case, because that was the summons served by publication,

Seaver v. Fitzgerald.

and as the writ of attachment was issued before this second summons, it was therefore void, under Sec. 551 of the Practice Act. This point is clearly untenable. A summons was duly issued before or at the time of the issuing of the attachment, and the attachment was therefore valid when it issued. The fact that the defendant absented himself so that that summons could not be served on him before the return day thereof, and that it was returned not served, could not have the effect of vitiating the attachment. No rule of law or provision of statute has been referred to by counsel to sustain any such position, and such a principle would be most pernicious in its consequences. It would only be necessary for a debtor to conceal himself for a few days, until the return day of a summons issued against him had passed, to invalidate any attachment which had been issued against him. A principle so manifestly unjust in its results could only be sustained by clear and positive statutory provisions, which do not exist in our laws. The argument of the appellant is based upon the idea that a plaintiff is entitled to only one summons in an action, and that if he fails to procure a service of that summons within the time fixed for its return, and it is therefore returned not served, the action is thereby abated or determined, that the attachment falls with it, and the issuing of a new summons is the commencement of a new suit. This argument is without foundation, as the plaintiff in such case is entitled to a new summons and a continuance of the case until such time as he can procure a service of the same, by publication or otherwise, and the suit is not abated or determined thereby, nor is the attachment in any way affected by the proceeding.

It is further contended that the judgment rendered in the action in which the attachment issued is void, on the ground that the affidavit on which the order to publish the summons was made is insufficient. The affidavit states that the defendant, D. C. Seaver, was at the time a resident of the First Township in the County of Contra Costa; that he had occupied a house on a tract of land claimed by him to be his own, and which he had cultivated up to the commencement of the suit and for a long time previous; that on the twenty-second day of October, the day before the commencement of the suit, he left his residence, informing his servants that

Seaver v. Fitzgerald.

he would be back that evening or the next day; that the summons in the suit was put in the hands of a proper constable, who made diligent search and was wholly unable to serve it; that Seaver had not returned to his residence, and that he believed that he concealed himself for the purpose of avoiding the service of the summons; and that the claim sued on is a just debt. The return of the summons by the constable is "not found in the county." The return of the officer that the party could not be found is sufficient evidence of proper diligence, and the affidavit of the plaintiff in that action showing that the defendant resided in the township and county, and the facts respecting his absenting himself from his home, show sufficient to entitle the plaintiff to the order of publication.

It is also objected that the order of publication is defective, because in designating the newspaper in which to publish the summons, it did not state that such paper was "most likely to give notice to the person to be served," or which summons was to be thus published. These objections are not well taken. The order directs the summons to be published in a certain newspaper, with the time it was to be thus published, and the presumption is that the Justice designated such particular paper because it was most likely to give notice to the person to be served, but it was not necessary for him to state in the order that such was his reason. The summons to be served was any legal summons issued in the case. The first summons had been returned not served, and it was therefore the second summons which was to be served by the publication—the first one having no longer any force.

The publication of the summons was proved by the affidavit of the principal clerk of the publishers of the newspaper, and the fact that a copy of the summons had been duly deposited in the post-office, properly directed, was proved by the affidavit of a competent witness. We think this a proper mode of proving such facts, and that a return of such facts, indorsed upon the summons by a constable or Sheriff, is not necessary in such cases.

It is also objected that the summons served is irregular and illegal, because it was returnable eleven days after its date, and it is urged that this is contrary to the provisions of Sec. 541 of the Practice Act, which allows no time exceeding ten days. Sec. 543

Seaver v. Fitzgerald.

provides that in cases of non-residence, departure from the State, or concealment by defendant, the publication of the summons shall be ordered "for such length of time as may be deemed reasonable, at least one week," but in cases of non-residence or absence from the State, the publication "shall not be less than three months." It is evident that in the last class of cases the summons must be made returnable more than ten days from its date, and in many cases of concealment in the State, a reasonable time might require a publication for more than ten days, and a limit to ten days would prevent a proper service. These two sections of the statute must be so construed as to make them harmonize if possible, so that both can be rendered effectual. We think that the provisions of Sec. 541 do not properly apply to cases where summons has to be published as provided by Sec. 543; and that in the latter class of cases the return day may be fixed at such time as will enable the summons to be published as required by the order before such return day. And the fact that such return day is more than ten days from the date of the summons will not invalidate it in such cases.

It is also objected that the judgment is against D. C. Seaver, while the name in the published summons is "D. C. Seavers." The names are substantially the same, and there was therefore no error in this. It is further insisted that the judgment is void because the cause of action was a joint contract of Seaver & Crosby, and the judgment was not entered up "against all the defendants," as required by Sec. 594 of the Practice Act, but only against Seaver alone. This objection goes only to the form of the judgment, and it has no force in this collateral proceeding. It does not render the judgment void, and therefore cannot be interposed in this action.

We have thus noticed numerous objections of the appellants to the proceedings of the Justice subsequent to the issuing of the attachment, but even if the record had shown that the judgment in that case was irregular or void it would not have aided the appellant in this action. It would only have shown that the plaintiffs in that action had failed to obtain a valid judgment, in consequence of irregularities in the proceedings before the Justice, by which he

People v. Wallace.

failed to obtain jurisdiction of the persons of the defendants therein. The Justice still had jurisdiction of the case and the subject matter, and the plaintiffs therein would, in such case, be compelled to proceed and take the proper steps in that action to enable the Justice to acquire jurisdiction of the persons as well as of the subject matter in order to enable him to render a valid judgment. Even if the plaintiffs in that action had failed to obtain a valid judgment that fact alone would not operate as a release or discharge of the attachment, which had been regularly and legally issued. That would have still remained valid and effectual, notwithstanding the subsequent alleged irregularity or invalidity of the proceedings before the Justice in the rendition of the judgment. The property would still have been bound by the attachment, which was sufficient to enable the defendant to attack the sale to the plaintiff in this action, and to show its invalidity as against the plaintiffs in the attachment suit who were the creditors of D. C. Seaver. (*Thornburgh v. Hand*, 7 Cal. 554.)

The judgment is therefore affirmed.

THE PEOPLE *v.* WALLACE.

In a criminal case, when the People appeal to the Supreme Court, the notice of appeal must be served on the defendant personally, if he reside in the county where the trial was had.

APPEAL from the Court of Sessions of Contra Costa County.

The defendant was indicted for perjury, and tried and convicted in the County of Contra Costa. The defendant's attorney (John F. Swift), on the trial in the Court of Sessions, resided in the City and County of San Francisco. After the jury had rendered their verdict, the Court of Sessions, on motion of defendant's attorney, arrested the judgment. From the order arresting the judgment the People appealed. The notice of appeal was served on defendant's attorney, at Sacramento, where he was temporarily sojourn-

Mulford v. Estudillo.

ing. The defendant, at the time, was residing in Contra Costa County.

Attorney-General, for Appellant.

S. S. Wright, for Respondent.

The mode of taking appeals in criminal cases prescribed by law, is laid down in Wood's Digest, 308, Art. 1706, Secs. 486, 488: "The motion must be served on the defendant (where the People appeal) if he resides in the county; if not, then on the attorney who appeared for him in the trial below. If such service cannot be made, then by advertisement."

CROCKER, J. delivered the opinion of the Court — COPE, C. J. concurring.

The respondent moves to dismiss the appeal on the ground that the notice of appeal was served on his attorney, who lived out of the county, instead of on him personally, as required by the statute (Wood's Digest, 308, Sec. 488), he residing in the county at the time.

The objection is well taken, and the appeal is therefore dismissed.

MULFORD v. ESTUDILLO *et al.*

▲ LEVY under an execution upon sufficient personal property to satisfy the same, is a satisfaction of the judgment, sufficient at least to discharge third persons who are liable collaterally or as sureties therefor, and the release of the property from levy thus made, without the consent of the parties thus liable, cannot revive their liability.

The law does not deem such levy a payment, but it is a satisfaction or discharge.

Where such levy is set forth in the answer as a defense, it is new matter, and under the former provisions of the Practice Act concerning replications, is deemed admitted, unless a replication is filed denying the same.

If an Appellate Court affirms the judgment of the Court below with costs, and upon the filing of its mandate of affirmance in the Court below, an order is made directing a new judgment to be entered up in accordance with the directions of the mandate, such new judgment, although it may be erroneous or irregular, is not void so as to invalidate an execution issued on the same.

APPEAL from the Third Judicial District, Alameda County.

On the twenty-ninth day of January, 1857, Clement Boyreau recovered judgment in the Circuit Court of the United States for California, in an action of ejectment against Robert Campbell, Thos. W. Mulford, the present plaintiff, and thirty-six others, occupants of a portion of the San Leandro Rancho, for the recovery of the possession of a portion of said rancho, and costs of suit. From said judgment the defendants therein prosecuted a writ of error to the Supreme Court of the United States, and to enable them to do so, the defendants in the judgment as principals and George V. Sanchs, James P. Valliant, G. W. Kinser, and John G. Bray, as sureties, executed the usual writ of error bond.

The defendants in this action, Juana M. Estudillo and eleven others, none of whom were defendants in the judgment recovered by Boyreau in the Circuit Court of the United States, on the twenty-ninth day of August, 1857, executed to the defendants in the judgment recovered by Boyreau a bond by which they covenanted to indemnify them and their sureties on the writ of error bond against all damages and costs from any judgment already recovered or to be recovered in the suit of *Boyreau v. Campbell et al.*

The judgment recovered by Boyreau was, on the thirty-first day of January, 1859, affirmed by the Supreme Court of the United States with costs; and on the same day the mandate of affirmance was sent down to the Circuit Court. Upon the filing of the mandate of affirmance, and on the ninth day of November, 1859, the Circuit Court on plaintiff's motion, without notice to the defendants, made an order that judgment be entered in accordance with the mandate; and on the same day a new judgment for costs was entered in favor of Boyreau. On the thirtieth day of November, 1859, an execution was issued on this new judgment and placed in the hands of the Marshal, who, on the second day of December, 1859, levied on sufficient of the goods of James Kennedy, one of the defendants, to satisfy the judgment; and on the same day the sale of the property was suspended by order of the Judge of the Circuit Court, and on the fourth day of February, 1860, the Circuit Court made an order that the original judgment in the case of

Mulford v. Estudillo.

Boyreau v. Campbell et al. be enforced and not the new judgment, and that the costs directed to be collected by the mandate of the Supreme Court be made, *nunc pro tunc*, a part of the original judgment, and that execution issue for the enforcement of the same. On the twenty-first day of February, 1860, the Marshal, by order of Boyreau's attorney, released the levy which he had made on Kennedy's goods. On the sixteenth day of February, 1860, Bray, one of the sureties on the writ of error bond, was called on to pay the judgment for costs, and paid the same to Boyreau, the plaintiff. Bray then sued Mulford, one of the principals in the writ of error bond for reimbursement, and recovered judgment against him; and on the eleventh day of June, 1860, Mulford paid him the full amount of the judgment, \$1,704.68. Mulford then brought the present action upon the indemnity bond given by Estudillo and others to recover judgment for the money thus paid. Plaintiff had judgment in the Court below, and defendants appealed.

W. W. Crane, Jr., for Appellants.

The allegation that the execution was levied upon the goods and chattels of James Kennedy, sufficient in value to satisfy the judgment, is an averment of new matter, and not being replied to, stands admitted upon the record. It is a statement of facts occurring between Boyreau and Kennedy, the legal effect of which, we claim, was to avoid the liability.

Our answer confesses that the bond of indemnity was executed; that there was a judgment for costs; that Bray paid it; but we avoid the legal effect of those facts by stating that something occurred before the payment which discharges us *per se*.

In *Frisch v. Caler* (21 Cal. 71) this Court held, that an allegation of payment in an action upon a note was not new matter, because an essential averment of the complaint was non-payment. In the case at bar, there is no question as to whether or not the bond of indemnity has been paid. It was not necessary to allege it had not been paid. A statement of the above facts confessed by us leads to the legal conclusion that the indemnitors are bound. How can we avoid that conclusion? Either by showing that we paid it, or that something has occurred which in law discharges us. We show the latter, and do not claim that we paid.

Mulford v. Estudillo.

In an action at law upon a contract, about the only issues that can be presented, are: 1st. That the defendant never made the contract. 2d. That he has paid the claim. 3d. That since he made the contract, something has occurred, the legal effect of which is to discharge him. The first two constitute the general issue, the last, new matter. *Goddard v. Fulton* (21 Cal. 430) is to the same effect as *Friech v. Caler*.

The defendants here are third persons as to the judgment in the suit between *Boyreau v. Campbell et al.* They are sureties, to the effect that Boyreau will not compel Mulford to pay his judgment for costs. Therefore, a levy upon the property of Kennedy by Boyreau of sufficient value to satisfy the writ is as between the execution plaintiff and defendant, at least, *prima facie*, a satisfaction of the judgment, and as to third persons, like defendants here, is absolute satisfaction. (*People v. Chisholm*, 8 Cal. 29; *Morley v. Dickinson*, 12 Id. 563; *Newson v. McLoudon*, 6 Ga. 392; *Duncan v. Harris*, 17 Sergt. & Rawle, 436; *Finley v. King*, 1 Head, Tenn., 123; *Brown v. Kidd*, 34 Miss. 291; *Voorhies v. Cross*, 3 Howard's Pr. 262; *Hayden v. Agent of State Prison*, 1 Sand. Ch. 195.)

Respondent claims however that the judgment of November 9th, 1859, is absolutely void, and that consequently the execution under which the levy was made is also void. The record shows that the U. S. Circuit Court had jurisdiction of the persons of the defendant and the subject matter of the action. The broad proposition I urge is, that under these circumstances, the judgment or proceedings of the U. S. Circuit Court cannot be attacked collaterally, and that, though as between the parties to the suit the entry of the second judgment, might in the Circuit Court by motion, or in the Supreme Court on appeal, be held to be clearly erroneous, yet that in the case at bar it is conclusive. (*Whitwell v. Barbier*, 7 Cal. 54; *Reynolds v. Harris*, 14 Id. 667; *Voorhies v. Bank of U. S.*, 10 Pet. 449.)

E. W. F. Sloan, for Respondent.

The averment of a levy under execution, is but a denial of the liability of Bray, as surety on the writ of error bond, circumstan-

Mulford v. Estudillo.

tially stated. It is not a statement of new matter. (*Spear v. Ward et al.*, 20 Cal. 675; *Frisch v. Caler*, 21 Id. 71; *Goddard v. Fulton*, Id. 430.)

The seizure of Kennedy's goods by the Marshal under that execution, was not a satisfaction of the judgment of the Circuit Court, mentioned in the covenant and complaint herein, for various reasons. The mere seizure of personal property on execution, by the officer, is only a satisfaction *sub modo*. (*Green v. Burke*, 23 Wend. 495; *People v. Hopson*, 1 Denio, 577; *Waddell v. Elmendorf*, 5 Id. 448; *Peck v. Tiffany*, 2 Comst. 456.) Where the Sheriff or Marshal seizes as much property as he desires it is presumed to be sufficient, until the contrary appears upon a sale. A second seizure, or other excessive levy is oppressive, and renders the officer a trespasser. The first levy is, *prima facie*, a satisfaction as to the defendant, so long as the goods remain in the hands of the Sheriff. Not so, however, where they have been restored to and accepted by the defendant himself. But, if improperly restored or otherwise disposed of by the officer, he renders himself chargeable to the plaintiff in execution, who for that purpose may proceed against such officer as if the money had been collected. Again, the property seized may be released by order of Court, or by the direction of the plaintiff and acquiescence of the defendant; in which case, as to the officer and the parties, the matter would stand as before the levy, though it might be a discharge of the judgment lien as to a *bona fide* purchaser for value; as in *Voorhies v. Gross* (8 How. Pr. 262), cited by appellants.

The formal draft purporting to be an entry of judgment, bearing date November 9th, 1859, was a nullity. The Court had already exhausted its power over the subject matter and the parties. It was a fundamental principle of the common law, that "none could have judgment except upon complaint exhibited to the Court against the defendant whilst in Court." A final judgment puts an end to the cause in which it is pronounced. The cause itself is no longer pending. Error in law or fact, can be brought up for trial only by a new writ. If, upon reversal of the judgment for error in law, a *venire facias de novo* is awarded, the original cause is restored to its former position, and the Court below has jurisdiction to try the cause again.

Mulford v. Estudillo.

Where the judgment below is simply affirmed on writ of error, unless it remains in the Appellate Court and is there carried into execution, no new judgment can be entered up. The Court below has no power to enter a new judgment. The original judgment is remanded alone for execution. (*Eno v. Crooke*, 6 How. 463, 465.)

The formal entry of judgment, in *Boyreau v. Campbell et al.*, upon filing the mandate of the Supreme Court, was not a mere irregular erroneous proceeding. It was utterly *coram non judice* and void. The entry of the formal judgment must be regarded as a mere clerical act. If it possesses any validity whatever, why may not the plaintiff cause a new judgment to be entered up, from time to time, for an indefinite period, as it may suit his whims or caprices? How can absolute verity be ascribed to the judgment roll, if the plaintiff can have as many new entries of judgment made upon it as he pleases, after the suit has ended and the defendant gone hence?

CROCKER, J. delivered the opinion of the Court — CORN, C. J. and NORTON, J. concurring.

This is an action to recover damages upon a bond of indemnity. The case has been previously before this Court, on appeal from a judgment rendered upon demurrer to the complaint, and will be found reported in 17 Cal. 618. After the decision of the first appeal the defendant answered, setting forth that the parties to the agreement mentioned in the bond of indemnity were never called upon or required to pay any costs or damages recovered in the suit of *Boyreau v. Campbell et al.*, or molested or disturbed by any judgment therein; and, further, that the costs in the action of *Boyreau v. Campbell et al.*, were paid by other of the defendants therein than those who were parties to the agreement; that the execution issued in said action was duly levied on the goods and chattels of one James Kennedy, one of the defendants therein, but who was not a party to the agreement, to an amount and value amply sufficient to satisfy and discharge said execution; that this levy was made before the payment by Bray, and the goods and chattels were in the custody of the Marshal, under the levy, at the

Mulford v. Estudillo.

time of such payment. To this answer there was no replication. The action was tried by the Court, who found for the plaintiff, and judgment was rendered accordingly, from which the defendants appeal.

The appellants contend that the allegations in the answer respecting the satisfaction of the execution by a levy upon sufficient personal property is new matter, and, no replication being filed thereto, is to be deemed admitted. On the contrary, the respondent contends that these averments are in the nature of a plea of payment, and therefore not new matter needing a replication. The law is well settled that, as a general rule, a levy under an execution upon sufficient personal property to satisfy the same is a satisfaction of the judgment, sufficient at least to discharge third persons who were liable collaterally, or as sureties thereon. (*People v. Chisholm*, 8 Cal. 29; *Mickles v. Haskin*, 11 Wend. 125; *Morley v. Dickinson*, 12 Cal. 561.) The law does not deem such a levy a *payment*, but it is termed a satisfaction or discharge, and the facts thus set forth in the answer were properly new matter, and were to be taken as true, no replication denying the same having been filed.

The defendants agreed to indemnify the plaintiff against the payment of costs in *Boyreau v. Campbell et al.*, and they were therefore in a manner collaterally liable therefor, in the nature of sureties. The levy upon sufficient personal property to satisfy the judgment and execution in that case operated as a satisfaction thereof, sufficient at least to discharge the collateral liability of these defendants. Neither the plaintiff in that action, nor Bray, one of the parties to the agreement, could do any act by which such discharge could be rendered ineffectual or nugatory, without the consent of these defendants. (*Morley v. Dickinson*, 12 Cal. 561.) It follows, that neither the release of the property from the levy by the plaintiff in that action, nor the subsequent voluntary payment of the judgment by Bray, could revive the liability of these defendants which had been thus discharged, unless done with their consent, no evidence of which appears in this case.

The rule that a levy upon sufficient personal property is satisfaction of the judgment is subject to many qualifications as between

Burns v. McKenzie.

the parties to the judgment, which it is not necessary to notice here, as they do not apply to the case before us.

The judgment on which the execution issued may have been erroneous or irregular, but it was not void, so as to render the execution invalid. The Court in which it was rendered had jurisdiction of the parties and of the subject matter, and that was sufficient to make it valid, so far at least that it could not be inquired into in this collateral action.

The judgment of the Court below is reversed and the cause remanded.

BURNS v. McKENZIE *et al.*

Admissions made by one partner, after the dissolution of the partnership, concerning the partnership business, are not competent evidence to charge the other partner.

APPEAL from the Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

B. P. Clement, for Appellant.

One partner can not, after dissolution of copartnership, bind the other partners by an admission relating to the partnership transactions. *Gleason v. Clark*, 9 Cow. 59; *Baker v. Stackpole*, Id. 434; *Robbins v. Willard*, 6 Pick. 464; *Van Keusen v. Parmelee*, 2 Comst. 530.)

Waller & Moore, for Respondent.

Conceding the dissolution to have taken place at the time these admissions were made, the power of one member to bind the firm does not entirely cease.

A partnership still exists, for the purpose of settling engagements made during its continuance, notwithstanding the decree of dissolution. (*Johnson v. Totten*, 3 Cal. 347.)

Burns v. McKenzie.

CROOKER, J. delivered the opinion of the Court — COPE, C. J. and NORTON, J. concurring.

This is an action upon a promissory note executed to the plaintiff by "McKenzie & Co.," a firm composed of the defendants. Dickinson was defaulted, and McKenzie filed an answer alleging that the note was given by his copartner, Dickinson, for his own individual debt, and the partnership name was signed thereto for the purpose of defrauding him. The case was tried by a jury, who found for the plaintiff, and a judgment was accordingly rendered against both defendants, from which, and from an order refusing a new trial, McKenzie appeals.

On the trial the defendant McKenzie introduced one Moore as a witness, who testified that he first saw the note sued on some two or three days before it fell due, at his office, in the hands of the defendant Dickinson, and that he left it with him to have it presented to McKenzie for payment. On cross-examination the plaintiff asked the witness to state what Dickinson said at the time he left the note, to which the defendant objected that the statements of Dickinson were incompetent testimony against him, but the Court overruled the objection, to which the defendant excepted. The witness then testified that Dickinson stated that the note was made by the firm for money borrowed in the course of its business; that McKenzie should pay it, as he had the proceeds of the property, which he had left in his hands for that purpose. The refusal of the Court to sustain this objection is the first error assigned.

It appears from the pleadings and evidence that the partnership had been dissolved long before this conversation, and the appellant contends that these admissions of his copartner, therefore, are not evidence against him. Under the American decisions the rule is well established that admissions made by one partner, after the dissolution of the partnership, concerning the partnership business, are not competent evidence to charge the other partner, and this rule seems to be founded on the better reason than the contrary, which has been held in a few English cases. (1 Phillips' Evidence, C. H. & E.'s Notes, 498, notes 138, 500; *Clark v. Gleason*, 9 Cowen, 57; *Baker v. Stackpole*, Id. 420; *Robbins v. Willard*,

Dawley v. Hovious.

6 Pick. 464; *Van Keusen v. Parmelee*, 2 Comst. 530.) The respondent, however, insists that these admissions were a part of the *res gestae*, accompanying the delivery of the note to the witness Moore, and therefore admissible. There might be some force in this position if this act of delivery had been made for or on behalf of the partnership or his copartner, but it was made as the agent of the plaintiff, and in no sense was the act done for the partnership or his copartner. It was not, therefore, admissible on that ground.

The plaintiff also offered in evidence a paper signed by McKenzie, dated January 19th, 1862, the time of the dissolution of the partnership, in which it was stated that he was to collect the property and debts of McKenzie & Co., retain the sum of \$4,577, and of the balance he was to pay to the order of Dickinson one-half, the other half belonging to him, to which the appellant objected that it was irrelevant and immaterial. The Court overruled the objection, and he excepted. This action of the Court is also assigned as error. We think this paper was not relevant to the matters in issue between these parties. There was no controversy as to the fact that McKenzie and Dickinson were partners on the first day of January, 1862, the date of the note, and there was therefore no necessity of proving that fact; and if there had been this paper affords no evidence upon that point. It was evidently a writing given upon the dissolution, setting forth how matters were to be settled between the partners, a question not in issue in this case. The Court therefore erred in admitting it.

The judgment is reversed and the cause remanded.

DAWLEY v. HOVIOUS *et al.*

In the statement on motion for a new trial does not show that it embodies all the evidence given on the trial, a new trial will not be granted on the ground that the verdict is contrary to the evidence, even if there is no conflict in the evidence contained in the statement.

The minutes of the Court during a trial copied into the transcript, are not a part of the record, unless made so by being embodied in the statement, or by a bill of exceptions.

Dawley v. Hovious.

APPEAL from the Twelfth Judicial District, San Mateo County.

The statement on motion for a new trial in this cause was agreed to by the attorneys of the parties in the following stipulation:

“MAY 28, 1862.

“It is hereby stipulated and agreed by and between the parties hereto and their respective attorneys, that the above statement shall be the statement on motion for a new trial herein, and on appeal.

“WM. J. BROWNSON, Defts' Att'y.

“WISE & GOUGH and FOX, Plff's Att'y's.”

Wm. J. Brownson and E. Cooke, for Appellant.

Tully R. Wise, for Respondent.

CROCKER, J. delivered the opinion of the Court — NORTON, J. and COPE, C. J. concurring.

This is an action against the Sheriff of San Mateo County and others, to recover damages for an alleged trespass in taking possession of a steam saw mill and a large quantity of lumber and stock claimed by the plaintiff. The Sheriff justified the taking under and by virtue of certain attachments in his hands; one against one Morrison, from whom the plaintiff had purchased one-half of the property, and others against said Morrison and said plaintiff. It was also charged that the conveyance which had been previously made by Morrison to the plaintiff was without consideration, and made to hinder, delay, and defraud the creditors of Morrison.

The assignment of error is that the verdict is contrary to the evidence. The plaintiff claimed damages in the sum of \$37,000, and the verdict of the jury was in his favor, and returned damages in the sum of \$2,083.33. The statement is very imperfect, and evidently does not set forth all the testimony in the case, nor does it purport to contain all of it. Under such circumstances, it is impossible for this Court to determine this point, even if there was no conflict in the evidence. The omitted evidence may make an entirely different case from that as now presented by the record.

Dawley v. Morrison.

It is urged that the evidence shows that the conveyance by Morrison to Dawley was made to defraud the creditors of the former. There is certainly very strong evidence to that effect; but still it is conflicting, and it seems to have been submitted to the jury, who must have found against the defendants on this point. It is not contended that the Court committed any error of law to the prejudice of the defendants during the trial, and this question of fraudulent intent was purely for the jury to determine, under proper instructions from the Court, which it is presumed were given though they are not set forth in the statement.

On this point it is also urged that the sheriff levied upon and sold the property by virtue of attachments and executions against both the plaintiff and Morrison, and therefore the plaintiff was not entitled to any damages. It is true that the amended answer sets up such facts, and the transcript contains what is termed "minutes of the Court," in which it is mentioned that some papers of that kind were introduced in evidence, and the deputy sheriff, in his evidence embodied in the statement, refers to such papers as having been in his hands. But these averments in the amended answer are not evidence, nor in the "minutes of the Court" made a part of the record by a statement or bill of exceptions, and even if they were, both they and the evidence of the deputy sheriff are entirely insufficient to enable us to determine the validity, force, or effect of these alleged attachments and executions. They should have been set out in the statement, to enable this Court to determine what weight to attach to them. Without them, we should not be justified in setting aside the verdict of the jury on this ground.

Several other points are stated by the appellant, but they amount to mere reasons why the verdict should be held to be contrary to the evidence, and it is not therefore necessary to notice them.

The judgment is affirmed.

Heyman & Lowell.

HEYMAN *v.* LOWELL *et al.*

WHEN the mortgagor sells the mortgaged property, after the execution of the mortgage, and before the commencement of a suit to foreclose, his grantees are necessary parties to the foreclosure suit.

IF the real holders of the title are not parties to the decree of foreclosure, a Court of Equity will allow them to be made such by a supplemental complaint, provided application be made within a reasonable time; but more than five years after the entry of the decree is not a reasonable time.

APPEAL from the Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Harmon & Hartley, for Appellant.

The Statute of Limitations cannot be successfully interposed as a bar, in any manner, to the granting to plaintiff the relief prayed for in his supplemental complaint. The present proceeding is not in any respect a new suit, or proceeding, but merely bringing into the old proceeding a new party. Where a former suit prevents the running of the statute, it does so upon the footing that the plaintiff has pursued his remedy within the time limited by it, and in such case, the second suit is connected with the first, which is regarded as the commencement of the action to be tried. In the case at bar, there was nothing held by plaintiff upon which the statute could operate, except the note and mortgage; of course, if no suit had been brought to enforce them within the statutory period, then their collection would be barred, and holders of the mortgaged property junior to the mortgagor, would obtain priority of title over him, by reason of the extinguishment of the debt upon which the mortgage was founded;—but in this case, no such state of facts exists. The note and mortgage have gone to judgment and decree, and that before they were outlawed, and there is nothing upon which the statute can operate. The theory upon which the application of the Statute of Limitations is made to such cases is, that the lapse of time raises a presumption of payment; but this presumption may be rebutted, and it is so rebutted, by a foreclosure. (5 Wend. 296.)

Heyman v. Lowell.

John B. Felton, for Respondent.

There is but a single question involved in this case. The respondent, Bromell, insists that the Statute of Limitations is a bar to any proceedings against her. This Court has already decided principles which guided the Court below, and certainly control completely the present case. *Boggs v. Hargrave* and *Goadenow v. Ewer*, following the great current of authorities, have held that the foreclosure of a mortgage is ineffectual and void to transfer the title, when the real holder of the title is not before the Court. In *Lord v. Morris*, it has held that a mortgage, being a mere lien upon land incident to a debt, is barred by the statute so soon as the debt which supports it is barred, and that the vendee of land incumbered by a mortgage may avail himself of the bar of the statute to defeat the mortgage, if his right to do so has attached only for a moment, even though the mortgagor attempt to renew the lien. The Court has also decided, in *Mason v. Cronise*, that a judgment, like any other debt or cause of action, is barred by the statute.

CROOKER, J. delivered the opinion of the Court—CORR, C. J. and NORTON, J. concurring.

This is an action to foreclose two mortgages. It was commenced on the fifteenth day of September, 1856, against the defendants, Lowell and wife, and a decree of foreclosure entered on the same day, under which the mortgaged premises were sold and purchased by the plaintiff. On the twenty-second day of March, 1862, he applied to the Court, upon affidavit, for leave to file a supplementary complaint, making several new parties of persons who had purchased a portion of the mortgaged premises of the mortgagors after the date of the mortgages, and prior to the commencement of the action. The Court granted leave to file the supplemental complaint, and it was filed accordingly, and the new parties subsequently moved to strike it from the files, which was denied, and one of them then filed a demurrer, on various grounds, one of which is the Statute of Limitations. The Court sustained the demurrer, and rendered a final judgment dismissing the supplemental complaint, from which the plaintiff appeals.

Dawley v. Ayers.

The plaintiff gives no reason or excuse why the vendees of the mortgagor were not made parties at the commencement of the action, or for the delay in filing the supplemental complaint. In the case of *Goodenow v. Ewer* (16 Cal. 470), this Court said: "Courts of Equity are ever ready to grant relief from sales made upon their decrees, where there has been irregularity in their proceedings rendering the title defective, as well when the purchaser or parties interested have been misled by a mistake of law as to the operation of the decree, as when they have been misled by a mistake of fact as to the condition of the property or the estate sold, provided application be made within a reasonable time, and the relief sought will not operate to the prejudice of the just rights of others." The "reasonable time" for applying to the Court in such cases is at least within the time fixed by the Statute of Limitations for the commencement of actions of a like character—that is, for the foreclosure of the mortgage, after the judgment of foreclosure has been entered. Whether a less period ought not to be fixed in such cases is not necessary to determine; for in this case, more than five years elapsed after the rendition of the judgment and the sale of the property, before the application was made to file the supplemental complaint. This cannot with propriety be considered a "reasonable time," under the rule established in *Goodenow v. Ewer*.

The judgment is therefore affirmed.

DAWLEY AND WIFE v. AYERS.

THE fact that husband and wife do not intend to reside permanently in this State does not prohibit them from enjoying the benefit of the homestead law; but they are entitled to the right of homestead so long as they claim and use the property as such, and actually reside within the State.

The amendment to Sec. 422 of the Civil Practice Act, allowing parties to be examined as witnesses in their own behalf, did not, prior to the amendment to Sec. 395 in 1863, permit husband or wife to be witnesses for or against each other.

APPEAL from the Fifteenth Judicial District, Butte County.

The facts are stated in the opinion of the Court.

J. E. N. Lewis, for Appellant.

The Act of 1861 does not change the common law rules prohibiting the wife and husband from testifying for or against each other, and Sec. 422 as it now stands does not modify or repeal Sec. 395 of the Practice Act. Sec. 395 expressly prohibits them from testifying for or against each other. The objection is not that they are parties in interest or to the record, but that they are man and wife. That disability has not been removed but established by Sec. 395, as it existed at common law. Under the Statutes of 1851 and 1860, we submit, to entitle a person to a homestead right, he must be:

1st. A citizen of the State or a *bona fide* resident thereof, in the sense that the expression "*bona fide* residents" is used in the Constitution, Art. 1, Sec. 17.

2d. It must be the permanent residence of such persons, with his or her family, with the intent of impressing it with the character of a homestead. (*Cook v. McChristian*, 4 Cal. 23.)

3d. Such persons must have no other residence or property either in or out of this State, claimed by them as a homestead.

H. O. Beatty, for Respondents.

Dawley and wife were both plaintiffs, and *necessarily* plaintiffs. Neither one could sue alone for the homestead. (See *Pool v. Girard*, 6 Cal. 73; 8 Id. 72-75, 353.) The Statutes of 1861, 522, or Practice Act, 422, provides that "a party to an action or proceeding may be examined as a witness in his own behalf." Another portion of the same section provides certain exceptions to this rule; among others, that where one of the original parties to the contract on which suit is brought is dead, the surviving party shall not testify, showing an intention to restrict the rule to cases where there was at least a partial equality. But there is no exception to the general rule. Now, does any body believe the Legislature intended to deprive a man of one of his most important privileges in the prosecution of legal rights, simply because he

Dawley v. Ayers.

was a married man, and some technical rule of law required that his wife should be joined with him as a party to a suit? The mistake here is in saying the parties testify for each other. They testify for themselves; and the fact that the same testimony inures to the benefit of the other, is a mere incident. The statute which allows a man to testify, does not make an exception of those cases where his testimony, given for himself incidentally, inures to the benefit of his wife.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action to recover the possession of a tract of land, claimed by the plaintiffs as a homestead, and which the husband had sold and conveyed to the defendant. Judgment was rendered for the plaintiffs in the Court below, from which the defendant appeals.

It appears from the record that the plaintiffs own a tract of land in Missouri, incumbered by a mortgage, and that it has been their intention, after making some money here—sufficient at least to pay off the mortgage—to return to that State to reside, and the appellant contends that they are not citizens of this State, or *bona fide* residents, and therefore are not entitled to the benefits of the homestead law. In this he is mistaken. The homestead law is not limited in its operation to any class, but is universal in its application; and all classes of persons are entitled to its benefits, without any distinction as to citizenship, or capability of becoming citizens. So long as the parties actually reside in the State, and use the property as a home, they cannot be denied the the benefits secured by the law.

On the trial, the Court permitted the plaintiffs, husband and wife, to testify on their own behalf, under notice given in accordance with the provisions of the amendment of 1861 to Sec. 422 of the Practice Act; and this the appellant assigns as error. This objection is well taken. Sec. 395, before it was amended in 1863, expressly provided that the "husband shall not be a witness for or against his wife, nor a wife a witness for or against her husband." Although Sec. 422 provided that a party to an action might be

Guy v. Washburn.

examined as a witness in his own behalf, the same as any other witness, it was necessarily qualified by the provisions of Sec. 395, which virtually prohibits such examination where the parties are husband and wife. This construction is necessary, in order that both sections may stand and have effect. Any other view would operate as a virtual repeal of Sec. 395, which evidently was not intended by the Legislature. It is no valid answer to say that each one testified on his and her own behalf, and not on behalf of the other; because they were, to all intents and purposes, testifying for each other. The Court, therefore, erred in permitting them to testify.

The judgment is therefore reversed and the cause remanded.

GUY v. WASHBURN.

WHEREAS taxes have been illegally assessed, and the tax collector is about to sell the property for the taxes thus assessed, the tax can be paid under protest and the money recovered back by action.

The presumption of law is that a Board of Equalisation perform their duty and correct any inequality in the assessment of taxes.

It is not sufficient in a pleading to state in general terms that a valuation of property is "unjust, disproportioned, and unequal," without stating clearly and distinctly wherein the alleged valuation is "unjust, disproportioned, and unequal."

APPEAL from the Twelfth District Court, City and County of San Francisco.

This was an action brought to recover back the sum of eleven thousand and thirty dollars and two cents, and interest from the date of payment, which sum was paid by the plaintiff to the defendant, the tax collector of the City and County of San Francisco, under protest. The remainder of the facts are stated in the opinion of the Court.

Whitcomb, Pringle & Felton, for Appellants.

Currey and Mastick, for Respondents.

CROCKER, J. delivered the opinion of the Court — NOXTON, J. concurring.

Gay v. Washburn.

This is an action to recover from the defendant, the Tax Collector of San Francisco, a certain sum of money paid him by the plaintiff for taxes, under protest, on the ground that the proceedings of the public officers respecting the tax list were irregular and void. The case was tried by the Court, who found for the defendant, and the plaintiff appeals.

The pleadings in this case are under oath. The complaint is made up almost entirely of averments of matters of evidence merely, and it is difficult to find an issuable fact properly stated in it. The answer follows the complaint, and the findings are subject to the same objection. But as no motion was made to strike out the objectionable averments, this Court can take no action upon it. This state of the pleadings and findings, however, renders it difficult to properly investigate the question presented for adjudication. The necessary averments in a case of this kind are few and simple, and there can be no excuse for stuffing the complaint with matters of evidence instead of the issuable facts. As an attempt to convert the complaint into a bill of discovery, it directly violates the spirit and letter of the four hundred and seventeenth section of the Practice Act. (*Bowen v. Aubrey*, 22 Cal. 566.) If, in a desire to get all the matters of evidence in the complaint, the plaintiff has neglected to state the necessary issuable facts, the Court cannot insert them for him. A pleading is always to be construed most strongly against the party pleading.

It appears that on the twenty-third of November, 1860, the plaintiff was the owner of a large amount of valuable real estate in the City of San Francisco liable to taxation; that this property was assessed to him, in his name (with the exception of a few lots only) by the Assessor of the City and County of San Francisco; that after this assessment had been made, and before the Board of Equalization had closed their labors upon it, certain irregular proceedings were had relating to the exhibition of the assessment roll for public inspection and its equalization, which the plaintiff claims rendered the levy of taxes on his property void, and released him from all legal liability to pay the same; that the Tax Collector, being about to sell his property for the taxes thus assessed and levied, the plaintiff came forward and paid his taxes to the Collector

Gay v. Washburn.

under protest, and he now brings this action to recover the money back.

It is objected by the respondent that as the property thus threatened to be sold was real estate, the payment, though under protest, was in law voluntary, and no action can be maintained to recover it back as it could if it had been a threatened sale of personal property. The right of a party who has paid money not justly due to a Tax Collector, under protest, to recover it back by action, has been sustained by this Court in cases of both real and personal property. (*Hayes v. Hogan*, 5 Cal. 243; *Falkner v. Hunt*, 18 Id. 167.) We are not disposed to disturb those decisions upon this point, and this objection is therefore overruled.

It is also objected that this action was not commenced until more than twenty days after the time fixed by law for the payment by the Tax Collector of the taxes collected by him to the County Treasurer; that the presumption of law is that the officer has done his duty and has so paid over the money; and therefore the action should have been against the County Treasurer and not the Tax Collector. It is unnecessary to determine this point, as it is not properly before us. The objection should have been taken by demurrer or answer. If the answer had stated that the defendant had, before the suit, paid the money received from the plaintiff to the County Treasurer, then the question could have been properly raised in this Court. But it is too late to raise it here for the first time.

The principal ground of the plaintiff's complaint is that the public officers did not keep the assessment roll open for public inspection, as required by the Revenue Law of 1857, under which the assessment was made, and their conduct towards himself and his agent, in their attempts to inspect the roll, is set forth with great minuteness and particularity. It appears, however, that several days before the adjournment of the Board of Equalization, and after he had asked the board for an inspection as a legal right, he was notified that he could personally inspect the roll; but neither he or his agent attended for that purpose, or after that applied for an inspection. It appears, further, that about the time of this notice, or shortly after, the plaintiff was compelled to leave the city

Guy v. Washburn.

for several weeks on account of ill-health. If the plaintiff, in consequence of the neglect or refusal of the public officers to perform their duty, had been entirely debarred or prevented from exercising his right to inspect the assessment roll, a question would have arisen as to whether such neglect or refusal would have vitiated his assessment and released him from all liability to pay the same, in the absence of all averment or proof that the valuation of his property by the Assessor had been excessive, or higher in proportion than the valuation of the other property in the city, or that he had suffered any actual damage thereby. That question is not, however, before us; for the fact appears that the plaintiff had a fair opportunity to inspect the tax list, either in person or by his agent, as he might choose, before the Board of Equalization had closed their labors, and thus he could have pointed out any inequality which might have existed in the valuation of his property, and could have applied to the board to have the same corrected. This fact is a sufficient answer to all the objections of the plaintiff, founded upon his inability to procure an inspection of the roll previous to that time.

The fact that he was rendered unable to make such personal inspection, by ill-health, is no answer or excuse. His ill-health was his misfortune; but that misfortune could not in any way invalidate his assessment for taxes, or sustain a charge that such assessment had never been equalized. If it could produce such a result, then every person would be relieved from paying his taxes by proving that during all the time fixed by law he had been unable, on account of sickness or any other misfortune, to personally inspect the assessment roll.

It appears futher, that the Board of Equalization met at the time required by law, and acted upon and duly equalized the assessment roll, and the presumption is that the plaintiff's property was duly equalized with the rest. The plaintiff avers in his complaint, however, "that the valuation of his property above-described, as made by the Assessor, is grossly unjust, disproportioned, and unequal," but it is nowhere averred that this inequality was not corrected by the Board of Equalization, and in the absence of such averment the presumption that the board did their duty and duly

Guy v. Washburn.

equalized it, must prevail. One of the most important averments in a case of this kind is, that the plaintiff has suffered actual damage by the acts and proceedings of the public officers complained of, and the above averment is the only one in the complaint upon that point. It is clearly insufficient as an averment of damage, or as a foundation for a charge of actual injury.

It is not sufficient in a pleading to state in general terms that a valuation of property is "unjust, disproportioned, and unequal," without stating clearly and distinctly wherein the alleged valuation is "unjust, disproportioned, and unequal." For aught that appears, this alleged disproportion and inequality may have consisted in valuing the plaintiff's property *lower* in proportion than other property in the city; in which case he would have no just cause of complaint, as it would appear that he had suffered no injury thereby. In such a case, the plaintiff could hardly expect a Court to declare the assessment roll void, or compel the Collector to repay his taxes. He should have averred, and proved if denied, that the valuation of his property was greater than it should have been to make it proportioned with the other property assessed. In the absence of such an averment, the complaint is defective, and the Court cannot cure that defect for the party.

In the case of *Cowell v. Doub* (12 Cal. 273) this Court, in examining a question relating to the necessity of a tax list being passed upon by the Board of Equalization, say: "It is no objection that the same act provides for a correction of this list by the Board of Equalization. The case does not show that there was error to be corrected, so far as the appellant's property is concerned. It is not material whether the notice provided to be given in the fifth section of this act was given regularly or not. The notice was only important as affording an opportunity for correcting errors in the value of the property taxed. But, as said before, the record does not show that there was any error in the value of the property taxed, to the prejudice of the appellant." So in the present case, "the record does not show that there was any error in the value of the property taxed, to the prejudice of the appellant," and it is therefore fully within the rule laid down in the above case.

Heyman v. Lowell.

HEYMAN v. LOWELL *et al.*

When the mortgagor sells the mortgaged property, after the execution of the mortgage, and before the commencement of a suit to foreclose, his grantees are necessary parties to the foreclosure suit.

If the real holders of the title are not parties to the decree of foreclosure, a Court of Equity will allow them to be made such by a supplemental complaint, provided application be made within a reasonable time; but more than five years after the entry of the decree is not a reasonable time.

APPEAL from the Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Harmon & Hartley, for Appellant.

The Statute of Limitations cannot be successfully interposed as a bar, in any manner, to the granting to plaintiff the relief prayed for in his supplemental complaint. The present proceeding is not in any respect a new suit, or proceeding, but merely bringing into the old proceeding a new party. Where a former suit prevents the running of the statute, it does so upon the footing that the plaintiff has pursued his remedy within the time limited by it, and in such case, the second suit is connected with the first, which is regarded as the commencement of the action to be tried. In the case at bar, there was nothing held by plaintiff upon which the statute could operate, except the note and mortgage; of course, if no suit had been brought to enforce them within the statutory period, then their collection would be barred, and holders of the mortgaged property junior to the mortgagor, would obtain priority of title over him, by reason of the extinguishment of the debt upon which the mortgage was founded;—but in this case, no such state of facts exists. The note and mortgage have gone to judgment and decree, and that before they were outlawed, and there is nothing upon which the statute can operate. The theory upon which the application of the Statute of Limitations is made to such cases is, that the lapse of time raises a presumption of payment; but this presumption may be rebutted, and it is so rebutted, by a foreclosure. (5 Wend. 296.)

Heyman v. Lowell.

John B. Felton, for Respondent.

There is but a single question involved in this case. The respondent, Bromell, insists that the Statute of Limitations is a bar to any proceedings against her. This Court has already decided principles which guided the Court below, and certainly control completely the present case. *Boggs v. Hargrave* and *Goodenow v. Ewer*, following the great current of authorities, have held that the foreclosure of a mortgage is ineffectual and void to transfer the title, when the real holder of the title is not before the Court. In *Lord v. Morris*, it has held that a mortgage, being a mere lien upon land incident to a debt, is barred by the statute so soon as the debt which supports it is barred, and that the vendee of land incumbered by a mortgage may avail himself of the bar of the statute to defeat the mortgage, if his right to do so has attached only for a moment, even though the mortgagor attempt to renew the lien. The Court has also decided, in *Mason v. Cronise*, that a judgment, like any other debt or cause of action, is barred by the statute.

CROOKER, J. delivered the opinion of the Court—CORR, C. J. and NOETON, J. concurring.

This is an action to foreclose two mortgages. It was commenced on the fifteenth day of September, 1856, against the defendants, Lowell and wife, and a decree of foreclosure entered on the same day, under which the mortgaged premises were sold and purchased by the plaintiff. On the twenty-second day of March, 1862, he applied to the Court, upon affidavit, for leave to file a supplementary complaint, making several new parties of persons who had purchased a portion of the mortgaged premises of the mortgagors after the date of the mortgages, and prior to the commencement of the action. The Court granted leave to file the supplemental complaint, and it was filed accordingly, and the new parties subsequently moved to strike it from the files, which was denied, and one of them then filed a demurrer, on various grounds, one of which is the Statute of Limitations. The Court sustained the demurrer, and rendered a final judgment dismissing the supplemental complaint, from which the plaintiff appeals.

Himmelmann v. Schmidt.

any cause the last is ineffectual, he is entitled to have the original revived for his benefit, and it is the bounden duty of a Court of Equity to aid and enforce his claim. (5 Cal. 456; 10 Id. 385; 9 Id. 107; 13 Id. 530; 11 Id. 190; *White v. Sheppard*, 16 Texas, 172.) The Homestead Laws of 1851 and of 1860, so far as they restrain voluntary alienation are unconstitutional and void. (*Gee v. Moore*, 14 Cal. 472; *Bowman v. Horton*, 16 Id. 213.)

We contend that the abandonment not having been recorded before the mortgage was delivered, does not render the mortgage invalid. The signing, acknowledging, and delivery were good without recording, as between the parties. The only object of recording is to notify third parties. This is the universal construction of the recording law. Record has been universally understood to be a mere mode of giving constructive notice, not to the immediate parties having actual notice, but to the world. (*H. S. v. Freeman*, 3 How. 565, and cases cited; *Juan v. Ingoldsby*, 12 Cal. 564.) A right of homestead is a mere personal privilege, which may be waived by the party interested. (*Guiod v. Guiod*, 14 Cal. 506; *Gee v. Moore*, Id. 472; *Bowman v. Norton*, 16 Id. 213.)

John Satterlee, for Respondent.

The foreclosure of one certain mortgage is sought in this suit. No other is set up by the pleadings, and no other mortgage can be enforced in this suit. Reference to any other is therefore not justifiable in this argument. This mortgage was made upon a homestead, occupied by the mortgagor and his wife until she died, April 11th, 1856, and afterwards up to the trial by him and his and her children. Further dedicated as a homestead by a declaration duly made by him, and recorded May 26th, 1860, as required by the act passed April 28th, 1860. Afterwards, this mortgage was made, and it was invalid for any purpose whatever—so says the statute.

The only case cited by appellant's counsel which would seem to have any bearing upon this, is that of *Cohen v. Davis* (20 Cal. 187). But in that case the declaration of homestead had not been made and recorded at the time of the giving of the mortgage, and particular stress is laid upon this fact by the learned Judge who delivered the opinion. The decision, indeed, turned upon that fact.

Himmelman v. Schmidt.

CROCKER, J. delivered the opinion of the Court — **COPB, C. J.** concurring.

This is an action to foreclose a mortgage. The defense is that the mortgaged premises were and are the homestead of the mortgagor. To this it is replied, that the homestead claim was duly abandoned, according to the provisions of the statute, before the mortgage was executed. The Court found for the defendant upon the homestead question, and rendered judgment accordingly for the debt alone, without any order for the sale of the mortgaged premises, from which the plaintiff appeals.

From the findings of the Court, it appears that the defendant for several years, while his wife was living, occupied the premises as a homestead; that she died in April, 1856, and he has ever since continued to reside thereon with his four children; that on the twentieth day of October, 1856, he executed a mortgage on the premises for \$1,000; and April 25th, 1859, this mortgage was released and a new one given for \$1,500, which included the old debt and the sum of \$500 then advanced; and on the twenty-fourth day of November, 1860, this second mortgage was released, and the one now sued on given for \$2,350, which included the debt secured by the second mortgage, and a still further advance of \$850; that the defendant duly made, acknowledged, and recorded his homestead declaration on the twenty-fifth day of May, 1860; that he made his declaration of abandonment of the homestead, which bears date November 26th, 1860, but was not acknowledged and recorded until December 1st, 1860, at ten o'clock, A. M.; the mortgage bears date November 24th, but was not acknowledged and recorded until two minutes past ten o'clock, A. M. of December 1st, 1860. Under these facts, the Court below found as conclusion of law that the mortgage was not a valid incumbrance on the premises.

The Act of 1860, which was in force at the time this mortgage was executed, provides, that "No mortgage or alienation of any kind made for the purpose of securing a loan or indebtedness upon the homestead property shall be valid for any purpose whatsoever;" and it is contended that the present mortgage comes within the

Hinselmann v. Schmidt.

terms of this provision, and is therefore utterly null and void, and cannot be used for any purpose whatsoever. Such a clause, so restrictive upon the right of a citizen to make a contract, must be strictly construed, and can be applied only to those cases which come clearly within its letter and spirit. Only a part of the present mortgage was given to secure a "loan"—that is, the \$850 advanced when it was made. The balance of the mortgage, \$1,500, was given for the release of a prior valid mortgage upon the property, and as a substitute therefor, and does not therefore come within the letter or spirit of the clause. A Court of Equity, under such circumstances, even if it came within the provisions of the act, would treat it, to the extent of the old mortgage included in it, as a substitute for the former mortgage, and to that extent as a valid incumbrance upon the property. (*Dillon v. Byrne*, 5 Cal. 455.)

The defendant, after the death of his wife, had the right and the power to alienate or incumber the homestead by his single deed. (*Revalk v. Kraemer*, 8 Cal. 73; *Benson v. Aitken*, 17 Id. 163.) It follows, that but for this provision in the Act of 1860, above referred to, the mortgage of the homestead by the defendant would be valid, and constitute an effective incumbrance upon the property.

It is further insisted, that as the declaration of abandonment bears date two days after the date of the mortgage, it cannot validate the mortgage — or, in other words, an abandonment of the homestead after the date of the mortgage cannot make the mortgage a valid incumbrance upon the property. It is evident, that as the abandonment of the homestead was filed for record just previous to the filing of the mortgage, it was the intention of the parties that the former should take effect prior to the latter. The mortgage could only take effect from the time of its delivery, and there is no evidence that it was delivered prior to the execution and recording of the declaration of abandonment.

But whether the abandonment took effect prior to the mortgage or not, it is clear that when the declaration of abandonment did become valid and effectual, and the property thereby ceased to be a homestead, the mortgage immediately became a valid incumbrance upon the premises, and the plaintiff had a right to have the same sold for the payment of his whole debt.

Hathaway v. Brady.

In *Gee v. Moore* (14 Cal. 472), the husband and wife had alienated a part of the homestead, but the deed was not acknowledged by the wife. The wife died pending a suit for the possession, and the Court held, that upon the death of the wife, without issue living, the premises ceased to be a homestead, and the purchaser in the prior deed became entitled to the possession; and that upon her death, the right to the enjoyment and use of the premises as a homestead was gone.

In the case of *Bowman v. Norton* (16 Cal. 213), the husband had executed two mortgages on the homestead, without the signature of his wife, and they afterwards conveyed the premises by a valid deed duly executed and acknowledged by both, and the premises thereby ceased to be the homestead. The purchaser filed his complaint to quiet his title, as to the asserted claims of the mortgages; and the Court held that when the premises ceased to be the homestead of the mortgagor, the mortgages immediately became valid incumbrances upon the property, and they ordered the complaint to be dismissed. It was held that the mortgages were not absolutely void, but were invalid only to the extent required for the protection of the husband and wife in the enjoyment of their homestead rights, and that the conveyance was a relinquishment of this homestead right.

Under these decisions it is clear that the mortgage was a valid incumbrance upon the premises, and the Court therefore erred in not rendering a decree for the sale of the property. The judgment is therefore reversed, and the Court below is directed to enter the usual judgment for the amount of the debt, and the foreclosure of the mortgage and the sale of the property mortgaged for the payment of the same.

HATHAWAY v. BRADY.

A Court of Equity may supply an omission in a promissory note, fixing the rate of interest, so as to make it correspond with the intention of the parties. Parol evidence may be introduced for the purpose of showing what were the

Hathaway v. Brady.

words omitted, and that they were omitted by mistake, but such evidence should clearly and fully establish the fact.

The statute which requires that a contract, for a greater rate of interest than ten per cent. per annum, shall be in writing, does not prevent a Court of Equity from correcting mistakes as to the rate of interest, in contracts for the payment of money, although by such correction the rate of interest be made to exceed ten per cent. per annum.

APPEAL from the Third Judicial District, Alameda County.

The facts are stated in the opinion of the Court.

W. W. Stow, for Appellant.

The cause of action first set out in plaintiff's complaint, was upon a note of five hundred dollars, with interest at the rate of two per cent. until paid. It does not say two per cent. per month, nor per day, nor per annum. The Court allowed verbal evidence to be given that the note should read "two per cent. per month." This was a clear violation of the statute (Wood's Dig. 551), and was overrating. (*Adler v. Friedman*, 16 Cal. 140.) It will not do to say that a Court of Equity could reform this agreement, by making it correspond to the original intent of the parties, and make a written agreement to pay interest different from the written agreement which defendant actually executed. Besides, the agreement was not made with plaintiff. He became the owner of this note, according to his own showing, as it was written. The averment of the complaint is that this note was indorsed to him, *i. e.*, as it reads, not as it might have been intended to read.

W. W. Crane, for Respondent.

It is apparent from the reading of this note that an omission was made. It became due by its terms the moment it was delivered, and if literally construed, is an obligation to pay five hundred dollars with two per cent. added, that is, five hundred and ten dollars immediately. The use of the words "until paid" indicates that the interest was to be at a certain rate for certain stated periods until paid. The Court acted properly in permitting us to explain the instrument and fill up an apparent omission. It was not an attempt on our part to vary or contradict the terms of the con-

Hathaway v. Brady.

tract. (*Palmer v. Vance*, 13 Cal. 558; *Thompson v. Brothers*, 5 Mill. Lou. 275.) In this last case the Court says: "If a house be let or leased on a given rent, without saying whether it be a monthly or yearly one, parol evidence is certainly admissible to establish that the rate manifests that the parties contemplate a yearly one." (See also *Seely v. Engell*, 8 Kernan, N. Y. 542; *Boyd v. Brotherton*, 10 Wend. 98; *Smith v. Wilson*, 3 B. & Adolph. 728; *Boorman v. Jenkins*, 12 Wend. 566; 2 Parsons on Contracts, 76.)

CROCKER, J. delivered the opinion of the Court—CORN, C. J. and NORTON, J. concurring.

This is an action upon three promissory notes, one for \$500, one for \$6,197.43, and the other for \$2,000. The case was tried by a jury, who rendered a verdict for \$11,151.30. The defendant moved for a new trial, which the Court ordered to be granted, unless the plaintiff would remit the sum of \$1,127.78 from the amount of the verdict. The plaintiff remitted the amount, and thereupon the Court refused a new trial, and the defendant appeals.

The first note sued on is as follows:

"\$500.

SAN LORENZO, Oct. 4th, 1857.

"For value received, I promise to pay to the order of George Hyde, five hundred dollars, with interest at the rate of two per cent. until paid.

LEWIS BRADY."

The complaint avers that the agreement of the defendant was to pay interest at the rate of two per cent. *per month*, but that by mistake the words *per month* were omitted in the note; and he asked that the mistake be corrected by inserting the omitted words in the note, and for judgment thereon accordingly. The answer of the defendant denies that there was any agreement to pay two per cent. *per month*, or that the words "per month" were omitted by mistake. On the trial the Court permitted the plaintiff to prove the facts thus put in issue by parol evidence, and this the defendant now assigns as error.

It is evident from the face of the promissory note that there is an omission of some kind in that part which relates to the rate of interest. If it be true that the words "per month" were intended

Hathaway v. Brady.

to be inserted by the parties, and that they were omitted by mistake, the plaintiff has a right to have such mistake corrected. The power of a Court of Equity to correct mistakes in written contracts is clear and undoubted. And in such case the mistake may be proved by parol evidence, though such proof should fully and clearly establish the facts. (*Wagonblast v. Washburn*, 12 Cal. 212; *Palmer v. Vance*, 13 Id. 556; *Eldridge v. See Yup Co.*, 17 Id. 55; *Lestrade v. Barth*, 19 Id. 661; *Pierson v. McCahill*, 21 Id. 122.) But it is urged that as the statute regulating the rate of interest requires that a contract for a greater rate of interest than ten per cent. per annum shall be in writing, therefore the agreement to pay a greater rate cannot be proved by parol. The power of a Court of Equity to correct mistakes in contracts which the statute requires to be in writing — such as conveyances of real estate — and to permit such mistake to be proved by parol evidence, is as well established as in cases where the contract is not required to be in writing. In fact, the greater class of cases in which this relief has been granted has been that of conveyances of real estate, which the law requires to be in writing. (1 Story's Eq. Secs. 158, 159.) It follows that there was no error in the action of the Court upon this point.

The only other error alleged is that the judgment is for a greater sum than the plaintiff was entitled to under the evidence. It seems that there were various matters on account between the plaintiff and the defendant, as also between the plaintiff and one Babcock, who rented defendant's land for a share of the crops. It is not contended here that the Court erred in any of its instructions to the jury or in the admission of evidence; but this Court is asked to investigate all these accounts, as a jury would be required to do, or a Court engaged in trying the case at *nisi prius*. These matters seem to have been fully and fairly investigated by the jury; but the Court below, in reviewing the action of the jury on the motion for a new trial, with all the evidence before it, came to the conclusion that the amount of the verdict was too great, and required the plaintiff to remit a large portion of it, which he did. Under these circumstances, where both Court and jury have acted upon the question, this Court will not reinvestigate it, upon the

People v. Gray.

ground that the judgment is contrary to the evidence, where the evidence is conflicting, and no rule of law has been violated. The plaintiff claims that he was entitled to the full amount found by the verdict of the jury; but as he consented to take the lesser amount, by remitting under the order of the Court, and has not appealed from the judgment, we cannot act upon any such question.

The judgment is affirmed.

THE PEOPLE *ex rel.* BARRY v. GRAY.

A WARRANT drawn by the Auditor of a County upon the Treasurer, although payable to "A or bearer," does not possess the quality of negotiable paper so as to make it transferable by delivery.

The County Treasurer cannot be compelled to pay to any other person than the one in whose favor it is drawn, without at least an assignment of the warrant by the payee.

APPEAL from the Seventh Judicial District, Solano County.

The facts are stated in the opinion of the Court.

Whitman & Wells, for Appellant.

It has been settled by repeated decisions of this Court that instruments of the nature of the one set forth in the complaint are not negotiable instruments; it follows that they, by themselves, constituted no cause of action, and are not in fact the evidence of debt sufficient to support the action, and it follows of course that the character of negotiable paper being denied, the holder can claim none of its privileges in dealing with it. (*People v. El Dorado Co.*, 11 Cal. 170; *Argenti v. San Francisco*, 16 Id. 257; *Martin v. Same*, Id. 287; *Dana & Bro. v. Same*, 19 Id. 486; *Keller v. Hicks*, 22 Id. 457.)

With this rule so well established, the plaintiff's title must fail. He has simply averred and proved a purchase of the warrant — not a purchase of the debt — not an assignment of the account which the warrant was simply the machinery to pay, which might entitle him to protection, but a purchase from a person not the owner, who cannot

People v. Gray.

and does not claim to have succeeded to the actual rights of the original payee — the right to draw the money from the treasury in satisfaction of his claim.

John Curry, for Respondent.

CROCKER, J. delivered the opinion of the Court — COPE, C. J. and NORTON, J. concurring.

This is an application for a writ of mandate to compel the defendant, who is the County Treasurer of Solano County, to pay a certain warrant drawn on the treasury of that county. The case was tried by the Court, who found for the plaintiff, and a judgment was rendered accordingly, from which the defendant appeals.

It appears that the warrant in question was issued to one Thompson for services as District Attorney; that he intrusted it to one Osborne to sell for him; that Osborne lost it; that Thompson afterwards applied to the Board of Supervisors for a duplicate warrant, which was issued, and which was in due time paid by the County Treasurer. One Weineman appears to have sold the original warrant to the relator; but Thompson never sold or assigned it to any person. The following is a copy of the warrant:

"No. 2,698. BENICIA, Solano County, October 27, 1858.

"The Treasurer of Solano County: Pay to James H. Thompson, or bearer, for salary as District Attorney, for the quarter ending October 1, 1858, out of the General County Fund, the amount of three hundred and seventy-five dollars (\$375).

"WILLIAM J. HOOTEN,

"Auditor Solano County."

It has been repeatedly held by this Court that warrants of this kind do not possess the qualities of negotiable paper, like bills of exchange, promissory notes, and the like. (*People v. El Dorado Co.*, 11 Cal. 170; *Argenti v. San Francisco*, 16 Id. 275; *Martin v. San Francisco*, Id. 285; *Dana v. San Francisco*, 19 Id. 486; *Keller v. Hicks*, 22 Id. 457.) The fact that the warrant is payable to bearer will not therefore make it transferable by delivery like a promissory note thus payable. In *Martin v. San Francisco*

People v. Rains.

it was held that even where there was a regular assignment of such a warrant by the person to whom it was issued, the assignee could not maintain an action on it without an assignment of the original indebtedness. But in *Dana v. San Francisco* it was intimated that an assignment of the warrant might be deemed in equity an assignment of the debt on which the warrant issued, and an authority to the assignee to receive the money. In the case of *Martin* the warrant was payable to the payees, or bearer, and in the case of *Dana* it was made payable to the order of the payee. It is clear that the County Treasurer cannot be compelled to pay a county warrant to any other person than the one in whose favor it is drawn, without at least an assignment of the warrant by the payee. The affidavit on which the application for the writ was made does not allege any such assignment, or any transfer or assignment either of the warrant or the debt for which it issued, by Thompson; and it therefore failed to show facts sufficient to authorize the writ to be issued. Nor was this defect cured by any evidence. The findings merely state "that in the month of August, 1859, or about that time, the said Barry purchased and became the owner and holder of said warrant." This is entirely insufficient to sustain the judgment, even if the affidavit was sufficient.

The judgment is therefore reversed and the cause remanded.

THE PEOPLE *v.* RAINS *et al.*— No. 1.

When a default has been entered for a failure to answer or demur, an affidavit by the attorney that he had prepared a demurrer, but failed to file it in time, in consequence of a mistake on his part as to the day on which the time for filing would expire, is insufficient to open the default.

On application to set aside a default, it is necessary for the defendant to show that he has a good defense on the merits. Where the affidavit shows that the defense rests on matters appearing on the face of the complaint, it shows that the defense is of a technical character, and is therefore insufficient.

When a complaint contains the substantial averments of a cause of action, though defective in form and certainty, the defect is cured by a verdict or default.

Since the passage of the Act of 1861 an Assessor is only required to assess improvements on real estate and personal property in general terms and under a gross valuation, and a specific description of such property is unnecessary.

People v. Reina.

When a demurrer is overruled, with leave to answer, it is not necessary that the order fix the time within which the answer must be filed. The Court has power to fix such time for answering as it may deem proper; but where no time is fixed, the defendant should answer within the same time as in case of service of a copy of the original complaint.

APPEAL from the First Judicial District, San Bernardino County.

The facts are stated in the opinion of the Court.

Sharp & Lloyd, for Appellants.

The time required by law to answer the original complaint is ten days if served within the county, and twenty days if served out of the county; but no time is "required by law" within which a plea to an amended complaint shall be filed. But the defendant shall, according to Sec. 43, Practice Act, plead thereto "in such time as may be ordered by the Court." There being, therefore, no time "allowed by law," and none fixed by the Court, the defendants could never be brought into default, and therefore the default was improperly entered and should have been set aside. It should have been set aside on the ground of excusable neglect — the defendant having sworn to merits.

If the action is prosecuted under the Revenue Act of 1861 (Sess. Laws, 432, etc.), then the complaint is insufficient, for by the form prescribed by Sec. 40 it is made incumbent on the District Attorney to describe the improvements with the same particularity as would be required in actions for the recovery of personal property. (See Form, 433.)

The reason for requiring a particular description is because only certain defenses are allowed, as appears by Sec. 42, one of which is "that the property was exempt;" another, a denial of title.

How can the defendant plead either of these defenses unless the improvements and property are described so that he can know precisely what is, and what is not assessed? How can he deny title to the personal property when he is not told of what it consisted?

Horace C. Rolfe, for Respondent.

CROCKER, J. delivered the opinion of the Court — CORN, C. J. and NORTON, J. concurring.

People v. Raina.

This is an action to recover delinquent taxes. The defendants appeared and demurred to the original complaint; their demurrer was sustained, and leave granted to the plaintiff to amend the complaint. An amended complaint was duly filed and served; but the defendants failing to plead thereto within ten days, a default was duly entered, with a final judgment for the amount claimed in the complaint. The defendants came in and moved the Court to set aside the default and judgment, which motion was denied, and they then appealed therefrom to this Court.

It appears that the attorneys of the defendants had prepared a demurrer to file to the amended complaint, but they failed to file it in time, in consequence of a mistake on their part as to the day on which the time for filing would expire—they, by a miscalculation of time, supposing that the time would not expire until the day after it did. In the affidavit on which the motion was founded, and which was sworn to by one of the attorneys of the defendants, he says that after a careful examination the attorneys for the defendants are of the opinion that they have a good legal defense to the complaint, as the same appears upon the face thereof. The facts set forth in excuse of the failure to plead in time are insufficient. (*Elliot v. Shaw*, 16 Cal. 377.) It was also necessary for the defendants to show that they had a good defense to the action, on the merits, to entitle them to an order setting aside the judgment and default. (*Gregory v. Ford*, 14 Cal. 141; *Gibbons v. Scott*, 15 Id. 284; *Logan v. Hillegass*, 16 Id. 200; *Woodward v. Backus*, 20 Id. 137.) The statement that their defense depends upon matters appearing upon the face of the amended complaint shows that their defense is of a technical character, not affecting the merits of the action, and it was therefore insufficient, and there was no error in refusing the motion.

The next error assigned is, that the amended complaint does not state facts sufficient to constitute a cause of action, in this, that there is no detailed specific description of the improvements on real estate and personal property assessed to the defendants. The real estate is described fully, and then follow these words: "and also the improvements thereon;" and in another portion of the complaint it is averred that there was duly assessed to the defend-

People v. Rains.

ant, "the above-described real estate, improvements on real estate, and certain personal property." Even if there was a lack of certainty and particularity in the description of the improvements and personal property, there is still a substantial averment of the facts, though defective in form and certainty, and in such case the defect is cured by a verdict or default. (*Garner v. Marshall*, 9 Cal. 268; *Hentsch v. Porter*, 10 Id. 559.) The forty-fifth section of the Practice Act provides that objections on the ground of uncertainty and the like must be taken by demurrer or answer, or they will be deemed waived.

This action is brought under the General Revenue Act of May 17th, 1861 (Stat. 1861, 419), and we had occasion to give a construction to this act on the question of the sufficiency of a description of personal property like the present in the case of *The People v. Eastman*, decided at the present term, in which it was held to be sufficient. The same reasons by which such a description of personal property was upheld will apply equally to "improvements on real estate." The Assessor is only required to assess such improvements in general terms under a gross valuation, and the statute does not seem to contemplate a more specific description in the complaint.

The judgment is therefore affirmed.

On petition for rehearing, CROCKER, J. delivered the following opinion—NORTON, J. concurring:

The appellant insists, in his petition for a rehearing, that the plaintiff had no right to enter a default, because the Court did not fix any time within which to answer the amended complaint, in accordance with the provisions of Sec. 43 of the Practice Act. It is the universal practice in this State to answer amended complaints within the same time after service of a copy as in case of a service of a summons with a copy of the original complaint, and it is seldom that the Court fixes any specific time by an order for answering in such cases. The defendants in this case evidently were governed by this practice, and so construed the law, as they intended to file their answer within ten days after the service of the amended complaint, but failed to do so by a mistake as to the date of the expiration of the ten days. We think that a reasonable construction of

People v. Rains.

the Practice Act sustains this practical interpretation of the law upon this subject. (See Sec. 67.) Under Sec. 43, the Court would have the power to fix such time as it might deem proper, but it does not follow that, because the Court failed to make such an order, the defendant would have an unlimited time to answer. In such case the defendant should answer within the same time as in cases of a service of a copy of the original complaint with the summons.

The rehearing is denied.

THE PEOPLE v. RAINS *et al.*— No. 2.

IN an action to recover delinquent taxes in the County of San Bernardino, assessed for the year 1860, the complaint should state the assessed value of the real estate, the improvements, and the personal property, each separately. When the statute provides that the District Attorney, before commencing suit, shall publish notice to delinquents, it is not necessary to aver in the complaint that this notice was published, but the failure to publish this notice must be taken advantage of by plea in abatement, or it is waived. It is not error to make the real estate a party, as in proceedings *to rem.* in an action to collect taxes. The Assessor may assess real estate to any person whom he finds in the possession, charge, or control of it, and such person is liable for the taxes, as well as the property assessed.

APPEAL from the First Judicial District, San Bernardino County.

The facts are stated in the opinion of the Court.

R. H. Lloyd, for Appellants.

This suit was brought under the Act of March 27th, 1861 (Laws 1861, 75, 76). It is a special act, providing for the collection of delinquent taxes for 1860, in San Bernardino County. Under this act the complaint is insufficient.

The second section prescribes that the District Attorney "shall designate in his complaint the amount of taxes due and unpaid for State, County and other purposes, separately, and shall state the kind and value of property assessed, both real and personal." The complaint in this case does not state the kind of personal property—

People v. Raina.

whether it was money, hogs, sheep, cattle, or what it was. All the information given is, that it was "certain personal property." Nor does the complaint state the value of it, nor the value of the real estate.

The reason why the statute requires the kind and value to be stated appears in the same section, and is, because the defendant is only allowed to plead to the complaint: first, that the taxes have been paid; and, second, that he had not the property mentioned in the complaint or the valuation thereof, at the time of the assessment.

The answer must be under oath. How are the defendants in this case to answer under oath? They are not informed whether the real estate was rated at one dollar or fifty thousand dollars. They are not told what personal property they are charged with having, whether it is money, cattle, or hogs, or what value was placed on the different kinds of property. The defendants are deprived of the opportunity to make the statutory defense; and the statute declares they shall make no other.

By Sec. 7 of the act, it is provided that "the District Attorney of said county shall, immediately upon the receipt of a certified copy of this act, cause the same to be published weekly for the space of four weeks in some newspaper published in said county; and he shall not commence suit against delinquents until after said term of publication has expired." This is a condition precedent to his right of action. The notice must be given before a right of action accrued under the statute. The complaint must show that the party is entitled to his action; for that purpose, in this case it must appear that the notice was given. It has not been alleged, nor does it so appear.

CROCKER, J. delivered the opinion of the Court — COPE, C. J. and NORTON, J. concurring.

This is an action to recover delinquent taxes levied for the fiscal year 1860, on certain real estate, improvements thereon, and personal property, in the County of San Bernardino. The Court rendered judgment against the defendants and the real estate assessed, from which they appeal.

People v. Raina.

The defendants demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action; that several causes of action had been improperly united; that it was ambiguous and uncertain, and that there was a misjoinder of parties defendant. The Court overruled the demurrer, and this is assigned for error. The complaint in this case follows the form prescribed by the General Revenue Act of 1861 (Stat. of 1861, 433); but this action does not properly come within the provisions of that act, which apply only to the taxes of the year 1861 and the succeeding years, and these taxes were levied in the year 1860. But on the twenty-seventh day of March, 1861 (Stat. 1861, 75), a law was passed relating to the delinquent taxes of 1860 in the County of San Bernardino, and that act therefore properly governs this action. The second section of the latter act provides that the complaint "shall state the kind and *value* of the property assessed, both real and personal." The complaint in this case describes the real estate fully and particularly, and then states, "also the improvements thereon." A further averment is that the defendants were "the owners of, and there was duly assessed to them the above described real estate, improvements upon the same, and certain personal property," and then sets forth the amounts of the several kinds of taxes levied upon the property. It contains no further description of the improvements or personal property, nor does it state the value of any of the property assessed. It is evident that the complaint is defective in not stating the assessed value of the property—that is, the assessed value of the real estate, the improvements thereon, and of the personal property, each separately. It is sufficient in stating the "kind" of property to state which of these three kinds of property the assessed property consists of. The description of the property in this complaint we deem sufficient, for the reasons stated in the case of *The People v. Eastman*, decided at the present term. The act in question does not require a more particular or specific description than the law in question in that case.

The seventh section of the act under which this action was brought provides, that the District Attorney shall, immediately upon the receipt of a certified copy of the act, cause the same to be

published weekly for four weeks in some newspaper published in the county, and that he should not commence suits against delinquents until after said term of publication had expired. It is contended that the complaint is defective, because it does not aver that this publication had been made, and that the term of publication had expired. This matter of publication does not affect or relate to the right or cause of action, but merely to the time of commencing the action. If the publication was not in fact made, or the term had not expired, these facts should have been plead in abatement of the suit. It was not necessary to aver them in the complaint, but they could be plead as a defense, to abate the suit, if the defendants saw proper to do so. That objection to the complaint, therefore, is not tenable.

It is objected that the real estate is made a party, as in a proceeding *in rem*. All proceedings for the assessment of property and the collection of taxes thereon are in the nature of proceedings *in rem*, as the property is considered primarily liable for the taxes assessed thereon, and there is therefore no impropriety in framing the proceedings in the form of an action in which the property is sought to be sold for the payment of the taxes. This objection, therefore, is not valid. The demurrer should have been sustained, however, as the complaint fails to state the value of the several kinds of property assessed.

After the demurrer had been overruled, the defendants answered, alleging that the property assessed was the separate property of their wives, as they acquired the same by descent from their deceased father; and denying that they had any right, title, or interest in the real estate, improvements, or personal property, except as managers of the personal property; and the Court found such to be the facts, but also found that the defendants lived upon and had been in the possession, charge, and control of the property ever since 1858. The General Revenue Law of 1860, under which this assessment was made, authorizes property to be assessed to the persons "owning, claiming, or having the possession, charge, or control of any real or personal property," and as the property assessed in this case was in the possession, charge, and control of the defendants, the assessment was properly made to them,

People v. Raina.

and under that act they were liable to pay the taxes. County Assessors are not required to investigate the titles to all the property in the county, and to determine who are the real owners thereof. Such questions often require the skill, research, and learning of the ablest lawyers and jurists, which Assessors are not expected to have. It is sufficient for the purpose of assessment and taxation that he finds some person in possession, or having the charge and control of the property, to authorize him to assess it in the name of such person, and to make the latter liable for such taxes, leaving him to his remedy against the real owner of the property, if any he has. The property itself is, however, also liable for the taxes.

On the seventeenth day of May, 1861, the Legislature passed an act supplementary to the Act of March 27th (Stat. 1861, 416). It provides that in certain cases, including that of an assessment "to the husband or agent of the real owner, the person liable to pay the taxes thereon may be sued by a fictitious name, or the real name of the party liable to pay the same; and the fact that the property was not assessed in the name of the party liable to pay the same, shall be no defense to an action brought for the recovery of the amount of the taxes due thereon, if the summons is served upon the party liable to pay the same." This provision does not properly apply to the case before us, because the property was "assessed in the name of the party liable to pay the same," as the defendants were in the possession, charge, and control of the property, and were thus liable to pay the taxes, as has been already shown. The summons has therefore in this case been "served upon the party liable to pay the taxes," within the terms of the statute. There may be cases where "the husband or agent" was not in "the possession, charge, or control" of the property, and therefore perhaps not liable to pay the taxes, in which case this provision may be applicable. The objection, therefore, that no summons was served on the wives of the defendants, is not valid.

The Court having erred in overruling the demurrer, the judgment is reversed and the cause remanded for further proceedings.

 Zoller v. McDonald.

ZOLLER *et al.* v. McDONALD.

THE order of a County Court dismissing an appeal from a Justice's Court in an action of forcible entry and detainer is a final judgment, from which an appeal may be taken to the Supreme Court.

An undertaking on appeal to the Supreme Court, conditioned "that appellant will pay all costs and damages which may be awarded against him on the appeal, and also all the rents and profits of the premises in controversy during the pendency of the appeal, not exceeding six hundred dollars," is sufficient to sustain an appeal.

An undertaking on appeal filed under the three hundred and forty-eighth section of the Practice Act is not invalidated because the sum mentioned exceeds three hundred dollars.

A notice of appeal from a judgment rendered in a Justice's Court to the County Court, in an action of forcible entry and detainer, is not invalidated because it contains a clause that the "appeal is taken on questions of law alone."

APPEAL from the County Court of the County of San Francisco.

The facts are stated in the opinion of the Court.

Alfred Rix, for Appellant.

W. H. Tompkins, for Respondent.

CROCKER, J. delivered the opinion of the Court — NORRIS, J. concurring.

This is an action of unlawful detainer, tried in a Justice's Court, where the plaintiffs recovered judgment, from which the defendant appealed to the County Court, where, on motion of the plaintiffs, the appeal was dismissed, and the defendant appeals to this Court.

The plaintiffs move to dismiss the appeal to this Court on the ground that we have no jurisdiction; that the undertaking is insufficient, and that it is an appeal from an order and not a judgment. The order of the County Court dismissing the appeal is the final decision and determination of that Court upon the case before it, which puts an end to the suit; and is, therefore, to all intents and purposes, a judgment, subject to the revision of this Court. It matters not in what form the determination of the suit is put, so that it embodies the final action of the Court, it is sufficient. (*Bell v. Davis*, 1 Cal. 135.) The undertaking on appeal is conditioned

that the appellant will pay all damages and costs which may be awarded against him on the appeal, as also all the rents and profits of the premises in controversy during the pendency of the appeal, not exceeding six hundred dollars. It is urged that the undertaking was filed for the sole purpose of staying proceedings, as required by Sec. 352 of the Practice Act, and is not the one required by Sec. 348. Whether it is sufficient as an undertaking to stay execution, under Sec. 352, is a question not necessary for us to determine; for it is sufficient to sustain the appeal, if it contains the substantial requirements of Sec. 348, which we think it clearly does. That the amount exceeds three hundred dollars is no valid objection to it, so long as it contains the conditions required by Sec. 348. The undertaking required by these sections may be embodied in one instrument by Sec. 354. The action is to recover the possession of lands or tenements, and we think comes within the terms used in the sixth section of the act regulating the jurisdiction of this Court. (Wood's Dig. 148.) The motion to dismiss the appeal is therefore overruled.

The notice of appeal from the Justice's Court to the county Court was full and sufficient; but it contained this clause at the end: "This appeal is taken on questions of law alone." The plaintiffs moved in the County Court to dismiss the appeal because the same was taken on questions of law alone, instead of law and fact; and the Court sustained the motion. The seventeenth section of the act respecting forcible entries and unlawful detainers, as amended in 1832, provides that the Appellate Court shall try the case anew on the evidence introduced before it; and this section controls appeals in this particular form of action. Such an appeal, therefore, cannot be tried on a statement of the case, or evidence or exceptions taken before a Justice of the Peace. This section regulates the mode of trial in the County Court. The fact that the defendant inserted in his notice that the appeal was taken on questions of law alone cannot affect or vary the mode of trial presented by the statute, nor did it vitiate the notice. His notice was good and sufficient without that clause, and it may well be treated as surplusage. Sec. 19 of the act especially provides that the Appellate Court shall not dismiss the proceedings for want of form, and

People v. Park.

the objection in this case goes to the form of the notice only. Parties should not be held to any great strictness in proceedings before Justices of the Peace. The notice was sufficient to advise the plaintiffs that the defendant appealed from the judgment of the Justice; and then the statute, and not the notice, regulated the mode in which that appeal should be tried.

The judgment of the County Court dismissing the appeal is reversed, and the cause remanded.

THE PEOPLE v. PARK.

UNDER the Revenue Law of 1860, choses in action and property of an intangible character, such as debts and the like, are properly assessable in the county where the owner resides at the time of the assessment.

APPEAL from the Thirteenth Judicial District, Mariposa County.

The facts are stated in the opinion of the Court.

[No briefs on file.]

CROOKER, J. delivered the opinion of the Court — COPE, C. J. and NORTON, J. concurring.

This is an action to recover a sum of money claimed to be due for taxes on personal property assessed to the defendant in Mariposa County. The assessment was originally made in the following form:

“T. W. Park. Mortgage on J. C. Fremont, value \$350,000.

But it was afterwards changed by the Board of Equalization so as to read as follows:

“T. W. Park. Money at interest secured by mortgage executed by J. C. Fremont, June 14, 1860, and recorded in the Recorder's Office of Mariposa County, in book E, on folios 409, 411, 412, and 413. valued at \$350,000.”

The defendant was a resident of the City of San Francisco before and since the levy of this tax, and was assessed for personal prop-

People v. Park.

erty in that city for the same year. The Court found in favor of the defendant, and the State took this appeal.

The tax in this case was levied under the Revenue Law of 1860 (Stat. of 1860, 365.) Sec. 11 of that act provides that each District Assessor shall ascertain the names of all persons "owning, claiming, or having the possession, charge, or control of any real or *personal property*, not exempt from taxation, within the district," and the cash value of the same; and he is required to *assess* the same to such person, and to demand of every person within his district a statement under oath of all such real or *personal property* within his district. Sec. 14 requires the Assessor to list under the head of "*personal property*," all movable property, and movable chattels, etc., etc., including among others, "all money at interest, secured by mortgage or otherwise." Under this law all "*personal property within the district*" of the Assessor must be assessed in such district. It is evident that all personal property of a tangible character, such as is capable of manual possession and delivery, is to be assessed in the county where it may be at the time of the commencement of the assessment, to wit: the first Monday in March. But the question is, in what county must personal property, of an intangible character, such as mere choses in action, debts, promissory notes and the like, be assessed in? Are they to be considered as having a taxable locality where the debtor resides, or where the property on which the debt may be a lien is located, or where the owner resides?

The general rule of law is that personal property follows the body or person of the owner. (Story on Conflict of Laws, Secs. 378-380.) And this rule is applied to the question as to where such property is properly taxable; and it is held that it should be assessed and taxed in the town or county where the owner resides. (*Holton v. Bangor*, 23 Maine, 264; *Little v. Greenleaf*, 7 Mass. 236; *Salem Iron Factory v. Danvers*, 10 Id. 514; *Amesbury Man. Co. v. Amesbury*, 17 Id. 461; *Preston v. Boston*, 12 Pick. 7; *Lyman v. Fiske*, 17 Id. 231; *Blood v. Sayre*, 17 Vt. 609.) By special statute this rule was changed in Massachusetts so as not to apply to persons who hired stores and carried on business in other towns than those in which they dwelt; and in

McGarvey v. Hall.

such cases such property was made taxable in the town where the business was conducted. (10 Mass. 514; *Gray v. Kittell*, 12 Id. 161.)

Under these authorities and rules of law, we think the proper construction of the Revenue Law of 1860 is that all personal property of a tangible character was properly taxable in the county where it was actually situated at the time of the commencement of the assessment; but choses in action, and property of an intangible character, such as debts and the like, cannot be said to be "within the district" of the Assessor, and are, therefore, properly taxable in the county where the owner resides at that time. They could not properly be assessed where the debtors reside, as they may be non-residents, or reside in several counties; nor where the property on which it may be secured is located, for that might be in several counties, and it is the *debt* and not the *security* which is properly taxable. (*Falkner v. Hunt*, 16 Cal. 167.)

In this case the debt and mortgage did not exist at the commencement of the assessment; and if they had, they were properly assessable and taxable in the County of San Francisco, where the defendant resided, and not in the County of Mariposa.

It follows that the judgment of the Court below is correct, and is therefore affirmed.

McGARVEY v. HALL.

At the time of the execution and delivery of a promissory note, the payer also give the payee a bill of sale of personal property by way of mortgage to secure the note, and also deliver possession of the property, the payer has a right to have the property mortgaged applied in satisfaction of the debt; and if the payee sells any of the property he has a right to have the proceeds or value applied towards the satisfaction of the debt.

If the payee sells the note, the purchaser takes it subject to the equities subsisting between the original parties.

APPEAL from the Seventh Judicial District, Mendocino County.

The facts are stated in the opinion of the Court.

McGarvey v. Hall.

William Holden, for Appellant.

Wm. Neely Johnson, for Respondent.

CROCKER, J. delivered the opinion of the Court — CORP, C. J. and NORTON, J. concurring.

This is an action brought by McGarvey upon a promissory note and an account against the defendant, assigned to him by one Dickson. The defendant in his answer, among other things, made the following averments: That at the time of making the promissory note he executed and delivered to Dickson a bill of sale intended as a mortgage, to secure the note, conveying all his interest in a certain sheep contract with S. C. Hastings, one hundred and fifty head of hogs, and four horses, and delivered the said property to Dickson; that the said property is worth \$2,000; that afterwards Dickson and the defendant entered into a written agreement, which is copied into the answer, by which it was agreed that, in case the defendant did not sell before the first of October, he had sold to Dickson his interest in a flock of sheep belonging to S. C. Hastings; also his quarter ranch, and two tons of hay thereon; Dickson agreeing to take the ranch, sheep, and hay for a fair valuation, to be determined by two or more men "that both might agree to;" Dickson to take the property as far as it would go on the debt of the defendant; that he did not sell said property on or before the first of October; that he has complied with said agreement on his part, and Dickson has failed and refused to comply on his part; and that his interest in the property described in this agreement is worth the sum of \$1,500. The plaintiff moved to strike out this portion of defendant's answer, and the motion was sustained. The case was tried by the Court, findings in favor of the plaintiff were filed, and a judgment rendered accordingly, from which the defendant appeals.

It is clear that the defendant had a right to set up the execution and delivery of the bill of sale in the nature of a mortgage, and the fact of the delivery of the property therein named, as a defense. He had a right to have the property mortgaged applied in satisfaction of the debt. If the assignor, Dickson, had sold or disposed of

Coster v. Brown.

any of the property, the defendant was entitled to have the proceeds or the value thereof applied toward the satisfaction of his debt. If the property still remained in the hands of Dickson, he had a right to have it sold under the order of the Court, and the proceeds applied in the same way. The Court therefore erred in striking out that portion of the answer.

The execution of the subsequent agreement cannot be pleaded as an accord and satisfaction at common law, because there has been no acceptance of the property as a satisfaction, as required by the rules of law upon that subject. (Chitty on Contracts, 658, 659.)

Nor can it be pleaded as a ground for equitable relief in the nature of a specific performance of the contract. As a general rule, equity will not decree a specific performance of a contract respecting personal property. There are some exceptions to this rule, relating to heir-looms, family jewels, and the like, when there is a peculiar value attached to the article, that cannot be compensated in the damages. In such cases, because of the especial value placed upon the property on account of its individual or associate qualities, equity will grant relief by decreeing a specific performance, or a delivery of the specific article. (Fry on Specific Performances, Secs. 27-31.) The present case does not come within the exceptions.

But the defendant had a clear right to set up this agreement in his answer, as a ground for damages which he had sustained by the non-performance of the contract on the part of Dickson; and he had a right to have such damages applied, by way of recoupment, upon the debt. The Court therefore erred in striking out this part of the answer.

The judgment is reversed, the order striking out is set aside, and the cause remanded for a new trial.

COSTER v. BROWN — SCHNEIDER, INTERVENOR.

WHERE the debt, to secure which a mortgage is given, is barred by the Statute of Limitations, the mortgage is also barred; and if an action is brought to

Coster v. Brown.

foreclose it, one who has purchased or acquired a lien on the property subsequent to the mortgage, has a right to intervene in the action and plead the Statute of Limitations.

APPEAL from the Eleventh Judicial District, El Dorado County.

The facts are stated in the opinion of the Court.

H. C. Sloss, for Appellant.

S. W. Sanderson, for Respondent.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action to foreclose a mortgage. Schneider filed a petition of intervention, alleging that he had purchased the mortgaged premises at a sale under a decree of foreclosure of a subsequent mortgage, and that plaintiff's mortgage was barred by the Statute of Limitations. The plaintiff demurred to the petition, so far as it set up the Statute of Limitations, on the ground that the same did not state facts sufficient to constitute a defense to the action. The Court below sustained the demurrer, and rendered judgment in favor of the plaintiff for the amount of the debt, foreclosing the mortgage and ordering a sale of the mortgaged premises; from which the intervenor appeals.

The note sued on, and to secure which the mortgage was given, fell due on the first day of November, 1857, and this action was not commenced until December 18th, 1861, more than four years after the right of action accrued. We have held in several cases, that a subsequent purchaser or incumbrancer of the mortgaged premises has the right to plead the Statute of Limitations in bar of any action for the sale of the property. (*Lord v. Morris*, 18 Cal. 490; *McCarthy v. White*, 21 Id. 495; *Grattan v. Wiggins*, 23 Id. 16.) The intervenor had a clear right to intervene in this case, and plead the Statute of Limitations in bar of so much of the relief as related to a sale of the mortgaged premises for the payment of the plaintiff's debt.

The judgment is therefore reversed, and the cause remanded for further proceedings.

McNiel v. Borland.

McNIEL *et al.* v. BORLAND *et al.*

THE proceeding to enforce a mechanic's lien under the law of 1861, is a special case, within the proper meaning of that term as used in the Constitution, of which the Legislature might properly give jurisdiction to the County Courts. The law of 1861, giving to County Courts jurisdiction to enforce mechanics' liens, is not unconstitutional.

APPEAL from the Eleventh Judicial District, El Dorado County.

Plaintiffs filed their petition, on the 18th day of January, 1862, in the County Court of El Dorado County, to foreclose a mechanic's lien for work and labor performed in the construction of a building. The County Court dismissed the proceeding for want of jurisdiction and plaintiffs appealed:

S. W. Sanderson, for Appellants.

The Constitution, Art. 6, Sec. 9, provides as follows, to wit: "The County Courts shall have such jurisdiction in cases arising in Justices' Courts and in special cases, as the Legislature may prescribe; but shall have no original civil jurisdiction except in such special cases."

"An Act concerning the Courts of Justice of this State and Judicial Officers, passed May 19th, 1853" (Chap. 5, Sec. 44), provides as follows, to wit: "The County Court shall have original civil jurisdiction — 1st, of an action to enforce the lien of mechanics and others." * * * * *

Sec. 7 of the Mechanics' Lien Law of 1861, provides as follows, to wit: "Said liens may be enforced in the County Court by any lienholder, upon his filing a petition, etc." * *

Thus it appears that both these acts confer jurisdiction in express terms; but it is contended on the other side, that both these acts, in the present particular, are unconstitutional. Whether they are so or not, depends upon the meaning of the words "special cases" in the Constitution, and whether mechanics' liens come within that meaning. The section of the Constitution in question is taken, word for word, from the Constitution of New York, Art. 6, Sec. 14, last sentence of the section. Under this section, the Court of

McNiel v. Borland.

Appeals of that State have held that the foreclosure of a mortgage was a special case, and that an act conferring jurisdiction of actions for the foreclosure of a mortgage upon the County Court was constitutional. (*Arnold v. Rees*, 18 N. Y.; 4 Smith's Court of Appeals, 57.) Also in the case of *Doubleday v. Heath* (16 N. Y., 2 Smith, 80), the same Court held that an action for a partition of real estate was a special case, and jurisdiction was constitutionally conferred upon the County Court. Upon the question as to what are special cases, *Rundolf v. Tholheimer et al.* (12 N. Y., 2 Kern., 593) is also cited.

Within the reasoning of those cases, a mechanic's lien under Sec. 7 of the Act of 1861, is undoubtedly a special case. No case could be more special. The proceeding there described is wholly unknown to the common law. It is wholly the creation of statute, and bears no resemblance to an action at law or a bill in equity. It is *sui generis*, and unlike any proceeding belonging to Courts of general jurisdiction, whether legal or equitable. The language used by Ch. J. Denio, in *Doubleday v. Heath* (p. 83), is in every respect applicable to the present case. "The proceeding to obtain partition" (to enforce a mechanic's lien) "is, in fact, very special in its character. It is commenced by petition, without a suit of any kind. The allegations of the parties are peculiar, and unlike those in the ordinary common law actions. Everything is summary, with a view to save expenses and prevent delay. It may be characterized, I think, as a special statutory proceeding, instituted to take the place of the tedious action by original writ out of chancery, to which I have referred. It may, therefore, in my opinion, be considered a special case, according to the use of that phraseology in the Constitution."

But it is contended that a different construction has been put upon the phrase in question, by the Supreme Court of this State, and the doctrine of *stare decisis* is appealed to by counsel upon the other side. In support of this position, the cases of *Parsons v. The Tuolumne Co. Water Company* (5 Cal. 43), and *Brock v. Bruce et al.* (5 Id. 279), are relied upon. We submit that neither of these cases, either expressly or by implication, asserts a doctrine fatal to the present case. The first case decides that an action to

McNiel v. Borland.

abate a nuisance is not a special case, and the Court there say: "We think that the term 'special cases' was not meant to include any class of cases for which the Courts of general jurisdiction had always supplied a remedy."

But it is further contended that the case of *Brock v. Bruce et al.* (5 Cal. 279), goes further and especially declares that a mechanic's lien is not a special case. That case decides that a mechanic's lien under the statute which existed at that time, was not a special case; but it does not decide that it is not competent for the Legislature to create a lien and prescribe proceedings under it which might make it a special case. The lien which the Court decides in that case was not a special case — was created and governed by the Act of 1850.

But, *non sequitur*, that the Mechanics' Lien of 1861 is not a special case. On the contrary, the same reasoning that shows that of 1850 not to have been one, proves that of 1861 to be one. Under the Act of 1861, we have no action or suit by complaint and summons in the ordinary manner; we obtain no personal judgment, but if such is desired, we are sent to another Court, and remitted to the ordinary remedy by suit. The remedy is summary, unusual, extraordinary, peculiar, and special; and so new and strange that it never has been, before this time at least, attached to "the general frame-work of Courts of Common Law and Equity."

The case made by the seventh section of the Act of 1861 is as much a peculiar and special case as that of the insolvent, or a contested election, or the granting or dissolving of injunctions, or the issuing of commissions to take testimony; yet jurisdiction in all these cases has been constitutionally conferred upon the County Court or the Judge thereof.

Humphrey Griffith, for Respondent.

It would scarcely be deemed either necessary or proper to argue this question before this Court after the decision of *Brock v. Bruce et al.* (5 Cal. 279), where this question is decided in terms, were it not for the effort of appellant to procure a reversal of that decision. In the decision of that case, the Court go to the foundation of the right as conferred by statute, and say that it is

McNiel v. Borland.

one which can be enforced on the chancery side of the District Court. And surely that Court has the same power now that it had under the old statute, in addition to which is the fact that the course contended for by the appellant would require a multiplicity of suits to accomplish what, under the ruling of the Supreme Court heretofore, could as well be done in one.

This Court, in a long series of decisions, has defined the limits of the jurisdiction of the different Courts under the Constitution, and that jurisdiction is now well settled and understood; for no light cause should it be interfered with. We think the Court decided rightly in holding that a suit to enforce a mechanic's lien was not a special case. If there ever was room to doubt the propriety of that decision, the evil of overturning it would be greater than to abide by it.

NORTON, J. delivered the opinion of the Court—CORE, C. J. and CROCKER, J. concurring.

The provision of our State Constitution, that County Courts shall have jurisdiction in special cases as the Legislature may prescribe, was copied from the Constitution of the State of New York. The Judges of the Court of Appeals of that State are about equally divided as to the proper meaning of the provision. One portion consider that it is the purpose of the Constitution to confer upon the Supreme Court, which corresponds to our District Court, general jurisdiction in all cases properly cognizable in Courts of Law and Equity, without specially designating them; and also to authorize the Legislature to confer upon County Courts jurisdiction in such cases as the Legislature might think appropriate to that tribunal, and should specially designate. Another portion consider that the Constitution intends only to authorize the Legislature to confer jurisdiction upon County Courts in cases which are in their character special, by differing from those cases of which the Supreme Court would take cognizance by virtue of its powers as a Court of general jurisdiction. (*Arnold v. Rees*, 18 N. Y. 57.) The latter is the view taken by the Supreme Court of this State. (*Parsons v. The Tuolumne County Water Co.*, 5 Cal. 43; *Brock v. Bruce et al.*, 5 Id. 279.) In these cases our Supreme Court say:

McNiel v. Borland.

"The 'special cases,' therefore, must be confined to such new cases as are the creation of statutes, and the proceedings under which are unknown to the general framework of Courts of Common Law and Equity." There remains difficulty, however, in determining what are such special cases.

It is a maxim that there can be no right without a remedy; and it is not easy to imagine any new case in which a right should be conferred by statute, for which a mode of enforcing it would not be found in the general framework of the Courts of Common Law and Equity. In New York, some of the Judges, who held that these special cases must be in their character different from those falling within the cognizance of Courts of general jurisdiction, have nevertheless concurred in holding that a proceeding for the partition of land and an action to foreclose a mortgage were special cases. (*Arnold v. Rees*, cited above; *Doubleday v. Heath*, 16 N. Y. 80.) And in our State the same has been decided in regard to proceedings in insolvency. (*Harper v. Freelon*, 6 Cal. 76.)

The lien of a mechanic upon a house and the ground on which it stands, as security for the amount due to him for work done and materials furnished in building the house, irrespective of any contract for such a lien, is the "creation of statute," and the proceedings to enforce it as provided by the law of this State as amended in 1861, "are unknown to the general framework of Courts of Common Law and Equity," if any proceedings can be. They are commenced by petition, and not by complaint and summons. No summons or other process is issued, but in their place a notice is published for all persons interested to come in and participate; and all the other steps are calculated to dispose of the matter in a summary way, and with the least delay and expense. In these respects they are substantially identical with the proceedings in insolvency. The right and the remedy are peculiar, and we can conceive of no case that could be considered "special," if this is not.

It is said, however, that the point has been decided the other way in the case of *Brock v. Bruce* (cited above). We think there is a radical difference between that case and this. By the law as it stood when that case was decided, the mechanics' lien

McNiel v. Borland.

could only be enforced by an action; and the Court put the decision expressly upon the ground that the mechanic could enforce his right to compensation for his work and materials by suit in Courts of general jurisdiction, and that the lien was a species of mortgage added by statute, which followed the debt, and might be enforced in the same action. In the law, as it now stands, the debt and the lien are expressly separated: the former to be enforced by an action, of course, either in the District Court, or before a Justice of the Peace; the latter by a special proceeding in the County Court only. The debt, which would exist if there were no Mechanics' Lien Law, may be enforced like any other debt—by action in a proper Court. The lien is a peculiar right, existing only by the statute, and which the same statute provides must be enforced by a special proceeding wholly separate from the debt. This case falls within the definition of "special cases," as given in the case of *Brock v. Bruce et al.* (5 Cal. 279), but is not within the effect of that decision.

If the term "special cases" in the Constitution, means such cases as the Legislature may see fit to assign to the jurisdiction of County Courts by special designation, without regard to their peculiar character, then of course the County Court had jurisdiction of the case under consideration, as such jurisdiction is directly given by the seventh section of the Mechanics' Lien Law as amended in 1861.

Our conclusion is, that under either view of the proper meaning of the term "special cases" in the Constitution, the provision to enforce a mechanic's lien under the law as amended in 1861, is a special case of which the Legislature might properly give jurisdiction to the County Courts under the Constitution.

The judgment is therefore reversed, and the cause remanded for further proceedings.

People v. Linn.

THE PEOPLE v. ADAM LINN.

In an indictment for larceny in stealing coin, the same strictness of proof in identifying the property is not required as in other species of property; and in such case it is proper that the jury should be left to determine from all the testimony and all the circumstances, whether the coin proved to have been stolen was the same as that charged in the indictment.

APPEAL from the Court of Sessions, City and County of San Francisco.

The defendant was indicted for stealing sixty-four pieces of gold coin of the lawful currency of the United States, of the value of twenty dollars each, being of the denomination of double-eagles. He was found guilty, sentenced, and from the judgment of the Court appeals.

Henry B. Jones, for Appellant.

There is an entire variance between the description of the money in the indictment and the proof.

This Court has, in terms, decided what the description of money must be in an indictment for larceny. (*People v. Bell*, 14 Cal. 101.) In all material averments, the proof and the description in the indictment must correspond, even although the averments of the indictment are unnecessary. (*Roscoe's Cr. Ev.* 102; *State v. Hughes*, 1 Swan, 262; 2 Russ. on Crimes, 109.)

When a specific coin is described, the proof must show the larceny of some one or more of the specific coins charged to have been stolen. (*Burr. on Cr. Ev.* 171, 186, 657; 1 Stark. Ev. 491, 499, note; *Whart. Cr. L.* 162; *Barb. Id.* 2d Ed. 187.)

Proof that property is of the same kind with that lost is insufficient. The larceny charged of a "gray horse," is not sustained by proof of the larceny of a "gray gelding." (*Hooks v. The State*, 4 Ohio, 350.) The larceny of "money" is not sustained by proof of the larceny of bank notes." (*Prior v. The Commonwealth*, 2 Darm. 298.)

Nathan Porter, for Respondent.

People v. Llan.

CROCKER, J. delivered the opinion of the Court — COPE, C. J. and NORTON, J. concurring.

The defendant was indicted for the crime of grand larceny in stealing gold coin. On the trial, the defendant asked the Court to instruct the jury as follows: 1st. That if the jury find from the evidence that the prosecution has failed to identify the money described in the indictment, as it is there described, they must acquit the defendant. 2d. That the mere statement of a sum, is not a sufficient identification of the money described in the indictment to warrant a verdict of guilty." The Court instructed the jury as asked, with this explanation: "That the jury must be satisfied from all the testimony that the money referred to by the witness Williamson, in the alleged admission of the defendant to her, was the same money, or a part of the same money, described in the indictment—that that would be a sufficient identification, without a more specific identification of the money taken;" and the defendant excepted to this qualification of the instructions as asked by him. There is no error in this qualification of the instructions. Coin is not capable of the same specific description and identification as other property, and therefore the same exactness in proof cannot be had. It is therefore proper that the jury should be left to determine, from all the testimony and all the circumstances, whether the coin proved to have been stolen was the same kind of coin as that charged in the indictment; and if several kinds are stated in the indictment, then the proof should show that one or more of such kinds were among the kinds of coin stolen.

It is also urged that the mere confession of the defendant is insufficient, without other proof of the fact, that a crime had been committed. The weight of the authorities is in favor of the doctrine that the prisoner's confession alone is sufficient to warrant a conviction; while some cases hold that the *corpus delicti* at least must be proved by other evidence. (1 Phillip's Ev., C. H. & E.'s Notes, 532, 541.)

In the present case, there was sufficient evidence to show that a larceny had been committed, and that the prisoner was in all probability the person who committed it, independent of his confessions.

Neely v. Naglee.

This objection is therefore overruled. There was also sufficient evidence to show that the offense was committed within the jurisdiction of the Court that tried the case.

The judgment is therefore affirmed.

NEELY v. NAGLEE.

WHEN a legal notice is served by mail, the distance which it travels is a question of fact to be determined by proof.

The law fixing the distances from the different County Seats to the Capital, State Prison, and Asylum, refers only to the distances for which mileage shall be allowed to Sheriffs, County Treasurers, etc., and has no application to the service of legal notices.

The statement or representation of an agent, made at the time of a transaction which is within the scope of his authority, is evidence against the principal himself.

When an agent's letters have been adopted or acted upon by the principal, they become admissible in evidence against the principal.

APPEAL from the Third Judicial District, Santa Clara County.

The facts are stated in the opinion of the Court.

W. W. Stow, for Appellant.

“The declarations or admissions of an agent, made in regard to a transaction already past, but while his agency for a similar purpose still continues, will not bind the principal.” (See a similar letter in *Webber v. Marshall*, 19 Cal. 453; and see this case subsequently decided on the ground and principle above laid down.) *Thalhimer v. Brinckerhof* (4 Wend. 394), was decided on this principle, and Judge Marcy quotes, with approbation, *Bentham v. Benson* (Gow's N. P. 45), as follows: “It is not true that when an agency is established, the declarations of an agent are admitted in evidence merely because they are his declarations; they are only evidence when they form a part of the contract entered into by the agent, on the behalf of his principal, and in that simple case, they become admissible.” (*Fairlie v. Hastings*, 10 Vesey, 123;

Neely v. Naglee.

see *City Bank of B. v. Bateman*, 7 H. & John. 104, 108; 19 Pick 220; 3 Day, 491, 495; 8 Metc. 142; *Laughom v. Allnutt*, 4 Taunt. 511.) The law is too well settled to admit of a doubt.

C. T. Ryland, for Respondent.

In the letter, Janes does no say "our arrangement about the cattle was," but, "our arrangement is," as follows: This contract or letter is signed by him, as Naglee's agent. He was acting for Naglee; he was making the contract then. He was not, as appellant now contends, telling what the arrangement had been. He spoke nothing of a former contract, but was at the date of that instrument, making the contract itself. From the evidence, it will appear that what defendant calls admissions of the agent, were made *dum ferveret opus*, and that exhibit No. 6, being the contract, was made during that time, and was in fact *res gesta*. (See 1 Greenl. 113-126; Story's Agency, 134, 135; 9 Cal. 256.) The case in 19 Cal. 453, referred to by defendant, is not in point. In that case, the agreement was as a fact, made before the letter of Hammond was written; and the letter shows on its face that it referred to a prior transaction, and was written as evidence of such prior agreement.

CROCKER, J. delivered the opinion of the Court—CORN, C. J. and NORTON, J. concurring.

This was an action upon an account for work and labor performed by the plaintiff and his wife, for goods sold, money paid, etc. The case was, by stipulation of the parties and order of the Court, referred to a referee to take the testimony and report the same to the Court. The referee took the testimony, duly reported the same, the Court filed its findings therein in favor of the plaintiff, and judgment was rendered accordingly, from which the defendant appeals.

The stipulation of the parties provides that five days' notice of the time and place of taking the testimony by the referee should be given to the parties. The referee resided at San José, and the testimony was taken there, while the defendant's attorney resided at San Francisco. A proper notice, specifying the time and place

of taking the testimony, was duly deposited in the post-office at San José, postage paid, directed to the defendant's attorney at San Francisco, seven days before the time fixed. The defendant did not appear at the taking of the testimony; and when the case came before the Court, upon the testimony as reported by the referee, the plaintiff moved for judgment upon the pleadings and testimony, which was opposed by the defendant, who objected to the Court's considering any part of the testimony, on the ground that he was not present when it was taken, and proper notice had not been given. On the hearing of this motion, the plaintiff introduced a witness who testified that he knew the distance between San José and San Francisco, and that the distance by the United States mail-route is about forty-eight or fifty miles. The defendant, however, contended that the distance was to be ascertained by the Statute of 1858, defining the legal distances from each county seat to the Capital, Lunatic Asylum, and State Prison; that by that act the legal distance from San José to San Quentin was fixed at eighty miles, and the distance from San Francisco to the latter place was fixed at twelve miles, leaving the legal distance from San José to San Francisco at sixty-eight miles, which, at twenty-five miles per day, would require three instead of two days for the traveling time of the notice. The Court overruled the defendant's objection, and he now assigns this action of the Court as error.

The act referred to by the defendant declares that the distances established by it, are the legal distances for which mileage shall be allowed for County Treasurers settling their accounts, for conveying the insane to the State Asylum, and to Sheriffs for transporting prisoners to the State Prison, and it therefore has no application to the question before the Court. The distance between San José and San Francisco was a fact to be determined by proper evidence; and such evidence was introduced by the plaintiff, establishing it at forty-eight to fifty miles. This evidence shows that the notice was served in due time, and the Court therefore properly overruled the defendant's objection.

Among other evidence reported by the referee was the following letter to the plaintiff, written by Janes, the defendant's agent, to wit:

Neely v. Naglee.

SAN FRANCISCO, December 1st, 1860.

MR. ROBERT NEELY—Dear Sir: Our arrangement about cattle, hogs, and poultry, on Naglee's place in San José, occupied by you, is as follows: For taking care of the same, you are to have half the produce and increase, Naglee furnishing the feed and service of bulls, etc.—you doing all the labor. Yours, etc.,

H. P. JAMES,

Agent for H. M. Naglee.

The defendant moved the Court below to strike out this letter from the testimony, on the ground that it was a mere declaration or admission made by the agent *after* the agreement stated in the letter was made, and therefore not admissible. The Court overruled this motion, and this is also assigned for error.

The general rule is that the statement or representation of an agent, at the time of a transaction which is within the scope of his authority, is evidence against the principal himself, in consequence of the legal relation between principal and agent. (1 Phillip's Ev. C. H. & E.'s Notes, 507.) But when an agent has said or written anything relative to a transaction which is past and completed, the question of the admissibility of the agent's declaration without calling the agent depends on the point whether the making of such a statement was within the scope of the agent's authority. (Id. 513.) When an agent's letters have been adopted or acted upon by the principal, they become admissible against him, for the principal's conduct raises the inference that the letters were written within the scope of the agent's authority. (Id. 516.)

From the terms of this letter it would seem to relate to a present contract then put in writing. The words are, "our agreement is as follows," not *was*, which would have been the word used had the writer referred to an agreement previously made. The writing is therefore to be considered as the agreement itself, and not as an admission merely of some prior contract. The authority of the agent to make such an agreement on behalf of the defendant is not disputed. The evidence shows further that the plaintiff afterwards exhibited to the defendant his account, which included the matters to which this letter relates, and he made no objection to it, but

People v. Gaunt.

promised to send him the money from San Francisco, where he was going the next day. It appears also that one Fox, on behalf of the plaintiff, asked the defendant for a settlement of the plaintiff's accounts with him, and for a division of the stock and poultry, to which the defendant replied that he was not prepared; but he made no objection as to the right of the plaintiff to a division. From this evidence it would seem that the defendant must have known of the agreement referred to in the letter, and that he had adopted or acquiesced in it. It is clear, however, that the Court did not err in overruling this motion of the defendant.

The judgment is therefore affirmed.

THE PEOPLE *v.* GAUNT.

THE granting of continuances rests very much in the discretion of the Court below, and it is only in cases where that discretion has been abused, that the Supreme Court will review its action.

An affidavit for a continuance should state that the facts expected to be proved by the absent witness, cannot be proved by any other witness.

The case of the *People v. Gatewood* (20 Cal. 147), as to challenging jurors, affirmed.

APPEAL from the Eleventh Judicial District, Placer County.

The facts are stated in the opinion of the Court.

Hereford & Williams, for Appellant.

If error be committed in the case (that is a criminal case), this Court will not undertake to say whether the defendant was injured or not. In the case of *The People v. Stewart* (7 Cal. 144) the Court say: "It is enough for us to know it might have been different." In the case of *People v. Ybarra* (17 Cal. 171) the Court say: "When error is shown, the burden of establishing its immateriality rests upon the party in whose favor it was committed." In *People v. Williams* (18 Cal. 194) the Court say: "If any error intervenes in the proceeding, it is presumed to be injurious to the prisoner."

Certainly error intervened in this case; if so, the case should be reversed, and the case of *The People v. Gatewood* reversed.

C. J. Hillyer, for Respondent.

As the jurors challenged did not sit in the case, and as the jury was completed and accepted by defendant without exhausting his peremptory challenges, he cannot avail himself of any exception to the ruling of the Court upon the challenges for cause. (*People v. Gatewood*, 20 Cal. 146; *People v. Knickerbocker*, 1 Parker's Crim. 302; *Freeman v. The People*, 4 Denio, 31; *Stewart v. The State*, 8 Eng., 13 Ark. 741-743.)

The *People v. Gatewood*, which is precisely in point, is fully sustained by the other cases cited, in each of which the facts are almost identical with those of the case at bar.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

The defendant in this case was indicted and tried, in the County of Placer, for the crime of murder, and was convicted of manslaughter. The case was first set for trial July 22d, 1862, but was continued until the next (October) Term, on the application of the defendant, on the ground of the absence of material witnesses. At the October Term, when the case was called for trial, the defendant again moved for a continuance, on the ground of the absence of some of his witnesses; the Court overruled the motion, and this is assigned as error.

The trial was set for October 31st, 1862. The subpoena bears date October 13th; was issued to the Sheriff of Santa Clara County, and was served by him on two of the three witnesses October 27th, in that county, the return showing that the other witness was not found. The affidavit of the defendant, on which the motion for a continuance was founded, set forth that he expected to prove by these witnesses the character of the deceased—that he was a quarrelsome man, etc.—and that these facts were known to the defendant; and further states “that he does not know of any other witnesses by whom he can prove the facts aforesaid as fully as by the said witnesses.” This matter of granting and refusing continuance rests very much in the discretion of the Court below; and it is only in cases where that discretion has been abused that this Court will

People v. Ebner.

review their action. We see no abuse of that discretion in the present case. It is necessary in applications of this kind to show that the testimony of the absent witness is not merely cumulative, and that the same facts cannot be proved by another whose testimony can be procured. (*People v. Thompson*, 4 Cal. 240; *People v. Quincy*, 8 Id. 89.) In this respect the affidavit is clearly insufficient, for it admits that the same facts can be proved by others, though not in his opinion as fully as by the absent witnesses. The facts he states he expected to prove by the absent witnesses, are of such a character as would be likely to be generally known in the community where the deceased lived; and could, therefore, hardly be confined to a few persons. There was, therefore, no error in denying the continuance.

During the impanneling of the jury, the defendant challenged one Myrick, who was called as a juror, for implied bias. Three triers were sworn to inquire whether the jurors challenged were biased against the defendant. During the examination of the juror, several questions asked by the defendant were ruled out by the Court, to which he excepted. The triers found the challenge was not true. Thereupon the defendant challenged the juror peremptorily. Like proceedings were had as to two other jurors. This action of the Court is also assigned for error. The statute gave the defendant twenty peremptory challenges, only ten of which were used by him, thus leaving him ten peremptory challenges after the jury was impaneled. It is clear, therefore, that the defendant suffered no injury by the ruling of the Court upon these questions, and it is therefore unnecessary to determine whether such ruling was erroneous or not. (*The People v. Gatewood*, 20 Cal. 147.)

THE PEOPLE *v.* EBNER *et al.*

THE crime of false imprisonment is not a felony under the laws of this State. If the indictment be for a misdemeanor, the defendant may appear and plead by attorney, and the trial may be had in his absence. In an indictment for a misdemeanor, if the defendant appear and offer to plead by attorney, the Court has no power to enter his default and declare his recognisance forfeited.

People v. Ebner.

APPEAL from the Sixteenth Judicial District, Amador County.

The facts are stated in the opinion of the Court.

J. C. Goods and *J. W. Coffroth*, for Appellants.

It is well settled that the District Court cannot revise a judgment of forfeiture which has been entered in the Court of Sessions. The District Court has no power to question the regularity or legality of such judgment. (*People v. Wolf*, 16 Cal. 385.)

In this case the appellants do not question the correctness of the opinion in the case of *People v. Wolf*, but they do contend strenuously that they had a legal right in the District Court, as a defense to the action upon the forfeited recognizance, to prove that the defendant Heilbron was present by attorney in the Court of Sessions when called.

Can sureties who are sued in the District Court upon a recognizance forfeited by the Court of Sessions make any defense to the action?

The District Court would surely not be revising the judgment of forfeiture entered by the Court of Sessions by hearing testimony of witnesses to prove that the defendant (for whose appearance the sureties became responsible) was dead at the time of forfeiting the recognizance, and consequently unable to appear and answer the indictment. If such testimony would be a defense for the sureties, why may they not plead any legal cause? In this case it is admitted that the defendant was charged with a misdemeanor, and that he appeared by counsel when called for arraignment. Having thus appeared, appellants contend that it was a good and sufficient defense to the action in the District Court.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action upon a forfeited recognizance, executed by the defendants as sureties for one A. Heilbron, for his appearance to answer to an indictment for the crime of false imprisonment. On the trial the plaintiff introduced in evidence the record of the Court of Sessions of Amador County, in which the indictment was pend-

ELLIS v. HULL

ing, relating to the default of the party charged with the offense, which showed that when the case was called the defendant Heilbron appeared by attorney, though not in person, and tendered to the Court a plea of not guilty to the indictment; but the Court refused to accept the plea, and, on motion of the District Attorney, he was three times called at the window of the court-house, and not appearing in person his default was entered, and his recognizance declared forfeited. The defendants in this action, upon the production of this record, insisted that the defendant in the indictment had a right to appear and plead to it by attorney, and that his personal presence was not necessary—the offense charged being a mere misdemeanor, and not a felony; but the Court below overruled their objection and rendered judgment for the plaintiffs, from which the defendants appeal.

Sec. 259 of the Criminal Practice Act provides that: "If the indictment be for a felony, the defendant must be personally present; but if for a misdemeanor, his personal presence is unnecessary, and he may appear upon the arraignment by counsel." Sec. 320 also provides: "If the indictment be for a misdemeanor, the trial may be had in the absence of the defendant; but if for a felony, he must be personally present." So, also, Sec. 415 provides that in cases of misdemeanor the *verdict* may be rendered in the absence of the defendant. A forfeiture must be strictly proved. The record discloses that the Court of Sessions had no power or authority to enter a default, or to declare the recognizance forfeited.

The judgment is therefore reversed, and the Court below is directed to dismiss the action.

ELLIS v. HULL *et al.*

WHEREAS an appeal is taken to the Supreme Court from a judgment, by filing notice of appeal and undertaking, and the appeal is afterwards dismissed by the Supreme Court for failure of the appellant to send up a transcript, the sureties are liable on the undertaking on appeal.

APPEAL from the Seventh Judicial District, Solano County.

People v. Leet.

On the twenty-fourth day of December, 1861, judgment was rendered in the County Court of Solano County in favor of Ellis against Hull & Hull for three hundred and fifty-one dollars and fifty-three cents damages, and for one hundred and four dollars and fifty cents costs. On the twenty-third day of January, 1862, the defendants appealed to the Supreme Court, and the defendants W. Long and S. W. Long, as sureties, signed the undertaking on appeal. On the twelfth day of April, 1862, the Supreme Court dismissed the appeal, because the transcript had not been filed. This action was brought on the undertaking on appeal. The Court gave judgment for plaintiff, and defendants appealed.

M. A. Wheaton, for Appellants.

Swan & Hays and *G. W. McMurtry*, for Respondent.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action upon an undertaking on appeal, and the only ground of error assigned is that no appeal had been taken, and therefore that the undertaking was without consideration. The evidence sustains the findings of the Court that an appeal had been taken, which was dismissed by the Supreme Court with costs, on the ground of the failure of the appellants to file the transcript. The objection, therefore, is not well taken.

The judgment is affirmed.

THE PEOPLE v. LEET.

THE Statute of 1861, requiring real estate, in actions to recover taxes, to be described in the complaint with the same particularity as in actions of ejectment, only applies to actions in which the real estate is made a party defendant.

In an assessment for taxes, a description of a tract of land by name is sufficient. When the complaint avers that the property was duly assessed by an Assessor of a district or county (naming it), it is not necessary to further aver that the property was situated within the jurisdiction of the Assessor.

People v. Leet.

APPEAL from the Eleventh Judicial District, Placer County.

The facts are stated in the opinion of the Court.

W. H. Bullock, for Appellant.

The description is defective. The description of the real estate is, "Forks House Ranch"; the number of acres is not stated; the complaint does not state that it is inclosed; it does not state whether there are any buildings on the ranch, or any improvements.

There is no allegation that the property assessed in is Township No. 6. This is fatally defective. Assessors in Placer County are elected in each township. Unless the property was in Township No. 6, Spear had no power or authority to assess it. The complaint should show clearly the authority of the Assessor. There are no presumptions in his favor. (*Lachman v. Clark*, 14 Cal. 138; *Ferris v. Coover*, 10 Id. 632; *People v. Pico*, 20 Id. 595.)

The description of the property at Michigan Bluffs is as follows: "Stone buildings on the south side of Main Street," etc. This is insufficient; each building should be separately assessed, because they may belong to different owners, or they may be sold to different persons, and each would have the right to pay the taxes on his own property. Several buildings could not be sold in a lump for taxes; such a tax deed would convey no title. This is a plain principle, applicable to all taxation; this principle was decided in the case of *Terrill v. Graves* (18 Cal. 149). The assessment should show that the tax was on the improvements, and not on the land itself. (*Hall v. Downing*, 18 Cal. 619.)

Jo. Hamilton, for Respondent.

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is an action to recover delinquent taxes levied upon property assessed to the defendant in the year 1862, under the Revenue Law of 1861 and the amendments thereto. The defendant demurred to the complaint on the ground that it did not state sufficient facts to constitute a cause of action; that the Court had no

jurisdiction of the subject of the action; that there was a misjoinder of parties; and that it was ambiguous and uncertain. And a special demurrer on behalf of the real estate, which was made a party, was also interposed, that it did not state facts sufficient to constitute a cause of action against the real estate. The Court sustained the demurrer as to the real estate, and overruled it as to the defendant, Leet; and, no answer having been filed within the time fixed by the Court, a final judgment was rendered against the defendant for the amount of the taxes and costs, from which the defendant appeals.

No appeal having been taken on behalf of the plaintiffs, the action of the Court in sustaining the demurrer as to the real estate cannot be reviewed.

The appellant alleges as error, that the description of the real estate is defective and insufficient, and the Court erred in not sustaining his demurrer for that reason. It is doubtful whether the appellant has the right to raise this objection here, under the peculiar circumstances of this case. The Statute of 1861 authorizes suit to be brought against the "person so delinquent, and against the real estate and improvements assessed so delinquent," etc.; and, in making the real estate a party, it requires that it shall be described with the same particularity as in actions of ejectment; but no description seems to be required, except for the purpose of identifying the real estate as a party. (Stat. of 1861, 432, Sec. 40.) The demurrer filed on behalf of the real estate having been sustained, and no amendment having been made, the real estate ceased to be a party to the action; and the reason for a particular description ceased to have any force, as no judgment could be or was entered against it.

Still, however this may be, we think the description is sufficient. One tract is described as the "Forks House Ranch, valued at \$1,500; said ranch situated about twelve miles north and easterly from Michigan Bluffs, about one and a half miles southerly and easterly from Damascus." This is a sufficient description, as held in the cases of *Castro v. Gill* (5 Cal. 42) and *Yount v. Howell* (14 Id. 467). A description of a tract of land by name is sufficient, as it is presumed that the tract, and the extent of its bound-

People v. Leet

aries, is well known by the name. The next piece is described as a "house and lot on the north side of Main Street, Michigan Bluffs, occupied by A. Ferguson as a tin shop, valued at \$400." This is clearly sufficient to identify it. The last is a "stone building on the south side of Main Street, Michigan Bluffs, between Tyler's and Levin & Hefter's, valued at \$2,700." This is also sufficient to identify the tract. This objection is therefore overruled.

It is also objected, that the complaint avers that the property was assessed by the District Assessor of Township No. 6, and it does not aver that the property is in that township. The complaint avers that the property was duly assessed by the District Assessor; and this is all that is required by the statute, which prescribes the form of the complaint in such actions. If it was not properly assessed, and there was any fraud in the assessment, the defendant should have set forth the facts in an answer.

It is also contended that the complaint should show that each building was separately assessed. The statute does not require any such statement in the complaint; and if it did the complaint in this case sufficiently states it, in averring the separate sums the property was valued at. The objection that the personal property assessed is not sufficiently described in the complaint, is untenable, as was held in *The People v. Eastman*, decided at the present term. The total amount of taxes claimed exceeds two hundred dollars, and the District Court therefore had jurisdiction of the case. If the property assessed included any public lands belonging to the United States, and therefore exempt from taxation, that fact should have been stated in an answer. The complaint does not show it, and the question, therefore, could not be raised by demurrer.

The judgment is affirmed.

GREWELL v. WALDEN *et al.*

THE plaintiff in an action may have the place of trial changed upon a proper showing made under the twenty-first section of the Practice Act, and it is error in the Court to refuse it.

IN pleading, it is the ultimate and not the probative facts, which should be averred; and it is error in the Court to exclude evidence offered to establish the probative facts, although they are not averred in the complaint.

APPEAL from the Fifth Judicial District, San Joaquin County.

The facts are stated in the opinion of the Court.

M. G. Cobb, for Appellant.

Appellant contends that if appellant's vendors had been owners of the land upon which the wood was cut, and out of possession, and defendants had entered without title, and cut and carried away the wood, the right to the wood may be shown by showing title to the land from which it was cut, and this without any allegation of title to the land in the complaint.

In support of this proposition in the Court below, the appellant relied upon *Halleck v. Mixer* (16 Cal. 574). Strange to say, the defendants in support of their doctrine that appellant could not go into the question of title to the land, not even the possession, without an allegation of title, etc., relied with equal confidence upon the same case. Unfortunately, the complaint set out in this case (*Halleck v. Mixer*), and which was demurred to, gives the defendants some justification for taking this ground.

As the appellant understands that case, the Court simply say, that where the title to personal property sought in a replevin suit depends upon the plaintiff's title to land, it does not vitiate the complaint to set out in it the land title. This case does not decide that this must be done. Defendants do not, or rather did not, dispute the law of this case but said in all cases, where the right to personalty is derived from realty, the title to the realty must be set out in the complaint *expressis verbis*.

The appellant has examined the authorities cited by the Court in

Grewell v. Walden.

Halleck v. Mixer, and also those cited by counsel for appellants in the same case; in none was the question raised which has been raised on this point of pleading; in nearly all, however, it may fairly be inferred that the title to real estate was incidentally tried under the personal action of replevin or trover, without any express averment having been made, as to the title in the complaint. (*Sands v. Pfeiffer et al.*, 10 Cal. 258; *Rockwell v. Sanders*, 19 Barb. 473; *Harlan v. Harlan*, 15 Penn. 507; *Brown v. Sax*, 7 Cow. 95; *Baker v. Wheeler*, 8 Wend. 505; *Wingate v. Smith*, 20 Me. 287; *Davis v. Early*, 13 Ill. 192; *Heath et al. v. Ross*, 12 Johns. 140.)

In replevin, a general allegation that plaintiff is the owner of the property, is sufficient under the New York Code, from which we have copied literally. (*Heine v. Anderson*, 2 Duer, 318; see also, *Vogel v. Babcock*, 1 Abb. Pr. 176; *Hunter v. Hudson River Ins. Co.*, 20 Barb. 501; 1 Whittaker's Prac. 738; 1 Van Santvoord's Plead. 279.)

The Court erred in not granting appellant a change of venue. The New York Code, Sec. 126, is similar to our own in this respect.

No point was made in the Court below by counsel for defendants as to the sufficiency of the affidavit in this case. The only point was as to the Court's having any discretion in such a case; the plaintiff having elected his tribunal. In local actions, where the plaintiff in the first instance is compelled to bring his action within a certain jurisdiction, the Courts have entertained motions for a change of venue on the part of plaintiff, on the ground of convenience of witnesses. (*Inter. Assur. Co. v. Sweetland*, 14 Abb. Pr. 240.)

As between plaintiff and defendant in such motions, in New York the Courts have laid it down, as a general principle governing applications of this nature, that the place of trial should be in the county where the principal transactions between the parties occurred, and where it appears the largest number of witnesses who know anything of the transaction sued upon, reside. (*Jordan v. Garrison*, 6 How. 6; *People v. Wright*, 5 Id. 23; *Goodrich v. Vanderbilt*, 7 Id. 467; *Hinchman v. Butler*, Id. 462; *Mason v. Brown*, 6 Id. 481; 2 Whittaker's Prac. 3d Ed. 251.)

Grewell v. Walden.

Our statute is broad enough to cover the discretion asked for.

Hall & Scaniker, for Respondents.

The general rule as to allegation of title in an action strictly personal, at common law, cannot be doubted; and it is not necessary that the evidence of the title should be stated. But all that is claimed here, on these points by the respondents, is that they should have been put upon notice by a general allegation that the appellant was the owner or in possession of the land from which the wood was severed. The defendants would then have put that fact in issue by a denial.

The case of *Halleck v. Mixer* establishes the following propositions:

1. That if it appears, whether on the face of the complaint or under the proofs, that the plaintiff's title to the wood rests upon his title to the land, and at the time of the cutting of the wood he is not in possession, but the defendant is, claiming the land adversely under color of title, the action of replevin cannot be maintained, because the Court will not determine the land title in the personal action.

2. But in other cases proof is admissible of title to the land, as the means of showing title to the wood; that is, where the title to the wood is founded on the title or possession of the land, and the defendant is a mere intruder or trespasser.

3. But in such case, in order to admit proof of the plaintiff's title or possession of the land, such title or possession must be alleged, because the title to the chattel is inseparably connected with the right to the land, and because it is that upon such proof the right of recovery rests.

The defendants did not deny in the Court below that the Court had a discretionary power to order a change of venue; but the defendants claimed that the proof upon the affidavits did not justify the Court in making the order, for the reason that the convenience of parties and of witnesses would not be subserved, but rather hindered thereby.

No such rule as that sought to be sustained by the cases cited in New York has been recognized in this State; and your Honors

Grewell v. Walden.

would not disturb the action of the Court below unless it was apparent that its discretion had been grossly abused.

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is an action brought in San Joaquin County to recover the possession of a quantity of cord wood, alleged to have been taken from the plaintiff's possession in Stanislaus County, and then detained in the County of San Joaquin. The defendant recovered judgment, from which the plaintiff appeals.

The plaintiff, after issue joined, moved the Court for a change of venue to Stanislaus County, alleging in his affidavit that his right to the wood depended upon his title and possession of the land from which the wood was cut, which lay in Stanislaus County, and that the convenience of witnesses, seventeen of whom are stated to be residents of Stanislaus County, required a change of the place of trial to the latter county. He also states good reasons why he commenced the action in San Joaquin County, to wit: the necessity of procuring the immediate possession of the wood before it could be removed beyond his reach to some other part of the State. No opposing affidavits appear to have been filed. The Court denied the application, and this is assigned for error. We see no good reason why the plaintiff in an action may not have the place of trial changed, upon a proper showing, equally with the defendant. There is nothing in the statute forbidding it. Sec. 21 of the Practice Act provides that "The Court may, on motion, change the place of trial in the following cases," etc. It does not confine this motion to the defendant, but leaves it open for both parties. As a general rule, the action should be commenced in the county where the defendants reside; but if, after the issues are made up, and each party knows the facts necessary to be proved, the plaintiff should find that the convenience of his witnesses requires that the trial should be had in some other county, where the cause of action arose, and where his witnesses reside, he is certainly as much entitled to a change as the defendant would be under the same circumstances, and he should not be denied that right because he has brought his action in the county where the defendants reside, or

where the personal property in controversy may happen to be found. The present case shows the importance of thus establishing the rule. The plaintiff finds his property in San Joaquin County, and to prevent its being carried away beyond his reach, or being converted by the trespasser, he commenced his suit in that county to recover its possession. But the property was taken from his possession in Stanislaus County, where the act was committed which forms the gravamen of the action, and where it is presumed the witnesses reside who know the facts. The Court therefore erred in refusing to change the place of trial.

During the trial the plaintiff called a witness, and offered to prove by him that he owned the land upon which the wood in question was cut, and sold the wood to the plaintiff, and put the following question to the witness: "Who was the owner and in possession of the land upon which the wood in question was cut and taken away by the defendants?" The defendants objected to the question, because it was inquiring into the title of land, and the plaintiff had made no allegation of such title in his complaint. The Court sustained the objection, and excluded all evidence relating to the title or possession of the land on which the wood was cut. After the plaintiff had closed his testimony, the defendants moved for a nonsuit, on the ground that the plaintiff's title to the wood depended upon the title of his vendors to the land upon which the wood was cut, and no such fact of title was averred in the complaint, or proved. The Court granted the nonsuit, and these rulings of the Court are assigned as error.

The Court erred in excluding the evidence, and in granting the nonsuit on the ground stated. In discussing the rules of pleading this Court say, in the case of *Green v. Palmer* (15 Cal. 411): "To illustrate this, let us suppose an ultimate fact, upon the establishment of which the claim or defense depends, and that the establishment of this fact depends upon the establishment of three or four prior facts, which being established proves this. It is the ultimate fact, and not the prior or probative facts, which should be set forth." To apply this rule to the present case. The ultimate fact to be established here is the ownership of the wood, when it was taken away by the defendants. The establishment of this fact

Grewell v. Walden.

depends upon establishing the ownership and possession of the land from which it was severed. These latter are, therefore, but probative facts, and need not be set forth; but the ultimate fact, to wit: the ownership of the wood being stated, it is sufficient. The principle that the owner of the land is entitled to the wood cut from it, where there is no other person in possession of the land, holding adversely in good faith under claim and color of title, was fully established in the case of *Halleck v. Mixer* (16 Cal. 574), and a similar principle had been sustained by this Court in the case of *Sands v. Pfeiffer* (10 Cal. 263). It is true that in the case of *Halleck v. Mixer* the facts relating to the ownership and possession of the land by the plaintiffs were fully set forth in the complaint, and there is no impropriety in making the averments in that manner; but it is not essential that they should be so stated in order to admit the proof of such facts.

The judgment is therefore reversed, and the cause remanded for further proceedings.

OCTOBER TERM, 1863.

[177]

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OCTOBER TERM, 1863.

FRANKLIN v. STATE BOARD OF EXAMINERS.

THE Constitution does not impose any limitation upon the amount of State indebtedness which may be created by the Legislature in case of war, to repel invasion or suppress insurrection.

The political department of the State Government is the sole judge of the existence of war or insurrection ; and when it declares either of these emergencies to exist, its action is not subject to review, or liable to be controlled by the judicial department of the State.

APPEAL from the Sixth Judicial District, Sacramento County.

On the twenty-first day of August, 1863, John Franklin filed his petition, in which he set forth that on the twenty-fifth day of November, 1861, he became an enlisted soldier in Company H of the second regiment of cavalry, California Volunteers, and on the twenty-fifth day of July, 1863, was honorably discharged from service, and that on the eighteenth day of August, 1863, he requested the Board of State Examiners to audit and allow his claim for five dollars per month during his period of service under the Act of April

Franklin v. State Board of Examiners.

27th, 1863, and that said board refused to audit and allow his claim.

The District Court denied the application for a *mandamus*, and from this judgment the petitioner appealed.

George Cadwalader, for Appellant.

In case of war, invasion, or insurrection, there is no limitation on the power of the Legislature to create a State debt exceeding \$300,000. (*The People v. Rogers*, 13 Cal. 159; *Cal. State Telegraph Co. v. Alta Telegraph Co.* 22 Id. 398; *Nogues v. Douglass*, 7 Id. 65.)

The recognition by the Legislature of either war, invasion, or insurrection, is a determination of a question of fact solely and exclusively confided in the Legislature. (*Houston v. Moore*, 5 Wheat. 1; *Martin v. Mott*, 12 Id. 29; *Luther v. Borden*, 7 How. 1.)

F. M. Pixley, Attorney-General, for Respondents.

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring, and COPE, C. J. concurring specially.

This is an application for a *mandamus* to compel the defendants to audit and allow a claim to the bounty of five dollars per month allowed by the Act of April 27th, 1863, entitled "An Act for the Relief of the Enlisted Men of the California Volunteers in the Service of the United States." The Court below refused the *mandamus*, and the plaintiff appeals.

The respondents contend that the act in question violates the eighth article of the State Constitution, and is therefore void. The portion of the article applicable to the present case reads as follows: "The Legislature shall not in any manner create any debt or debts, liability or liabilities, which shall singly or in the aggregate with any previous debts or liabilities, exceed the sum of \$300,000, except in case of war, to repel invasion or suppress insurrection," etc., etc. The act in question provides for the creation of a debt which may amount to \$600,000; and it is admitted that the indebtedness of the State, at the time of the passage of the law, greatly exceeded

Franklin v. State Board of Examiners.

the constitutional limit of \$300,000. These facts would render the act invalid, unless it is saved by the exception in Art. 8.

It is contended by the appellant, that the present condition of the nation is evidence that the exigency exists provided for by the exception, and, therefore, the act is valid; while, on the other hand, the respondents insist that there is nothing in the condition of our National affairs which authorizes the law. In arguing this question, various constructions of this exception have been suggested: One is, that the power of the Legislature to create debts is unlimited only in cases where a war exists in the State, or where there is an invasion or threatened invasion of the State; or where there is an insurrection within its boundaries. Another is, that it applies in all cases where a war or insurrection exists in any part of the United States, or there is an invasion or threatened invasion of any territory within the National jurisdiction. It is also claimed that it applies only to repelling invasions of the State, or suppressing insurrections within its bounds in time of war. We do not deem it necessary to investigate this question, or to attempt to give an exact or definite construction of the terms thus used in the Constitution. The evident intention was to impose limitations upon the general power of the Legislature to create debts, leaving them free, however, from such restrictions in great emergencies caused by a war, an invasion, or an insurrection. In such cases, the Legislature should be left free to exercise their judgment and discretion upon the subject, answerable alone to the people for any abuse of the power. The existence of the emergency calling for the exercise of the power is purely a political question, and the Legislature, as the body in whom the political power of the State is vested, are the sole judges as to the existence of such emergency. It is the exercise of a purely political power, upon a political subject, in no manner of a judicial character, and it is not, therefore, subject to review, or liable to be controlled by the judicial department of the State. The Legislature is, therefore, the proper judge of the construction to be given to the Constitution upon this subject.

In the exercise of their rightful authority, they have decided that the exigency has arisen demanding the exercise of the power, and they have directly declared that the object of the law and the debt

created by it, is "to aid in repelling invasion, suppressing insurrection, enforcing the laws, and preserving and protecting the public property;" and this decision cannot be reviewed or set aside by this Court.

In the case of *Luther v. Borden* (7 How. U. S. 1), it was held that the decision and determination of matters of a political character by the Executive or Legislative departments of the Government, was binding on every other department, and could not be questioned by a judicial tribunal. The dangers and difficulties which would grow out of the adoption of a contrary rule are there clearly and ably pointed out. The National Constitution declares that Congress shall have power "to provide for calling out the militia to execute the laws of the Union, suppress insurrections, and repel invasions;" and Congress, by the Act of 1795, provided "that whenever the United States shall be invaded, or be in danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the State or States most convenient to the place of danger as he may judge necessary to repel such invasion." It was held that this power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. It was also held that although the power is in its terms limited and confined to cases of actual invasion, or of imminent danger of invasion, yet the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons. There is no provision for any appeal from the decision of the President. (*Martin v. Mott*, 12 Wheat. 19.)

But even if it was necessary for this Court to decide whether or not war exists in the country, and that the emergency had arisen justifying the exercise of the power, there is sufficient in the condition of our National affairs to sustain the position that the emergency existed which justified the Legislature in passing the law. It is a matter of public history that eleven of the State Governments have organized a new confederacy of States, which they have called the "Confederate States of America," and under this new but unconstitutional organization they have levied war against the United

States, and for nearly three years have prosecuted direct and open hostilities against the National and many of the State Governments, with all the means in their power. These hostilities constitute, both in law and fact, war. The fact that an insurrection exists, and that these hostilities are conducted by persons owing allegiance to the National Government, who are therefore rebels and traitors, renders it none the less a war. One part of the constitutional definition of treason is, that it consists "in levying war against them," that is, the United States. It is none the less treason because the rebels have levied war under a pretended national organization. A traitor cannot escape the punishment of his crime by adding thereto the offense of creating or acting under a governmental organization, and committing his treasonable acts under its pretended authority. Still, however this may be, the hostilities in which the nation is engaged are none the less war, whether carried on against traitors or not.

The fact that the rebels have never invaded this State can make no difference; for they are waging war against the nation, of which the State is a component part, and which we are equally interested, with each and all the other States, in sustaining. Whatever affects any one part of the nation equally affects us. The success or defeat of the National Government is equally our success and defeat. It is therefore the duty of the State to aid the National Government, when necessary, to the full extent of its means and ability. The Legislature is the sole judge of this necessity, and the extent to which aid should be rendered.

Not only does the public history of the times establish the fact of the existence of war, but various acts of Congress providing the means for prosecuting it, and the proclamations of the President of the United States, especially those of September 22d, 1862, and January 1st, 1863, recognize the existence of war, and prescribe rules regulating it. (12 U. S. Stat. at Large, 1267-1269.)

Our conclusion is, that the law in question is constitutional, and that the Court below erred in refusing the *mandamus*. The order to that effect is therefore reversed, and the Court below is directed to order a *mandamus* to issue, as prayed for by the plaintiff.

Gatewood v. McLaughlin.

CORE, C. J.—I concur in the judgment, upon the ground that the exigencies contemplated by the Constitution are matters of the existence of which the Legislature is the sole judge.

GATEWOOD v. McLAUGHLIN.

THE right to a mining claim upon the public lands rests upon possession only, and a sale by parol by one in possession accompanied by a transfer of possession, transfers the title.

APPEAL from the Sixteenth Judicial District, Calaveras County.

The facts are stated in the opinion of the Court.

H. P. Barber and William S. Wood, for Appellant.

H. O. Beatty, for Respondent.

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is an action to recover the possession of the undivided one-fourth of a mining claim. Both parties claim under one Tyson; the plaintiff under a deed dater March 25th, 1861, and the defendant under an alleged verbal sale and delivery of possession prior to that date, by Tyson to one McCabe, and by McCabe to one Harris, and by Harris to the defendant. On the trial, the defendant "offered to prove by good and competent evidence, to wit: by parol, that the plaintiff's grantor, prior to the conveyance made to the plaintiff, had sold his interest, being the interest in controversy, to one McCabe; that McCabe afterwards sold to James Harris; that Harris sold to the defendant the identical interest sold to the plaintiff by Tyson, and that the grantors of the defendant went into the possession, and they and the defendant have held the possession thereof to the present time." To this the plaintiff objected that such parol transfer was void and not binding upon him, as he claimed under a deed duly acknowledged. The Court sustained the objection and ruled out the evidence, and this is assigned for error.

In the case of the *Table Mountain Tunnel Co. v. Stranahan*

Zeigler v. Wells, Fargo & Co.

(20 Cal. 198), it was held that the right to a mining claim rested upon possession only, and did not amount to an interest in the land, and therefore was not within the Statute of Frauds; and that no conveyance other than a delivery of the possession was necessary to transfer the title from one person to another. And the Court intimated a similar opinion in the case of *Jackson v. Feather River Water Co.* (14 Cal. 22). Under these rulings, which we see no good reason for disturbing, the Court clearly erred in rejecting the evidence offered by the defendant.

The judgment is therefore reversed, and the cause remanded for a new trial.

ZEIGLER v. WELLS, FARGO & CO.

- IN an action against a common carrier, to recover damages for the loss of a draft the measure of damages, *prima facie*, is the amount due on the same; but the defendant is at liberty to reduce the damages by proof of payment, the insolvency of the maker, or any fact tending to invalidate the security.
- IN such action, a complaint which does not state the date of the draft, the amount for which it was drawn, the time when it was payable, or to whom payable, is insufficient.

APPEAL from the Eleventh Judicial District, Placer County.

The facts are stated in the opinion of the Court.

Saunders, Dwinelle, and Wilkins, for Appellant.

Jo. Hamilton, for Respondent.

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is an action to recover damages caused by the failure of the defendants to deliver a letter containing a check or draft received from the plaintiff at their office in Auburn, inclosed in a common ten-cent letter envelope, issued by the defendants, directed to Louis Sloss & Co., at Sacramento. The check in question was drawn by one Jackson, on the defendants at San Francisco, and soon after

the letter was deposited with the defendants for transmission to Sacramento, Jackson became insolvent and left the country, leaving no funds in the hands of the defendants for the payment of the check.

The original complaint was demurred to, and the demurrer was sustained. The plaintiff filed an amended complaint, which was also demurred to. The Court overruled the demurrer, and this is assigned for error. It is objected that the complaint should have averred that Jackson had sufficient funds in the hands of the defendants at the time he drew the draft to pay the same, and that the averment of Jackson's solvency at the time is not sufficient. The plaintiff avers in his amended complaint that the draft was worth the sum of nine hundred and thirty-four dollars—the amount he paid for it. Where property sued for is a chose in action, as a bill, note, or other security for the payment of money, the measure of damages is *prima facie* the amount due on the security; the defendant being at liberty to reduce that valuation by evidence showing payment, the insolvency of the maker, or any fact tending to invalidate the security. (Sedgwick on Damages, 488.) We think the statement of the value of the draft in the complaint would be sufficient, if it had stated the sum for which it was drawn; but in the absence of any averment that it was drawn for any sum, the mere averment that it was "valuable," or of a certain value, is insufficient.

It is further objected that the draft is not sufficiently described in the amended complaint. The description is as follows: "A valuable draft or writing drawn by John Q. Jackson on Wells, Fargo & Co., at San Francisco." Neither the date or amount of the draft is stated, or the time when it was payable, or to whom it was payable. The defendants were entitled to such a description as would clearly identify the draft in question, and in this respect the averments in the complaint are clearly insufficient. The Court therefore erred in overruling the demurrer.

The judgment is reversed, and the cause remanded for further proceedings.

People v. Todd.

THE PEOPLE v. TODD.

AN act of the Legislature legalizing assessments for taxes for the fiscal year ending on the first day of March, is not void because the Constitution provides that the fiscal year shall commence on the first day of July, but the word "fiscal" in the act, may be treated as surplusage.

A complaint in an action to recover unpaid taxes is sufficient if it avers "that certain sums are due for certain taxes levied in the year 1858, upon certain real estate assessed in the year 1858," without stating that these taxes were levied under an assessment ending on the first day of March, 1858.

The addition of five per cent. imposed by Act of 1858, on the third Monday in October, upon the taxes of delinquents, may be recovered in the action, along with the unpaid taxes, as well as the cost of advertising.

Where an act of the Legislature provides that taxes which have been remitted by the Board of Supervisors shall be exempt from its provisions, it is not necessary to aver in the complaint that the taxes sued for have not been remitted; but that fact, if it exists, should be pleaded in bar of the action.

Courts have no power to go behind assessments legalized and confirmed by an act of the Legislature, to inquire into alleged errors and irregularities in the assessment.

APPEAL from the Fifteenth Judicial District, Butte County.

The facts are stated in the opinion of the Court.

O. C. Pratt, for Appellant.

No assessment of taxes known to the laws of California, whether for State or other purposes, upon property, whether personal or real, were legalized, and confirmed, and rendered valid and binding against the persons assessed, by the act entitled "An Act to Provide for the Collection of Delinquent Taxes in the County of Butte," approved April 5th, 1861. That act was special, and confined in its terms to assessments of taxes upon property for the fiscal years ending on the first days of March for the respective years 1858, 1859, and 1860. There is no fiscal year known to the laws of California, ending on the first day of March in any year. Sec. 8, Art. 11 of the State Constitution, provides that "the fiscal year shall commence on the first day of July;" and as a consequence, no fiscal year can end on the first day of March.

The complaint counts upon a supposed cause of action under the special act approved April 5th, 1861, which professes only to legalize the assessments of taxes for "fiscal years" ending at par-

People v. Todd.

ticular and impossible dates under the Constitution; and it would be equally faulty if the facts contained in it were those provided for in the general act on the same subject, approved May 17th, 1861. (See Stat. 1861, 92, 471.) Both provide for rendering valid that which never had entity of any kind.

George Cadwalader, also for Appellant.

F. M. Pixley, Attorney-General, for Respondent.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action to recover delinquent taxes, brought under an act entitled "An Act to Provide for the Collection of Delinquent Taxes in the County of Butte," approved April 5th, 1861 (Stat. 1861, 92). The defendant demurred to the complaint, the Court overruled the demurrer, the defendant declined to answer, and judgment was rendered accordingly against him, from which he appeals.

Section 1 of the act in question legalizes and confirms the assessment for taxes on all property "for the fiscal year ending on the first day of March, 1858, and for the fiscal year ending on the first day of March, 1859, and for the fiscal year ending on the first day of March, 1860." The appellant insists that no assessments for taxes were legalized by this act, because, as he contends, there is no fiscal year known to the laws of California ending on the first day of March of any year, and the State Constitution provides that "the fiscal year shall commence on the first day of July." We would not be justified in holding this statute void because it uses the term "fiscal" in an inappropriate manner. On the contrary, if necessary, it would be more appropriate to treat the word "fiscal" as surplusage, and thus give the statute full effect. The general revenue law in force at the time these taxes were levied provided that the Assessor should commence assessing property for taxes on the first Monday of March of each year, and it is evident that the statute intended to refer to this period of time in legalizing the yearly assessments referred to. The mere fact that it terms these yearly periods of time "fiscal" years, certainly would not have the effect of invalidating the law. They had the right and power to

designate these yearly periods of time by any term they might see fit, which would convey their meaning and intention, and there can be no valid objection to their using the term "fiscal" for that purpose.

The second section of the act in question authorizes the District Attorney to commence civil actions "to recover the unpaid taxes in said county for the fiscal years mentioned in the last section." The complaint avers that certain sums were due for certain taxes "levied in the year 1858" upon certain "real estate assessed in the year 1858," describing it. It is contended that no such taxes were provided for in the act, because it does not aver in precise terms that these taxes were levied under an assessment of property "for the fiscal year ending on the first day of March" either of the year 1858, 1859, or 1860. It is only necessary, under our system of practice, to state the facts in a pleading in "ordinary and concise language;" and a pleader is not required to use the precise and specific terms employed by the statute. There is no difficulty in understanding, from the terms used in this pleading, that the action was brought to recover taxes levied upon property assessed for that purpose during the year commencing on the first Monday of March, 1858, and ending on the day preceding the first Monday of March, 1859 — as by the law in force this assessment and levy had to be made during that portion of such yearly period included in the year 1858, and could not be made after that. This objection, therefore, is not valid.

The complaint avers that the taxes sued for "were levied upon and assessed against the following property, belonging to said defendant, in the County of Butte." It is objected that it does not state that the property belonged to or was claimed by the defendant at the time of the assessment. Even if it were necessary to aver that the property belonged to the defendant at the time of the assessment, the complaint states that fact with sufficient certainty. The fair meaning of the language used is substantially to that effect. But we do not wish to be understood as holding that such an averment is necessary; for the general revenue law makes parties in the possession, charge, or control of property, liable for the taxes thereon, whether they own it or not. This objection is therefore overruled.

The complaint contains two items; one being the five per cent imposed by section thirteen of the general revenue law in force in 1858 (Wood's Digest, 618), amounting to forty-one dollars and forty-six cents, and another item of one dollar for advertising. The defendant insists that these items cannot be recovered in action. In the case of *The People v. Seymour* (16 Cal. 332), which was an action under a law similar to the one we are considering, the same objections were made to the complaint; but the Court affirmed the judgment of the Court below, which included these items, evidently considering them as properly included within the terms of the statute.

The eighth section of the act provides that "all taxes and assessments which were remitted by the Board of Supervisors of Butte County, and which may hereafter be remitted, shall be exempt from the provisions of this act." The appellant contends that the complaint is insufficient, because it contains no averment that the taxes sued for were not remitted by the Board of Supervisors. This objection is not tenable. If the taxes had been wholly or in part remitted, that fact could and should have been pleaded in bar of the action.

It is also contended that the description of the real estate in the complaint shows that a portion of it lies in the County of Colusa, and therefore the action will not lie. As we have already shown, the complaint sufficiently avers that the property belonged to the defendant at the time of the assessment, and if it is true that a portion of the property thus assessed lay in the County of Colusa, and therefore is not taxable in Butte County, he could have applied to the Board of Equalization and had the error corrected. The assessment having been made in Butte County, the act in question legalizes and confirms the assessment, and makes it "valid and binding, both in law and equity." We do not think the Courts have the power to go behind assessments thus declared legal and binding, and inquire into alleged errors and irregularities in the assessment, especially where the defendant has neglected to have such errors and irregularities corrected by the proper tribunal provided by law for that purpose.

The judgment is affirmed.

Hayes v. Wells, Fargo & Co.

HAYES v. WELLS, FARGO & CO.

Common carriers, who are engaged in the transmission and delivery of letters inclosed in envelopes, are not liable for any article of special value inclosed within the envelope, or for any loss beyond that of an ordinary letter, unless informed at the time they received the letter for transmission of the value of the same.

APPEAL from the Fourth District Court, City and County of San Francisco.

The complaint avers that defendants, at their office in San José, California, received from the plaintiff a letter containing a check or draft of the value of seven hundred and ninety-two dollars and ten cents; such letter and check being inclosed in an envelope, sealed, and properly addressed to H. M. Newhall & Co., of San Francisco, California. That at the time of the receipt of such letter and check by defendants, the plaintiff paid them ten cents as hire for the transportation and delivery of such letter and check to the persons to whom the same were addressed, that being the amount demanded for such service; no disclosure having been asked by defendants or made by the plaintiff of the value of the contents of the letter or envelope. The complaint further avers, that through the negligence or fault of defendants, such letter and contents were not delivered to the person to whom the same were addressed and the check made payable, but were delivered to a person not authorized to receive the same, and that the money was drawn by such person, and thus wholly lost to plaintiff.

The answer admitted "that defendants were common carriers, and as such engaged in transmitting and delivering letters, etc., for hire." It further averred "that plaintiff, at the time when he delivered the letter to defendants, knew that although they (defendants) received and assumed to transmit and deliver ordinary business letters of advice and information, within the State of California, at the rate of ten cents each, still that they did not assume, nor ever have assumed to transmit and deliver such letters with valuable inclosures at the rate of ten cents each, but to charge for such letters in proportion to the value of the articles inclosed." And further, "that the custom of these defendants is and always has been to

Hayes v. Wells, Fargo & Co.

discharge their contract for the delivery of such ordinary business letters, by delivering them at the place of business or of residence of the person to whom they were addressed, by throwing them upon the counter, dropping them into the letter-box, or even putting them under the door, and in like manner, without attempting to make a personal delivery thereof to any person. But in regard to other letters and packages purporting to contain valuable inclosures, it has always been the custom of defendants to register such letters and packages, deliver them personally to the person to whom they were addressed, take his receipt therefor, and take all other precautions called for by the value of the letter or package."

The answer further alleged: "That plaintiff knew the matters of fact above stated, and that he did not disclose to these defendants or to any of their agents the fact that his letter contained an inclosure of great value, nor offer to pay these defendants a hire proportioned to the risk and value of such inclosure."

Henry B. Jones, for Appellants.

The plaintiff having made a *prima facie* case of gross negligence or wrong delivery, the defense interposed is no bar to this action being maintained. Such a *prima facie* case is made "when defendants refuse to deliver the goods, and fail to suggest any grounds for such refusal, or give any explanation of their conduct." (*Newstadt v. Adams*, 5 Duer; *Beardslie v. Richardson*, 11 Wend. 25; *A. & A. on Carriers*, Sec. 38, note 4, Ed. 1857.) The plaintiff was not bound to disclose the contents of the envelope or its value, no questions being asked by defendants. "Fraud cannot be imputed to the owner from the mere fact that he delivered the goods after having seen a general notice published by the carrier, whatever may be its purport. If the carrier wishes to ascertain the extent of his risk, he should inquire at the time the goods are delivered." (*Hollister v. Nowlan*, 19 Wend. 218, and authorities there cited; *Story on Bail*, 5th Ed. 586, 588; *Philips v. Earle*, 8 Pick. 182.)

The rule of the common law in respect to disclosure is well settled; exceptions were made to it by the passage of the Statute 2 William, 4, Chap. 68 (quoted at length in *Edwards on Bail*—

ments, 480). This statute was passed in 1830, and it is said that "While under its provisions the carrier is relieved from responsibility for parcels and packages of the articles enumerated in that statute, unless their value and contents are declared in the act of delivery, and a proper compensation paid for their carriage, it is to be observed that his duties in other respects remain unaltered." The common law, in the absence of statute law, is the rule in this State. (Stat. of 1850, 219.)

Saunders, Dwinelle & Hepburn, for Respondents.

The cases on the subject of the liability of common carriers are resolved by analysis into two classes.

1. When the common carrier, undertaking to receive and transport goods for hire, receives packages containing goods of large value, but still answering the description of goods. Here it is held, that mere silence as to the large value of the goods is not a fraud on the part of the shipper. Such were the cases of *Philips v. Earle* (8 Pick. 182); *Orange County Bank v. Brown* (9 Wend. 85); and see Story on Bail. Secs. 565-569.

2. Where the shipper, pretending to ship goods, secretly places in the package some other article of large value, which does not answer the description of the goods, such as money, bills of exchange, diamonds, jewelry, etc., this is held to be a fraud on the common carrier, as being an attempt to bind him to a contract which he did not make. Such were the cases: (*Orange County Bank v. Brown*, 9 Wend. 85; *Sewell v. Adams*, 6 Id. 335; Story on Bail. Secs. 565, 565 a, 566; *Gibbon v. Paynton*, 4 Burr. 2298.)

The following cases are not in point for the purpose for which they are cited by the appellant: (*Hollister v. Nowlan*, 19 Wend. 234; *N. J. Nav. Co. v. Merchants Bank*, 6 How. 344; *Cole v. Goodwin*, 19 Wend. 251; *Gould v. Hill*, 2 Hill, 623; *Atwood v. Reliance Trans. Co.*, 9 Watts, 87; *Moses v. Boston & M. R. Road*, 32 N. H. 523.) They go to show only that there are certain responsibilities which enter into the definition of the term "common carrier," from which persons following that occupation cannot divest themselves. They are not authority to the effect that common carriers cannot charge rates for transportation which are

Hayes v. Wells, Fargo & Co.

proportioned to the value and risk of the packages transported. On the contrary, the case of *Hollister v. Nowlan* (19 Wend. 284) is authority for the contrary proposition.

CROCKER, J. delivered the opinion of the Court — NOXON, J. concurring.

This is an action to recover damages for the failure of the defendants to transport and deliver a letter, containing a check for seven hundred and ninety-two dollars, received from the plaintiff at their office in San José, inclosed in a sealed letter envelope, addressed to H. M. Newhall & Co., San Francisco. The defendants do not appear to have been informed that the sealed envelope contained the check. It appears also that the envelope with its contents was not delivered to the persons to whom it was addressed, but by some means came to the hands of a person not authorized to receive it, who drew the money on the check, and the plaintiff therefore claims that he is entitled to recover the value of the check as damages. The case was tried by a jury, who found for the defendants, and a judgment was rendered in their favor, from which the plaintiff appeals.

The defendants are extensively engaged in the transportation of letters and packages of goods, and as such are common carriers, and subject to all the duties and responsibilities of common carriers. The general rule of law is well settled, that common carriers must take care at their peril, that goods placed in their charge for transportation are delivered to the right person; for otherwise they will become responsible. (Story on Bailments, Sec. 543-545 b, Angell on Car. Secs. 297, 324-326; Edwards on Bailments, 515.) But, while such is the general rule, the question as to what will constitute a delivery by which the responsibility of the carrier will cease, depends upon a variety of circumstances: such as the custom of particular places, the usage of particular trades, the manner of transacting business by different classes of carriers, their different means of transportation, and often upon special or implied contracts between the parties. Any local or special custom or usage upon the subject will govern as an implied term in the contract between the parties. Thus, while a carrier by the ordinary

Hayes v. Wells, Fargo & Co.

means of land conveyance will be required to deliver goods transported by him to the person entitled thereto, either at his place of business or residence, a carrier whose means of conveyance is by water will only, as a general rule, be required to deliver property at the proper wharf or landing; or if a railroad, at the proper depot. The mode in which the defendants transact their business, however, makes it their duty to deliver letters and packages to the owner at his place of business or residence, according to the character of the articles. This delivery must be either to the party to whom the letter or package is addressed in person, or to some agent, clerk, or employé authorized by him to receive the same. This will often depend upon the established mode or custom of doing business between the carrier and his customers. What that mode or custom was as between the defendants and Newhall & Co., does not appear in the evidence. The defendants in this case failed to deliver the letter in question, either to the person to whom it was directed, or to any other person authorized to receive it.

The degree of care and diligence which a carrier is bound to bestow upon property intrusted to him for transportation, depends upon its value and quality. Thus he will be required to exercise greater care and diligence in the preservation and safe delivery of a box of coin than a keg of nails, and of glassware than of bar iron. The value of the article especially is an important ingredient in considering the question of negligence; for that will be gross negligence in the case of a parcel of great value, which would not be in the case of a common article of little value. (Angell on Carriers, Sec. 8.) The general rule in the case of carriers is that they are bound to use *ordinary diligence*, and are liable for *ordinary neglect*; that is, they must take such care of the property intrusted to them as every prudent and intelligent man commonly takes of his own goods. (Id. Sec. 11.)

When the carrier is unable to ascertain the value of the goods intrusted to his care, from the appearance of the package, a question has arisen whether he must inquire its value, or whether the person employing him must inform him of the value, when it is of some great or peculiar value, which is not disclosed by the appearance of the package itself. The carrier has no right to open a

Hayes v. Wells, Fargo & Co.

letter or package intrusted to him for transportation, in order to inform himself of the quality or value of its contents. How, then, is he to obtain the necessary information to enable him to exercise that care and diligence which the law requires of him — which, as we have shown, depends to a great extent upon the article itself? It is the duty of every person sending goods to make use of no fraud or artifice to deceive or mislead the carrier, so as to increase the risk, or to lessen his care and diligence. If any fraud or unfair concealment is used, the carrier will not be responsible for any loss, **and it will make the contract between them null and void.** This rule applies to all cases of concealment or suppression of facts, and to all false statements made by the employer for the purpose of misleading the carrier. (Story on Bailments, Sec. 565.)

Still, the general rule has been held to be that the employer is under no obligation to inform the carrier of the value of the property; and the mere fact that he does not do so, in the absence of any attempt or act to mislead or deceive him as to the value, will not, as a general rule, affect the legal liability and responsibility of the carrier. But it is also held, as a general rule, **that the carrier** has a right to inquire as to the value and character of the property, and to have a correct answer. If he is deceived in any way, or a false answer is given, in such case he will not be responsible for any loss. It has also been held, as a general rule, that **"if he makes no inquiry, and no artifice is made use of to mislead him, then he is responsible for any loss, however great the value may be."** (Id. Sec. 567.)

These rules were adopted in cases where the articles transported were goods of the kind ordinarily transported by carriers, before the more modern changes in the modes of doing mercantile business. But recently a new kind of business has grown up in connection with the carriage of goods, and that is, the transmission of letters put up in sealed envelopes, which has become a most important branch of the express business of the country. It is an important question whether this rule, making it the duty of the carrier to inquire as to the value, properly applies to that branch of the business. There are some good reasons for the rule in the case of ordinary packages of goods, which are from necessity

Hayes v. Wells, Fargo & Co.

received personally by the carrier or his servants. But those reasons do not apply to the receipt and transmission of letters. The evidence in this case shows, what is generally known to be the case, that the greater portion of such letters are received by the letter-carriers in boxes, placed either in their own business houses or in different localities convenient to business men in the larger cities; and it is only a very small portion of the letters that are ever received by the carriers or their employés in person. This plan of doing business has become necessary, for the speedy transaction of business and the convenience of the public. With the thousands of letters daily received and transmitted by letter-carriers, it would be almost an impossibility for the carrier to make the inquiry as to the value of the contents of each letter received by them. The law does not require impossibilities, or attempt to deprive the public of the means necessary for the convenient, safe, and speedy transmission of their letters. On the contrary, it will adapt its rules to the new and varying systems of business, so that justice may be done to all parties. Where the reason ceases, the rule ceases. We are satisfied that this rule should be so far modified as to except letters from its application, and relieve the carrier from the necessity of making the inquiry of the value of the contents of letters received by him; making it the duty of the person employing the carrier to inform him of such value, in all cases where he desires to hold the latter responsible for any loss beyond that of an ordinary letter not containing articles or papers of special value. Where he does not desire to hold the carrier responsible, by withholding the information he assumes the risk, and avoids the payment of the extra compensation the carrier would be entitled to demand. By adopting this rule, the question is relieved of many of its difficulties, and no hardship or improper burden is imposed upon either party. Upon giving this notice of the value of the letter, the carrier can advise the employer of the compensation he requires for assuming the care of the letter, and the responsibility for its safe transmission and delivery to the proper person. If he demands no extra compensation beyond that for an ordinary letter, he will still be bound by all the duties and liabilities of a common carrier. By means of the notice, the carrier will be

required to use such kind of care and diligence in the performance of his duties as the law demands in cases of that kind, where articles of value are placed in his charge. It has been a mooted question as to how far one party may innocently be silent as to any matters which may form ingredients in directing the judgment of the other contracting party; and a very able writer on the subject of bailments maintains the necessity of a full disclosure of all the facts. (Jones on Bailments, Sec. 38; Story on Bailments, Sec. 566.) But the authorities have settled the general rule as before stated; and that rule we would not disturb in cases where it is properly applicable.

The evidence in this case shows that it is the custom and usage of the defendants to receive, transmit, and deliver letters specially intrusted to them as valuable, in a mode different from ordinary ones; and that they make an extra charge for so doing, depending upon the value of the letter, as a compensation for the extra trouble and risk. By that mode, great pains are taken to deliver the letter to the proper person, taking his receipt therefor, which is not done with ordinary letters. But the evidence leaves it uncertain whether the plaintiff knew of this difference in the mode of carrying and delivering the different kinds of letters. Under the view we have taken of the rights and duties of the parties, it was immaterial whether he had notice or not; as it was the duty of the plaintiff to inform the agent of the defendant of the contents of the letter, so far as it contained any article of special value.

It is a general rule in the law of bailments, that, if the plaintiff has brought the injury on himself, or has been guilty of negligence, and that negligence in any way concurred in causing the loss or damage, he is not entitled to recover. This rule is most frequently applied to cases of damage occasioned by obstructions in a highway, to collisions between carriages upon land and vessels upon water. (Angell on Carriers, Secs. 556-562, 636.) It also applies to common carriers, who are not held responsible for damages caused by the neglect of their employer. (Story on Bailments, Secs. 492, 563.) It also applies to innkeepers. (2 Hilliard on Torts, 617, 618.) In this case, the evidence shows that the plaintiff is an intelligent business man, yet he sent the check in

Preston v. Keys.

question, indorsed by himself, in blank—thus leaving it in the power of any person, who might get possession of it improperly, to draw the money; whereas, if it had been indorsed payable to the order of the firm to whom it was sent, the money could not have been drawn by an unauthorized person without forging the names of the indorsers; and, if the money had been paid on such forged indorsement, the drawees could have been compelled to repay it to the person really entitled to it. This was gross carelessness and culpable negligence on the part of the plaintiff. If he had used but ordinary care and the precautions usual in such cases, in indorsing the check, the probability is that no loss or injury would have occurred.

The judgment is affirmed.

PRESTON v. KEYS *et al.*

It is not error in a Court to refuse an instruction asked, which assumes a certain fact to exist, respecting which evidence has been introduced before the jury. Where the evidence is conflicting the Appellate Court will not reverse the order of the Court below denying a new trial.

APPEAL from the Seventh Judicial District, Marin County.

The facts are stated in the opinion of the Court.

W. Skidmore, for Appellant.

John Reynolds, for Respondent.

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is an action to recover damages caused by cattle driven into the plaintiff's inclosed field by the defendants. It appears that the plaintiff had an outside fence which inclosed about six hundred and sixty-seven acres of land, with some smaller inclosures inside of it. While the outside fence was in process of construction, and before it was completed, the defendant Murphy and one Kehoe erected a

house upon a spot now within the large inclosure of the plaintiffs. Afterward Kehoe filed a claim in the County Recorder's office, under the Possessory Act of this State, for a tract of one hundred and sixty acres of land, which was within this large inclosure, and included the house above spoken of. Afterward Kehoe sold his interest in the land to the defendant Murphy. The plaintiff has resided and pastured cattle within the large inclosure ever since the fence was built. The action was tried by a jury, who returned a verdict for the plaintiff, upon which a judgment was duly entered in favor, from which the defendants appeal.

On the trial, the Court refused to give the following instruction, asked for by the defendants, to wit: "If the jury believe that the land now inside of Preston's fence was, previous to June 1st, 1857, when Kehoe built his house, used as a common for the pasture of all the cattle of the neighborhood, and that Kehoe took possession and built a house before Preston inclosed it, the fact that Preston afterward built a fence which took in Kehoe's house will not operate to give Preston the exclusive possession and benefit of the inclosure: *but the inclosure caused by the fence will continue as much for the benefit of Kehoe and his assigns as for Preston, because Preston's fence does not divide the possession of the two.*" The first part of this instruction is correct; but the last part, in italics, is incorrect, and therefore there was no error in refusing the instruction as asked for. Kehoe had no right, title, or interest in the fence built by Preston, nor was he entitled to use it, or claim any benefit from it. So, too, the conveyance of the tract of land by Kehoe to Murphy conveyed no right to, or interest in, this fence built by Preston.

The Court also refused to give the following instruction asked for by the defendants, to wit: "If Kehoe was the first in possession of the land on which he built his house, the fact that Preston afterwards built a fence which took in the land on which Kehoe's house was built will not debar Kehoe and his assigns from the benefit of pasturage around his house, because the fence does not segregate Preston's possessions from the possessions of Kehoe." The record shows that one question raised by the plaintiff at the trial in the Court below, and respecting which he introduced evidence, was as to an alleged abandonment by Kehoe of his claim to the house and

land. That question was a pertinent one to the case; for if this possession or claim of Kehoe's had been in fact abandoned, all right to the premises in him or his assignee fell with it, and the defendants could not set up that possession as a defense to this action. This instruction, as asked for by the defendants, entirely ignores this question of abandonment. The mere fact that Kehoe was first in possession of the tract claimed by him did not establish a right claimed under it long afterwards, unless that possession was continuous and had not been abandoned. There was, therefore, no error in denying the instruction as thus framed.

The following instruction, asked for by the defendants, was also refused, to wit: "If the jury believe that Kehoe was prevented from complying with the statute in relation to maintaining possessory actions on public lands by the action of Preston in pulling down his house, and hauling off the materials, and interfering with him, then the jury will find for the defendants in the same manner as though the statute had been complied with." This instruction is objectionable, because it assumes as a fact that Preston had pulled down Kehoe's house and hauled off the materials. This was one of the facts respecting which evidence was given, and it was the province of the jury to determine from the evidence whether such were the facts or not; and it would have been improper for the Court to give an instruction virtually assuming that such facts had been proved.

The action of the Court in not permitting a witness to testify that the plaintiff admitted to him that the land in question was public land, was not prejudicial to the defendants, as the Court afterwards instructed the jury, at the defendants' request, that "all lands in this State are presumed to be public lands of the United States until the contrary is made to appear." The second instruction which was refused, although the rule of law respecting possession was not as fully and accurately stated as it should have been, was substantially correct, and there would have been no impropriety in giving it. Still there does not seem to have been any question that the plaintiff's outside fence constituted an inclosure within the rules of law, at the time of the alleged trespass on which this action is founded. The Court gave other instructions, defin-

McCarty v. Fremont.

ing what constituted actual possession and what did not, so that the defendants suffered no injury by the refusal to give this particular one.

The last ground urged by the appellants is, that the verdict was contrary to evidence. The evidence is conflicting in this case, and it was therefore proper for the jury to determine the facts. The verdict has been sustained by the Court in refusing to grant a new trial on this ground. Under these circumstances we do not deem it necessary to enter into an examination of the testimony to determine whether we might have decided differently, sitting as a Judge or juror at the trial.

The judgment is affirmed.

McCARTY v. FREMONT *et al.*

THE different causes of action which are allowed by the sixty-fourth section of the Practice Act to be united in one complaint should be separately stated. The owner of real estate has a right to remove a trespasser from his premises, using, however, only so much force as may be necessary for that purpose. If the damages assessed by the verdict of a jury are clearly excessive, and were evidently given under the influence of passion or prejudice, the Appellate Court will grant a new trial.

APPEAL from the Thirteenth Judicial District, Mariposa County.

The facts are stated in the opinion of the Court.

D. W. Perley, for Appellant.

The plaintiff has united several causes of action in his complaint, to wit: Injuries to personal property with injuries to real property. He has also united injuries to his person with injuries to both real and personal property. He has also united with the aforesaid actions, an action for a false imprisonment; which could not be done under the statute. (Pr. Act, Sec. 64; How. N. Y. Code, 284, 287.)

Another defect in the complaint is this: These causes of action, if they could be united, should have been separately stated, and the separate damages alleged for each injury. This was not done,

McCarty v. Fremont.

but general damages claimed for all the injuries united. The one hundred and sixty-seventh section of the New York Code is like the sixty-fourth section of the California Code, and the New York authorities are applicable. (How. N. Y. Code, 287; 8 How. Pr. 177; 6 Id. 131; 4 Id. 226.)

Harris, Merritt, & Deering, for Respondents.

CROCKER, J. delivered the opinion of the Court — COPE, C. J. and NORTON J. concurring.

This is an action to recover damages for alleged injuries to the person and property of the plaintiff, and for false imprisonment of the plaintiff's person, for forcibly ejecting him from a house and premises alleged to have been in plaintiff's possession, and keeping him out of the possession thereof. The defendants demurred to the complaint, but it was overruled by the Court. Sec. 64 of the Practice Act provides that the plaintiff may unite several causes of action in the same complaint, when they all arise out of certain classes of contracts or injuries as therein stated under seven different heads; the sixth class being injuries to the person, and the seventh, injuries to property. "But the causes of action so united shall all belong to only one of these classes, and shall affect all the parties to the action, and not require different places of trial, and shall be separately stated." In the present case the complaint includes two, if not three, of these several classes; and instead of being separately stated, they are all united in one count. This is a clear violation of the provisions of the Practice Act.

The evidence shows that an old dilapidated building, of little or no value, upon the "Mariposa Ranch," in Mariposa County, owned by the defendant Fremont, had been occupied by some Chinese, as tenants of one Smith, who acted as the agent of one Luce. Fremont, being desirous of erecting a mill and other buildings at that place, made an agreement with Smith, by which the latter authorized him to take possession of the building, upon making arrangement with the Chinese then in possession, which he did, and they soon afterwards, at his request, left the premises. The plaintiff, it seems, rented the building of Smith for a small sum, and when the

Skillman v. Lachman.

agents and employés of Fremont went there they found the plaintiff in the building, which was, however, destitute of furniture, claiming possession and refusing to leave. They thereupon forcibly removed him; and for this alleged injury he brought this action, claiming damages in the sum of \$7,000. The jury returned a verdict for \$1,000 damages, and judgment was rendered accordingly; from which, and from an order refusing a new trial, they take this appeal, and one ground of error assigned is that the damages are excessive. The evidence shows, and it is not controverted, that Fremont was the owner of the land; that the building was erected by one Hammett; that Luce was merely his agent to rent it, and that Hammett had, prior to these transactions, authorized Fremont to take possession. Smith had no authority from Hammett to rent it, nor did Luce have any right to vest such a power in him. It is clear, therefore, that the plaintiff had no right to the possession, and was a trespasser in his attempts to obtain the possession. The plaintiff was not, in fact, in possession of the property, but he was attempting to secure the possession when removed by the defendants. Under these circumstances, the defendants had a right to remove him from the premises, using, however, only so much force as was necessary for that purpose. It does not appear that any unnecessary or any serious injury was caused to the plaintiff by their acts. The damages, under these circumstances, even if the plaintiff had been entitled to recover any, are clearly excessive, and were evidently given under the influence of passion and prejudice.

The judgment is reversed and the cause remanded.

SKILLMAN v. LACHMAN *et al.*

When the plaintiff is appellant, and the judgment is for the defendant, the jurisdiction of the Supreme Court on appeal is determined by the amount claimed in the complaint.

If the appeal is by the plaintiff from a judgment in his favor, then the amount in dispute is the difference between the amount of the judgment and the sum claimed by the complaint.

The jurisdiction of the Supreme Court on appeal is determined by the amount in

Skillman v. Lachman.

dispute; and, before the amendments to the Constitution which went into effect in 1863, that amount was any sum exceeding two hundred dollars, exclusive of costs.

If the appeal is taken by the defendant from a judgment in his favor, where he set up a counter claim, the amount in dispute is the difference between the amount of the judgment, exclusive of costs, and the sum claimed in his counter claim. The interest due forms a part of the amount in dispute; and where the principal sum, for which judgment is recovered, is less than two hundred dollars, if the interest added swells the judgment to more than two hundred dollars, the Supreme Court has jurisdiction.

Where the several owners of a mine unite and coöperate in working the same, they form a mining partnership, which is governed by many of the rules relating to ordinary partnerships, but which has some rules peculiar to itself. One of these rules, peculiar to a mining partnership, is, that each owner has a right at any time to sell and convey his interest, and such sale does not dissolve the partnership.

Another of these rules is, that the law does not, in case of a mining partnership, imply any authority, either to a member of such partnership, or to its managing agent, to bind the company or its individual members by a promissory note, or a contract of indebtedness, executed in the name of the company; but it is incumbent on the party claiming to hold the company for such indebtedness to show that the person, executing or contracting the same in the name of the company, had power and authority to do so.

APPEAL from the County Court, Nevada County.

The facts are stated in the opinion of the Court.

C. Wilson Hill, for Appellant.

The points that arise are these: it being conceded that the members of this mining company are tenants in common, and so found by the Court:

1. Can one tenant in common bind his co-tenants, or, rather, make contracts, like the present, binding them without their authority or consent?

2. Would representations of defendant, as co-tenant, made before the execution of the note, that he was interested in the mining claims, be sufficient authority to authorize Sprout, his co-tenant, to execute said note so as to bind defendant?

Under the first point, I submit: Partners, by virtue of an agency arising from the relations existing between them as such, may make such contracts; but the relations existing between partners and those between tenants in common are widely distinct.

Skillman v. Lachman.

Among tenants in common there is no community of interest or authority, nor are they agents of each other, unless under special authority delegated to them. (Story on Partnership, Sec. 458.) Tenants in common of mines are considered, both in reference to themselves and to others, as the ordinary owners of the land, working their respective interest of the mines, responsible only for their own acts, subject to no laws of partnership whatever, and possessing distinct rights in the property. (*Crawshay v. Maule*, 1 Proanst. 523.) As tenants in common and as joint owners in mines, one tenant in common has no authority or power to pledge the credit of the general company; and the fact that one tenant in common has the general management of the mines makes no difference, in the absence of circumstances from which authority for that purpose can be inferred. (*Ricketts v. Bennet*, 4 C. B. 686; *Manning v. Granger & Scott*, 17 Law Jurist, C. P., 17.)

Thomas P. Hawley, for Respondent.

Does the finding of facts support the judgment? The Court finds, that Sprout was a member, and foreman, of the Gold Hill Company, and that he was authorized to execute a company note for the debts of the company. Also, that the note sued upon was by said Sprout, executed in said capacity, and given for a company debt. Now, if Sprout was authorized (and there is no doubt on the point) to execute this note for the company, then it is only necessary to see whether D. Lachman was a member, or can be holden as a member, of said company.

The counsel for appellants goes behind the facts found by the Court, and contends that a tenant in common cannot, without authority from his co-tenant, bind such co-tenant by note; *ergo*, that Sprout could not bind Lachman by the note executed to Skillman.

I am perfectly willing to concede, that one tenant in common cannot, from that fact alone, bind his co-tenant by contract; but, with all due respect to the opinions of the learned counsel for appellant, I must frankly admit my inability to see its application in the present case.

It is apparent from the evidence, as well as from the facts found

Skillman v. Lachman.

by the learned Judge, that the owners of certain mining ground had thrown their several interests together, and formed a mining company known as the Gold Hill Company. Hence, we here find not only tenancy in common, but, more than this, we find the interests of the several owners thrown together for the conducting of a certain business—that of mining—for the common profit of all. We find the owners no longer representing their several interests as individuals, but we find those interests associated together in a mining partnership, under the name “Gold Hill Company”; and we find W. P. Sprout inducted as managing partner and foreman of said company, employing workmen, purchasing materials, giving the notes and due-bills of said company for company indebtedness, and transacting the whole business of said Gold Hill Company, with the acquiescence, consent, and approval of said company.

The working of a mine may be the subject of a partnership, and such partnership is subject to all the rules governing partnerships. (Collyer on Partnership, Sec. 165; Story on Partnership, Sec. 82; Collyer on Mines, 58; Rockwell on Mines, 574.)

The fact that the partnership was formed for the purpose of deriving profit from real estate by working the mines therein, coupled with the appointment of Sprout as the agent for the conduct of said business, would be sufficient to authorize Sprout to bind the company by note.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring, and COPE, C. J. concurring specially.

This is an action upon a promissory note for one hundred and two dollars, with interest at three per cent. per month, against the defendants, as members of the “Gold Hill Company,” originally brought before a Justice of the Peace, where a judgment was rendered against the defendants, from which they appealed to the County Court, where judgment was again rendered against them for two hundred and sixty dollars and forty-six cents, besides costs, that sum being the principal and interest of the note, and from which they appeal to this Court.

The respondent contends that as the note was for the sum of one

hundred and two dollars only, this Court has no jurisdiction of the case. Where the plaintiff is appellant, and the judgment is for the defendant, the jurisdiction of this Court is determined by the amount claimed by the complaint, for that is the "amount in dispute" in such cases. (*Gillespie v. Benson*, 18 Cal. 410; *Votan v. Reese*, 20 Id. 89.) But if the appeal is by the plaintiff from a judgment in his favor, then the "amount in dispute" is the difference between the amount of the judgment and the sum claimed by the complaint. (*Votan v. Reese*, 20 Cal. 89.) So, upon the same principle, if the appeal is taken by the defendant from a judgment rendered against him for a sum exceeding two hundred dollars, exclusive of costs and per centage, this Court has jurisdiction of the case, because the amount of the judgment is the "amount in dispute" on the appeal. So, too, of the appeal is taken by the defendant from a judgment in his favor, where he has set up a counter claim, if that judgment is for a sum more than two hundred dollars less than he claims in his answer, this Court has jurisdiction. The respondent contends, however, that the interest due on the demand, forms no part of the amount to be included in the estimate of the "amount in dispute." In this he is mistaken. The interest forms part of the demand sued for, and should properly be included in the estimate. It follows that the objection to the jurisdiction of this Court is not well taken.

The transcript in this case is very imperfect—neither the note sued on nor the pleadings are inserted in it. It appears, however, that the plaintiff furnished the "Gold Hill Company" (a company of persons who were working a mine together) with a quantity of lumber, for which the note was given, and which was signed, as follows: "H. P. Sprout, Foreman for Gold Hill Company." When the note was offered in evidence in the County Court, the defendants objected that it was the note of Sprout, and not of the company, which was overruled and excepted to. Judging from the signature it would appear to be the note of Sprout alone, and the words "Foreman for Gold Hill Company" are merely *descriptio personæ*; but the terms of the note itself may show that it was, in fact, intended to be the note of the company. This point we cannot determine, as the note does not appear in the transcript.

The principal point raised by the appellant is that the owners of

the claim are tenants in common and not partners, that Sprout was one of the owners, and that one co-tenant cannot bind his co-tenants by a note given in the name of the company. This question of the relation which exists between persons owning several interests in a mine, and engaged in working the same, is a very important one. Whatever may be the rights and liabilities of tenants in common of a mine not being worked, it is clear that where the several owners unite and coöperate in working the mine, then a new relation exists between them, and, to a certain extent, they are governed by the rules relating to partnerships. They form what is termed a mining partnership, which is governed by many of the rules relating to ordinary partnerships, but which has also some rules peculiar to itself—one of which is that one person may convey his interest in the mine and business, without dissolving the partnership. (*Ferreday v. Wightwick*, 1 Russ. & Mylne, 49.) Still, there may be a partnership in the working of a mine, subject to the rules relating to an ordinary partnership in trade. (Story on Part. Sec. 82.) And this relation of partnership may be constituted either by express stipulation or by implication deduced from the acts of the parties. (*Rockw. on Mines*, 575.) But in the case of an ordinary mining partnership, something more will be required to raise the presumption of liability arising from persons holding themselves out to the world as partners than would be necessary in the case of an ordinary partnership. Such persons, in the absence of other circumstances, cannot fairly be presumed to have intended to render themselves liable to all the consequences of a commercial partnership. (Id.) The same author concludes his examination of this question, as follows: "If the works are carried on by persons as mere owners of land, concurring in a general system of management for their common benefit, the shares of each person will only be liable for his individual engagement, and to the payment of debts contracted by himself, or his authorized agent, without interfering with the shares of the other tenants in common." (Id. 579.)

There have been several decisions relative to the rights and liabilities of shareholders in mining companies to the public and among themselves, which it may be well to examine. In the case of *Vice v. Lady Anson* (7 B. & C. 409), which was an action for

Skillman v. Lachman.

goods sold and materials furnished for working a mine, in which the defendant held one share, evidenced only by certificate issued by the secretary of the company, the plaintiff, at the time he furnished the goods, had no knowledge that she was a shareholder. She had paid the deposit on some shares, and had spoken and written of herself (in private letters) as a shareholder of the company. The Judge held that the plaintiff did not actually give credit to the defendant, and was not misled by her, and that she never held herself out to the world as a partner, and therefore she could only be chargeable on the ground of being really interested. The fact that she thought she had an interest did not make her interested; and he held that the certificate conveyed no interest in the mine, and therefore she was not liable. The correctness of this decision, that it was necessary to prove a conveyance of an interest in the mine, has been doubted.

The case of *Dickinson v. Valpy* (10 B. & C. 128), was an action by an indorsee of a bill of exchange, drawn and accepted by a mining company, against the defendant as a member of the company. The defendant had applied for and obtained shares in the company, on which he had paid several installments. The business of the company was transacted by a Board of Directors, and the bill had been drawn and accepted in pursuance of a resolution passed by them. It was held necessary for the plaintiff to show that the directors had power to bind the shareholders by drawing bills of exchange; and for that purpose, evidence should have been given of the nature and character of the business of the company, to show that in order to carry into effect the purposes for which it was instituted the drawing and accepting of bills was necessary, or to show from the practice of similar companies that it was *usual* to draw such bills. It was also held, that although in ordinary trading partnerships the law implied that one partner had power to bind another by drawing and accepting bills, yet that rule did not apply to mining partnerships, without showing that it was necessary to carry on its business.

In *Judson v. Bourne* (6 M. & W. 461), it was held that the members of a mining company have authority by law (in the absence of any proof of a more limited authority), to bind each other

Skillman v. Lachman.

by dealings on credit for the purpose of working the mines, if that appears to be necessary or usual in the management of the mines. In *Hawtayne v. Bourne* (7 M. & W. 595), the managing agent of the mining company had borrowed money from a bank to pay debts due to laborers who had levied distress warrants upon the materials of the mine, and it was held that there was no rule of law that such an agent could, even in case of an emergency suddenly arising, raise money and pledge the credit of his principals for its repayment; that the authority of the agent was only that he should conduct and carry on the affairs of the mine in the usual manner, and there was no proof of express authority to borrow money, or that it was necessary in the ordinary course of the undertaking.

A joint stock company was formed to work a mine, in which the defendant became a shareholder, and took part in its proceedings. The prospectus, issued on the formation of the company, stated that all supplies for the mine were to be purchased at cash prices, and no debt was to be incurred; and the scrip certificates also bore an indorsement to the same effect. The plaintiff supplied goods for the necessary working of the mine, on the order of a resident agent appointed by the directors to manage the mine, which was the customary course in such concerns: *held*, that the defendant was liable to the plaintiff for the price of such goods, notwithstanding the statements in the prospectus and certificates, unless it were shown that the agent had, in fact, no authority from the defendant, and that the plaintiff had notice thereof. (*Hawkin v. Bourne*, 8 M. & W. 703.)

Where a defendant is charged with a debt in an action for work and labor as a partner in a mining company, but is not shown to have either contracted such debt personally or represented himself to the plaintiff as a partner, the fact of his having been partner may nevertheless be shown by evidence short of strict proof that he had executed a deed of copartnership, or was legally interested in the mine. The fact may be proved by his admission made before or after the debt was incurred. (*Ralph v. Harvey*, 1 Q. B. 845.) One of several co-adventurers in a mine has not, as such, any authority to pledge the credit of the general body for money borrowed for the purposes of the concern. And the fact of his

Skillman v. Lachman.

having the general management of the mine makes no difference, in the absence of circumstances from which an implied authority for that purpose can be inferred. (*Ricketts v. Burnett*, 4 Q. B. 686.)

Such is the uncertainty of mining operations that few are willing to risk all their means in such undertakings; and it is therefore customary for a number of persons to unite in the enterprise; and often the interests owned by each differ greatly in amount, according as each is able to furnish means, or is willing to take the risk. As a general rule, it is impracticable for each proprietor to work his interest in the mine separate from the others; hence arises the necessity for an organization of some kind to work the mine, such as a corporation, joint stock company, or mining partnership. The company in the present case is one of the latter class. As each owner has a right to sell and convey his interest at any time, and as, in ordinary partnerships, such sale would dissolve the partnership, and compel a winding up and settlement of the business, which would be most disastrous to a mining enterprise, it has become an established principle that such sale does not dissolve a mining partnership, but it continues on as before. Such a radical change in the law of partnership necessitates other changes. One result is, that new members are thus introduced into the company without the consent, and often against the wishes, of the other members; and it would be most unjust to subject each proprietor to personal liabilities, which might sweep away all his property, created against his consent, by those who became members against his wishes. Hence arises the necessity of establishing new rules for such partnerships, differing from those regulating ordinary partnerships, especially those relating to the power of any one member, or a majority of the members, or of the Superintendent or managing agent, to make contracts binding upon the company or its members, and also regulating the extent and nature of the liability of each proprietor for the company debts, as between themselves and third persons. The rules regulating ordinary partnerships will, to some extent, form a proper guide, but do not necessarily determine these questions. It is impossible to lay down a perfect code of rules upon this subject; but, like other legal rules, they must be settled as they arise in

cases requiring their determination. Such rules must be governed by the peculiar condition and circumstances of the country, and must be founded upon sound principles of justice, and such as will protect the rights of individual proprietors against the unauthorized acts of others, and at the same time properly secure the claims of creditors and insure the successful working of the mine.

In the present case it appears that the defendant Lachman, for a long time prior and up to June 25th, 1858, held a mortgage on the interest in the mine of one Prior; that on that day he took a conveyance of that interest in satisfaction of the mortgage, and conveyed the same interest to one of the defendants, Sprout, on the twenty-eighth day of June, and received a mortgage on Sprout's interest in the mine to secure the payment of the purchase money. This appears to be, in fact, all the interest he had; but it was proved that both prior to and after the date of the note, which was dated June 20th, he admitted to two persons, one of whom was a brother of the plaintiff, and who delivered most of the lumber, that he owned an interest in the mine. It does not appear that any of these statements of Lachman were the means of inducing the plaintiff to sell or deliver the lumber. These statements of the defendant Lachman do not operate as an estoppel upon him, unless it appears that the plaintiff was induced thereby to sell and deliver the lumber to the company. Neither the evidence nor the findings of the Court contain any facts or evidence establishing this point.

But there is still a more important objection to the findings and judgment in this case. There was no evidence of any authority having been given by the company, or Lachman, to Sprout, a member of the company and the managing agent or foreman, to execute a promissory note in the name of and binding the company for the indebtedness due the plaintiff, or any general authority to that effect. In fact, several members, including Lachman, testified that they never gave him any such authority. It is clear that the law does not, in the case of mining partnerships, imply any such authority either to a member of such partnership or to its managing agent. In this respect the rule of law is different from that of ordinary commercial partnerships. It was clearly the duty of the plaintiff to prove that the person executing the note in the name of the com-

Tibbetts v. Moore.

pany had power and authority to do so. He might have had power to purchase the lumber for the use of the mine, but that is very different from authorizing him to execute a note in the name of the company, bearing interest at the rate of three per cent. per month. In this case the County Court failed to draw the proper distinction between the liability of members of a mining partnership and ordinary trading partnerships, and in this it erred.

The judgment is therefore reversed and the cause remanded.

COPE, C. J.—I think the conclusion arrived at by the Justice, CROCKER, is correct, and I therefore concur in the judgment.

TIBBETTS v. MOORE *et al.*

A MECHANIC'S lien which describes the property as a "quartz mill, being at or near the town of Scottsville, in Amador County, known as 'Moore's New Quartz Mill,'" contains a sufficient description to hold the property, where there is no evidence that there was any other quartz mill at the place so designated as to render it uncertain which was intended.

Where the lien describes the land around the building, on which a lien is claimed. In these words, "with such convenient space of land around the same as may be required for the convenient use and occupation thereof," the description is also sufficient; but it is proper for the Court by its decree to define the amount and extent of the land connected with the building which is properly subject to the lien; and if the decree follows the description in the lien, it is doubtful whether the purchaser will acquire any land beyond that covered by the building.

The lien of a material man accrues at the time he has the materials, which he has contracted to furnish, ready for delivery at the place where he has agreed to deliver them.

When a mechanic or material man commences proceedings to foreclose a lien, and publishes notice in accordance with the statute, for all persons holding and claiming liens to appear in Court and exhibit the same with their proofs, the exhibit of proofs of liens by lienholders, coming in under the notice, is not governed by the sections of the Practice Act relating to interventions, and the papers filed by them are not governed by the strict rules relating to pleadings in ordinary actions.

Where the notice of lien states that the materials were furnished to A. & Co., when in fact they were furnished to A, this does not invalidate the lien, for the material fact is, whether the materials were furnished for and used in the construction of the building on which the lien is claimed.

Tibbetts v. Moore.

a, the owner of a quartz mill in Amador County, executed a mortgage on the same to B. Afterwards, A purchased at Sacramento a steam engine and boiler, and, to secure the purchase money, executed to C a chattel mortgage on the same, and then transported them to Amador and placed them in the quartz mill, so that they became a part of the realty: *held*, that C's mortgage on the steam engine and boiler had priority over the mortgage of B.

APPEAL from the Sixteenth Judicial District, Amador County.

Moore, the mortgagor, purchased the steam engine spoken of in the opinion, of Lambard, its manufacturer, in Sacramento City.

The other facts are stated in the opinion of the Court.

John W. Armstrong, for Appellants.

The notice of lien did not correctly describe the property to be charged with the lien.

The law requires that the premises on which the building is situated should be described correctly (Wood's Dig. 1059, Sec. 2), with certainty and particularity. (Nott's N. Y. Lien Law, 137.)

It is true that the premises are described in the notice as Moore's New Quartz Mill, at or near Scottsville, but this is not sufficient notice of a mechanic's lien (*Montrose v. Conner*, 8 Cal. 346); yet even if it were sufficient, there is no evidence in the record, nor was there any given at the trial, that the property in controversy was so known at the time the lien was filed, or at any other time.

Premises in a deed must be described by a well known name, and if it is at all sufficient to describe it by name in a notice of lien, it must be done with as much particularity as in a deed — by a well known name. But I think that a description of the property by name is entirely insufficient, because the statute does not give a lien upon the building, and the whole tract of land on which the same is situated, but only on so much of the land as may be necessary for the convenient use and occupation of the building (Wood's Dig. 1060, Sec. 4); otherwise third parties dealing with the property cannot know how much of the ground is affected by the lien; they could not know how much ground would be deemed necessary to the convenient use and occupation of the mill. It was evidently the intention of the Legislature to require lien claimants to desig-

nate by some means the quantity of land charged with the lien; for a condition precedent to the attaching of the lien is, that a notice of lien containing a correct description of the property to be charged with the lien, should be filed in the Recorder's office of the county where the same is located; and the statute states what quantity of land (and therefore what particular land) shall be charged with the lien. (Wood's Dig. 1060, Sec. 4.)

On the facts as disclosed by the record, was defendant, O. D. Lambard, entitled to a decree that the boiler, engine, etc., should be segregated from the mill and sold separately to satisfy his mortgage, and thus destroy the security of the appellants?

I think not; the record of appellants' mortgage gave notice to all the world from the twenty-second day of October, 1860, that the assignor of the appellants had a lien by mortgage on the mill, land, and machinery in, and to be put into the mill; and therefore, Lambard took his mortgage with notice of the mortgage of appellants and subject thereto. (Wood's Dig. 103, Sec. 25.)

Did not defendant Lambard, lose his lien when he allowed the engine, boiler, etc., to be put into the mill, and become a necessary part of it? I think, as against appellants, he did.

They became fixtures when they were attached to the mill with the consent of Lambard; and if he ever had a lien upon them, he lost it.

It would destroy the whole property to segregate the boiler, engine, etc., and this the law will not allow.

The case of *Sands v. Pfeiffer* (10 Cal. 263), establishes the doctrine that a boiler, engine, etc., though not in the mill at the time of the execution of the mortgage, but put in soon after, are fixtures and pass to the mortgagee.

The case of *Merritt v. Judd* (14 Cal. 60), shows that such machinery in a quartz mill are fixtures.

In *Winslow v. Merchants' Insurance Co.*, (4 Met. 306), it is held, that as between the mortgagor and mortgagee, fixtures for trade cannot be removed by mortgagor though put up by mortgagor after the execution of the mortgage.

On examination of the case of *Winslow v. Merchants' Insurance Co.* (4 Met. 306, 316), it will be seen that the controversy was

Tibbetts v. Moore.

between a prior mortgagee who had a mortgage on the land and building, and a subsequent mortgagee who had a mortgage on the boiler, engine, etc., which were put into the building after the execution of the first mortgage, as in this case, and there the lien on the boiler, engine, etc., was adjudged in favor of the first mortgage. This case was followed in the case of *Butler v. Pope* (7 Met. 40), and in the case of *Colins v. McLagin* (29 Maine, 115.)

R. M. & N. C. Briggs, for Respondents Morgan and Weatherwax.

John H. Fry for Respondent Tibbetts.

John G. Hyer and *John H. Fry*, for Respondent Lambard.

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is an action to enforce a mechanic's lien, notice of which was filed in the Recorder's office, November 24th, 1860, on a quartz mill owned by the defendant Moore, in Amador County, for machinery used in the construction of the mill. Morgan and Weatherwax came in under the published notice, and filed liens on the same property for lumber furnished and labor performed on the mill. Brown and Andrews were made parties, they claiming a lien thereon under a chattel mortgage, executed by Moore to one Mosick, and by Mosick assigned to them. This mortgage bears date October 22d, 1860, was recorded the same day, and includes the quartz lode and the quartz mill then in process of erection, with the boiler, engine, and other machinery used in the mill. Lambard is also made a defendant, he claiming a lien under a chattel mortgage on the boiler, engine, and fixtures connected therewith, executed by Moore on the sixteenth day of November, 1860. The property described in this mortgage was then in Sacramento, where the mortgage was executed, but was afterwards removed to and put up as a part of the fixtures and machinery of the quartz mill. This mortgage was duly recorded in Sacramento County, November 17th, and in Amador County, November 19th. The case was tried by the Court, and a decree rendered that the claim of Lambard

was a valid, subsisting lien upon the property described in his mortgage for the sum of eight hundred and twenty-two dollars and five cents; that the mortgage of Brown & Andrews was a valid lien against the property described therein for three thousand nine hundred and thirty-eight dollars and sixty-six cents, and that they have a further lien for two hundred and eighty-seven dollars and eighty-six cents for money paid by them for taxes and other expenses about the property. It was further decreed that the property mentioned in the Lambard mortgage be sold, and out of the proceeds the Sheriff to pay—first, the costs and expenses of the sale; second, the costs and expenses of the action, and the two hundred and eighty-seven dollars and eighty-six cents advanced by Brown & Andrews, if sufficient to pay them and the debt due Lambard; third, to pay the amount due said Lambard; fourth, the overplus, if any, to be added to the proceeds of the sale of the property described in the mechanics' liens. It also decreed that the property described in the mechanics' liens should then be sold, subject to the rights of the purchaser under the Lambard mortgage, and from the proceeds, with any overplus from the first sale, after deducting costs and expenses of sale, to pay to the holders of the mechanics' liens the respective amounts due them under the decree, and if sufficient, to be divided *pro rata* among them; but if there should be a surplus, the same to be added to the proceeds of the sale of the property described in the Brown & Andrews mortgage. It also decreed, that the property described in the Brown & Andrews mortgage should then be sold, subject to the rights of the purchasers at the two prior sales; and out of the proceeds to pay the amount due on that mortgage, and the overplus, if any, to the defendant Moore; and in case of a deficiency in the payment of said several debts, judgment to be entered for such deficiency against him, and that executions issue thereon. From this decree Brown & Andrews alone appeal.

The first point urged is, that the notice of lien filed by the plaintiff Tibbetts, does not correctly or sufficiently describe the property sought to be charged with the lien. It is described as a "Quartz mill, being at or near the Town of Scottsville in Amador County, known as Moore's New Quartz Mill." There was no evidence that

Tibbets v. Moore.

there was any other quartz mill at that place so designated as to render it uncertain which was intended. The description we deem sufficient to identify the property and uphold the lien. (*Hotaling v. Cronise*, 2 Cal. 63.)

The land around the mill is described in the complaint and notice of lien as follows: "With such convenient space of land around the same as may be required for the convenient use and occupation thereof." It is objected that this description is also insufficient. Sec. 4 of the Mechanics' Lien Law (Wood's Digest, 538) provides that "the land upon which any building or superstructure shall be erected, together with convenient space around the same, or so much as may be required for the convenient use and occupation of the premises, shall also be subject to the lien," etc. The notice and the complaint in this case follow the terms of the statute, and are sufficient as a matter of description. In cases of this kind it is proper for the Court, by its decree, to define the amount and extent of the land connected with the mill which is properly subject to the lien. The decree in this case, however, does not do so; and this is also urged as an objection. Such an omission will not invalidate the decree; but it renders it doubtful whether a purchaser under it will acquire any land beyond that covered by the buildings. That question, however, is not properly before us; and it is not necessary to determine it. No objection of this kind seems to have been raised in the Court below by demurrer or otherwise; nor does it appear that the appellants requested the Court to define in its decree the extent of space around the mill to be subjected to the lien. Under such circumstances, they will be deemed to have waived such objections.

The next point is, that none of the materials furnished by the plaintiffs had been delivered at the mill at the time of the mortgage held by the appellants was executed and recorded, and it is contended, therefore, that the plaintiff's lien did not attach to the property until after the mortgage. The statute then in force provided that "the liens created by this act shall be preferred to every other lien or incumbrance which shall have attached upon the said property subsequent to the time at which the work was commenced, or the first of the materials were furnished; and also to all mortgages

and other encumbrances unrecorded at the time such work was commenced, or the first of such materials were furnished." The Court found, among other things, "that the plaintiff, on the twenty-fifth day of September, 1860, commenced to furnish, for the construction of the quartz mill described in the plaintiff's complaint, certain necessary castings," etc. The mortgage held by Brown & Andrews was dated October 22d. The question is, whether or not the word "furnished," as used in the statute, means "delivered at the building" in the construction of which the materials are furnished. We think that such is not its reasonable construction. The material man is properly said to have "furnished" the materials, when he has delivered, or has them ready for delivery, at the place where he has agreed to deliver them under the contract; which, in this case was at the plaintiff's foundry, some distance from the quartz mill. This point, therefore, is not tenable.

The next questions to consider are those relating to the lien of Morgan, one of the parties to the action. It is insisted that the petition filed by him, asserting his claim and lien, does not state facts sufficient to constitute a cause of action, and therefore the Court erred in admitting any evidence in support of the claim over the objection of the appellants. The proceedings in actions to enforce mechanics' liens are special, and peculiar in their character. Under the seventh section of the act in force at the time this action was commenced (Wood's Dig. 538, 539), it was not necessary for the lienholder who commenced the action to make other holders of liens under the statute, parties by name, but they were brought in by a published notice, "notifying all persons holding or claiming liens on said premises, to be and appear in said Court, on a day to be therein specified, and to exhibit then and there the proof of said liens." "On the day appointed, the Court shall proceed to hear and determine the said claims, in a summary way, or may refer the same," etc. It will be seen that the proceedings are summary in their character, and differ entirely from ordinary actions. The exhibit of proof of liens by lienholders coming in under the notice, is not governed by the sections of the Practice Act relating to interventions; and the papers filed by them, exhibiting their claims, are not governed by the strict rules relating to

pleadings in ordinary actions. In this case, the lienholder, Morgan, presented his claim in the form of a petition duly filed in the action, in which his demand and lien were set forth. It is objected that it does not state that the lumber was furnished to be used in the construction of the mill, or that it was used in that manner. This objection, if a valid one under the statute referred to, should have been taken by demurrer, and not by objection to the evidence which showed that it was thus furnished and used.

The notice of lien filed by Morgan sets forth that the lumber was furnished to "Moore & Co.," and it is objected that the lien cannot be enforced against property owned by Moore, and not Moore & Co. The material facts to sustain the lien are, that the materials were furnished for, and were actually used in the construction of the building on which the lien is claimed. Whether the owner purchased the materials in his own name or in the name of a firm of which he was a member, can make no difference so far as relates to the lien, which is the only matter the appellants have a right to contest.

The notice filed by Morgan includes claims for lumber furnished for the construction of the quartz mill, and also a blacksmith shop, and a building erected over the shaft of the mine. It is contended that by filing his notice in this form, he loses all lien on either. Whether, in a case like this, where all the buildings, though separated from each other, form one establishment, and are all used, and are necessary in conducting the one business carried on, the lien of the mechanic or material man can be held to include all the buildings in one claim and lien, it is unnecessary to determine. The Court, in this case, in its findings separated the amount due for the materials furnished for the construction of the quartz mill proper from that for the other buildings, and rendered its decree accordingly. In this, no error was committed to the injury of the appellants.

The next class of objections to be noticed are those which relate to the Lambard mortgage. The mortgage held by the appellants is dated October 22d, 1860, and was recorded in Amador County the same day. It was executed under the Chattel Mortgage Act (Wood's Dig. 108), and the property mortgaged is described as follows: "All that certain piece or parcel of land or lot of ground,

and the improvements thereon, known as Sidores Quartz Lode or Ledge, situate in Amador County and State of California, about one mile south from the town of Jackson, near the head of Hunt's Gulch, commencing about one hundred and fifty feet south of Howard's Garden, running thence south-east one thousand feet, said range running in a south-east and north-west direction, and being of sufficient width to cover said lode, with all the surface widths, dips, angles, and branches, and all things pertaining to the same, and being the same lode now worked by Albert Moore; also the quartz mill, being at this time in the course of erection upon or near the said lode, together with the boiler, engine, stamps, and machinery of all kinds and descriptions in or about said mill now, and when the same shall have been completed, and all fixtures, furniture, and implements used in or about said mill or quartz lode, and also all quartz rock taken from said quartz lode that may be at or near said mill and lode at the time of foreclosure of this mortgage," etc.

The Lambard mortgage is dated November 16th, 1860, and was duly recorded in Sacramento County, where the property then was, November 17th, and in Amador County on the nineteenth of November. It was executed in pursuance of the provisions of the same Chattel Mortgage Act, and the property mortgaged is described as follows: "One steam engine of the following description: twelve-inch cylinder, twenty-four inch stroke; one heater, one force-pump, one wheel and pinion, and one steam-gauge. Also, one steam boiler of the following description: twenty feet long, and forty inches in diameter, having five nine-inch flues." Soon after this mortgage was given, the property described therein was removed from Sacramento to the quartz mill, and put up therein, for the purpose of running the machinery thereof. The appellants claim that when this property was put up in the quartz mill it became a fixture and part of the realty; that it became thereby a portion of the property covered by their mortgage; that their mortgage, being prior in time to that of Lambard, it became a lien thereon prior to that claimed by Lambard; therefore the proceeds of the sale thereof should be applied first to the satisfaction of their debt, and that the Court below erred in giving priority to the lien of Lambard.

Tibbets v. Moore.

It is not pretended that the appellants' mortgage was any lien upon this boiler and engine at any time before the same was attached to the realty. At the time the Lambard mortgage was executed, there was no lien or incumbrance upon this property. Their mortgage was duly executed and recorded, in compliance with the statute, and at its date it was the prior and in fact only lien thereon. After the execution of the Lambard mortgage, the mortgagor took possession of the property, removed it, and set it up in the quartz mill. Did this act of the mortgagor, even though done with the knowledge and consent of the mortgagee, divest the latter of a valid lien, fully vested, and subject it to a prior lien on the mill? Treating the property described in the appellants' mortgage as real estate, there is no doubt that, when the boiler and engine were attached to the realty, they became subject to his mortgage. (*Ferguson v. Miller*, 6 Cal. 402; *Sands v. Pfeiffer*, 10 Id. 258; *Union Water Company v. Murphy's Flat Company*, 22 Id. 620.)

But it is equally clear that their mortgage was no lien thereon before the property was so attached. We are not aware of any rule of law or equity which will divest the defendant Lambard of the priority of lien lawfully acquired by him upon the property described in his mortgage, by any such means as are shown in this case. The cases referred to by the appellant merely sustain the principles above referred to as already decided by this Court, but they have no application to the present case. The cases of *Winslow v. The Merchants' Insurance Company* (4 Metcalf, 306), and *The Union Water Company v. Murphy's Flat Company* (22 Cal. 620), were very similar in principle. In both cases, fixtures and improvements had been put on the real estate *after* the first mortgage, but *before* the second had been executed. In both cases the real estate itself was the subject of the mortgages, and it was held in both cases that the fixtures became subject to the first mortgage as soon as they were attached to the realty, and therefore the first mortgage was a prior lien. But those cases differ from the present in this: that here there was a valid subsisting mortgage upon the engine and boiler *before* the appellants' mortgage became a lien thereon; and although the Lambard mortgage bears a later

date than the other, yet it was a lien upon this property *before* that had attached. We think it more consistent with the rules of equity to hold that the lien of appellants' mortgage upon the engine and boiler dates only from the time they became attached to the realty; and that time being subsequent to the date of the Lambard mortgage, it is subject to the lien of the latter. Ordinarily, the lien in such case would be construed to relate back to the date of the mortgage; but this doctrine of relation will not be so applied as to defeat or divest intermediate rights and liens lawfully acquired. In a case like the present, it should not be construed to relate back beyond the time the property was affixed to the realty, as against the Lambard mortgage.

Both mortgages are executed and recorded as chattel mortgages, under the statute; and treating them in that character, there can be no doubt that the Lambard mortgage has priority over the other so far as relates to the property included in it. The provision in Sec. 2 of that act, respecting the recording of the mortgage in the county where the mortgagor resides, and the property is located, and the proviso respecting the removal of the property to "a location for use," and the time allowed for recording by Sec. 7, clearly contemplate that property of the kind described in the act is to still remain subject to the mortgage lien, though its location be changed, and it be put to use in connection with other property. Much of the property covered by the act, such as saw mill and grist mill machinery, steam boilers, steam engines, machinery, and buildings connected with quartz claims, etc., are of such a character that they are of little or no practical use until they are secured by attachment to real estate in the nature of fixtures, and the evident object and intent of the statute, to protect the mortgagees of such property, would be entirely defeated by holding that a mortgage lien thereon, before becoming fixtures, would be defeated and divested, or subordinated to another mortgage upon becoming a fixture. The separation and removal of the boiler and engine from the realty will leave the latter in no worse condition than it was before they were put up; so that affords no just ground for a different rule. There is no ground for saying that there has been a confusion of goods by attaching the property to the realty.

Antoine Company v. Ridge Company.

There is no difficulty in distinguishing and separating the several articles named in the Lambard mortgage.

The judgment is affirmed.

THE ANTOINE COMPANY v. THE RIDGE COMPANY.

WHEREAS the evidence is conflicting, a new trial will not be granted; and where, in such case, a motion is made for a new trial, on the ground that the verdict is not sustained by the evidence and overruled by the Court below, the presumption is that the verdict fairly accords with the conviction of the Judge who tried the cause, as well as the jury.

In an action for damages, for taking gold from a mining claim, the plaintiffs labor under great difficulty in proving the exact amount of damages they have sustained, and the defendants have the means in their power of showing the correct amount of gold taken out; and if they neglect to do so, they cannot complain that the jury by their verdict have fixed a large estimate upon the damages.

It is not necessary to prove the transfer of title of a mining claim by a written conveyance, but a parol transfer with delivery of possession is sufficient.

Since the amendment of the Practice Act, in 1861, the Clerk may insert the amount of the costs, within two days after they shall have been taxed or ascertained, in a blank left in the judgment for that purpose.

APPEAL from the District Court, Tenth Judicial District, Yuba County.

The facts are stated in the opinion of the Court.

E. D. Wheeler, for Appellant.

Henry K. Mitchell, for Respondent.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action to recover the possession of certain mining ground and damages caused by the working of the same. The plaintiffs recovered judgment for the possession of the property, for damages in the sum of \$2,500, and costs amounting to \$2,952.75. The defendants moved for a new trial, and to retax the bill of costs, which were denied, and they thereupon took this appeal.

The parties are the owners of certain mining claims on opposite

Antoine Company v. Ridge Company.

sides of a ridge or hill; and the main question in controversy was how far back upon the ridge or hill their respective claims extended. The first two points of error assigned by the appellants are, that the evidence as to the location of the claims does not sustain the verdict of the jury. The third point is, that the evidence does not show that the defendants trespassed upon the ground, even as claimed by the plaintiffs. The fourth point is, that the damages are excessive, and the verdict in this respect is not sustained by the evidence. The transcript in this case is very voluminous, containing five hundred and forty-seven pages, the greater part of which is made up of the evidence given on the trial which it seems occupied about twenty days of the time of the Court below. The evidence, as is usual in such cases, is very conflicting—especially upon the principal questions involved in the controversy. It is not claimed that the Court below erred in its instructions to the jury, or that any error of law occurred during the trial prejudicial to the defendants. Even if we should come to the conclusion, from a full and careful reading of the evidence in the record, that the testimony preponderated against the verdict of the jury upon these points, we would not be justified in setting it aside. We could not possibly obtain from a mere reading of the evidence, as full and clear a view of the true facts of the case as the Court and jury who tried it. The appellants insist that the jury were governed by passion and prejudice in the action; but it is not charged that the Judge who tried the case was governed by any such feelings. He heard all the testimony of the witnesses as it was given to the jury, and the law has vested him with the power to grant a party, against whom a verdict has been rendered, a new trial, in all cases where, in his opinion, the verdict is against law, or the evidence is insufficient to justify it, or where the damages are excessive and appear to have been given under the influence of passion or prejudice. This power is a very important one in the protection of the rights of parties litigating in Court. Courts should be liberal in granting new trials in all cases where the Judge who tried the case is satisfied that the verdict is not sustained by the evidence, or that the jury were influenced by passion or prejudice. The law has vested this power in the *nisi prius* Courts, to be exercised discreetly, in

order to secure the rights of all parties. Thus, the verdict should fairly accord with the judgment and convictions of the Judge, as well as the jury, before the judgment rendered thereon should be allowed to stand. When a motion for a new trial has been made and overruled by the Court below, the presumption is that the opinions of the Judge and jury harmonize in support of the verdict. It is for that reason, and the fact that it is impossible for this Court to form as correct a judgment and conclusion of the proper weight to be given to the evidence of the witnesses, that we decline, as a general rule, to set aside, upon such grounds, a verdict thus acted upon. The record in this action does not present a case which would justify us in departing from this salutary and established rule. As to the question of damages, the plaintiffs, as is usual in mining cases of this kind, labor under great difficulty in proving the exact amount of damages they have sustained, as the evidence of the amount of gold taken out by the defendants from the ground claimed by the plaintiffs is necessarily almost exclusively confined to or under the control of the defendants. The plaintiffs were compelled to rely to a great extent upon the judgment and estimates of men who were not fully acquainted with the facts. If this resulted in causing the jury to return too large a verdict of damages, the defendants are themselves principally to blame; for they had the means in their own power of showing the correct amount of gold taken out by them, or at least of making the most accurate estimate of the amount.

The fifth point assigned as error by the appellants is, that the plaintiffs failed to connect themselves with the title of the original locators of their claim. They allege in their complaint the location of their claim in 1852 by certain persons, and that they have acquired the title of such original locators. They also allege that they were the owners and in possession of the mining ground at the time of the entry by the defendants. The defendants in their answer deny these allegations, and thus issue was taken upon them by the parties. If the plaintiffs proved by competent evidence that they were the owners and in possession of the mining ground at the time of the defendants' entry, they did all that was necessary to sustain their title and right of action. The presumption is that

Antoine Company v. Ridge Company.

the verdict of the jury is correct, and that the evidence was sufficient to sustain the verdict. This presumption is not rebutted by showing that the plaintiffs failed to deraign a title from the original locators to themselves, even though that kind of title was alleged in the complaint. The particular kind or character of title claimed by the plaintiffs was immaterial, so that they proved a better and superior right and title to the possession of the premises than that of the defendants. It was only necessary for them to prove by competent evidence that they were entitled to the possession of the premises in controversy, as against the defendants, to enable them to maintain the action. To do so it might, or might not become necessary to trace their title back to the original locators of the claim. They introduced evidence sufficient to establish their right to the possession, and that is sufficient to sustain the verdict and judgment. It was not necessary to prove a transfer of the title by written conveyances; but a parol transfer, with a delivery of the possession, was sufficient, as has been repeatedly decided by this Court. (14 Cal. 22; 20 Id. 198.) The point therefore is not tenable.

The sixth point is, that the item of costs inserted in the judgment should be stricken out, on the alleged ground that the bill of costs was not filed until after the judgment was entered, and after the Court had adjourned for the term. The appellants referred to the case of *Chapin v. Broder* (16 Cal. 419) to sustain their position. The record does not show that the bill of costs was filed after the entry of the judgment, or after the adjournment of the Court for the term. From the record, it would appear that the alleged grounds of this motion do not exist. But even if they did exist, they would not be sufficient to sustain the motion of the appellants. After the decision in the case of *Chapin v. Broder*, the Legislature, in 1861 (Stat. 1861, 494), amended Sec. 511, thereby authorizing the Clerk to insert the amount of the costs within two days after they shall have been taxed or ascertained in a blank left in the judgment for that purpose. This point is therefore overruled.

These are all the points assigned by the appellants; and as no error appears in the proceedings in the Court below, the judgment is affirmed.

Banks v. Marshall.

BANKS v. MARSHALL.

If a promissory note is surrendered up by mistake, under the supposition that it is fully paid, yet if not fully paid, the defendant is still liable for the balance due.

An action on a promissory note is barred by statute of limitations, if not commenced within four years from the time the cause of action accrues.

APPEAL from the District Court, Seventh Judicial District, Solano County.

The second count of the complaint was for four hundred and sixty-six dollars and forty-five cents, alleged to have been received by the defendant on the first day of July, 1861, to and for the use of plaintiff. The remainder of the facts are stated in the opinion of the Court.

Whitman & Wells, for Appellant.

The mistake was equivalent to so much money to the defendant: he had a credit to that amount to which he was not entitled. (See *Floyd v. Day*, 3 Mass.; *Hemenway v. Bradford*, 14 Id. 121; *Emerson v. Baylies*, 19 Pick. 55; *Appleton v. Bancroft*, 10 Metc. 237; *Fairbanks v. Blackington*, 9 Pick. 93; *Payson v. Whitcomb*, 15 Id. 212; *Chasm v. White*, 17 Mass. 568; *Arms v. Ashley*, 4 Pick. 71; *Miller v. Miller*, 7 Id. 133.

Swan and Hays, for Respondent.

CROCKER, J. delivered the opinion of the Court—**NORTON**, J. concurring.

This is an action to recover a balance alleged to be due upon a promissory note, executed by the defendant, bearing date March 17th, 1857, for seven hundred and twenty-five dollars, payable six months after date, to the plaintiff, with interest at two per cent. per month. The complaint avers that six hundred dollars was paid thereon, April 17th, 1860; and three hundred and eighty-six dollars July 1st, 1861; and that there was a balance of four hundred and sixty-six dollars and forty-five cents still due and unpaid. There is also a count for the same amount for money had and

Banks v. Marshall.

received. The defendant demurred to the complaint, on the ground that it showed that the action on the note was barred by the Statute of Limitations, the action having been commenced May 9th, 1862, more than four years after the right of action accrued. The Court sustained the demurrer as to the note. A final judgment was rendered for the defendant, from which the plaintiff appeals.

On the trial, the evidence showed that the note described in the complaint, was sent from New York through Wells, Fargo & Co.'s Express office for collection, with instructions to receive the amount of the principal and interest thereon, at ten per cent. per annum, in satisfaction of the note; that the agent of Wells, Fargo & Co., at Suisun, collected the principal and interest at that rate, according to instructions, in the payments stated in the complaint, and surrendered the note to the defendant. Afterwards, Wells, Fargo & Co.'s agent was advised that a mistake had been made in instructing him to collect only ten per cent. per annum interest; and that he should have collected the full amount of interest specified in the note. He then demanded payment of the balance claimed to be due on the note, and the defendant refused to pay it, saying there was an agreement that he was to pay only the ten per cent. interest. This action was thereupon commenced. If there was no valid agreement that interest was to be paid at any other rate than that specified in the note, then the money paid was not a full payment or discharge of the note; and although the note was surrendered up by mistake, under the supposition that it was fully paid, yet the defendant, under such circumstances, would still remain liable for the balance of the note remaining unpaid. His liability, however, was upon the note, and the action to enforce that liability should have been brought within the time fixed by the Statute of Limitations; and failing to do so, it was barred. The facts, as shown, will not sustain an action for money had and received, as was correctly ruled by the Court below.

It follows, that there was no error in the judgment rendered, and it is therefore affirmed.

Everett v. Hydraulic Flume Tunnel Company.

EVERETT *et al.* v. THE HYDRAULIC FLUME TUNNEL COMPANY.

IF the owners of a ditch or flume for the conveyance of water erect a dam above mining claims, and the claims are afterwards damaged by reason of the breaking of the dam, its owners are not liable for the damages, if it was constructed with that reasonable care which prudent men would use, and no negligence is shown in its care and management.

APPEAL from the District Court, Fifteenth Judicial District, Butte County.

The facts are stated in the opinion of the Court.

McRae & Beatty, for Appellants.

C. F. Lott, for Respondents.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action to recover damages caused by the breaking of a dam owned by the defendants. The plaintiffs are the owners of mining claims and sluice-boxes below the defendants' dam, which broke at a high stage of water, and, as is alleged, injured the plaintiffs' property below. The case was tried by the Court, who found for the defendants, and the plaintiffs appeal. The Court found that the dam was "well built, and constructed in a good and workmanlike manner, and of sufficient strength and capacity to contain the amount of water within it;" that no negligence on the part of the defendants was shown, and that they used that reasonable care and diligence which prudent men would have used, in the erection and care of the dam. Under these findings, the Court properly rendered judgment for the defendants, as the case comes clearly within the rule laid down in *Hoffman v. The Tuolumne Water Company* (10 Cal. 413), and *Wolf v. The St. Louis Independent Water Company* (Id. 541). But the appellant insists that the findings upon these points are not sustained by the evidence. We have carefully examined the record, and see no error in these findings. They are fairly sustained by the evidence.

The judgment is therefore affirmed.

Boles v. Johnston.

BOLES *et al.* v. JOHNSTON.

A Court of Equity will not set aside a Sheriff's sale and a deed executed under it in a collateral action commenced for that purpose, by reason of irregularities in the conduct of the officer in making the levy and sale. If parties have any remedy under such circumstances, it is by motion properly made in the Court where the judgment was rendered, to set aside the sale.

APPEAL from the District Court, Ninth Judicial District, Siskiyou County.

The facts are stated in the opinion of the Court.

J. A. Fletcher, for Appellants.

CROCKER, J. delivered the opinion of the Court—CORN, C. J. and NORTON, J. concurring.

This is an action to recover the possession of a house and lot in Siskiyou County. The complaint alleges that the plaintiffs are the owners of the property in question, and that the defendant claims title to it under and by virtue of a Sheriff's sale and deed, under an execution issued upon a judgment against the plaintiff Boles and one Martin. The complaint sets forth numerous irregularities in the conduct of the officer in making the levy and sale, and avers that he and the surities on his official bond are either insolvent or have left the State, taking their property with them. There is no averment that the defendant had notice of these irregularities, or that he in any way participated therein. The case was submitted to the Court below upon the facts stated in the complaint, and the exhibits of the judgment and execution attached thereto, and the Court dismissed the case, from which the plaintiffs appeal.

Whether a Court of Equity might not grant relief in a proper case showing fraud in the conduct of the Sheriff in selling property in violation of the rights of the parties and the requirements of the statute, of which the purchaser and those claiming under him had notice, or in which they may have participated, is a question unnecessary to determine in this case, as it is not founded upon any such state of facts. If the plaintiffs have any remedy at all under the

Schilling v. Holmes.

facts stated, it is by motion properly made in the Court where the judgment was rendered to set aside the sale, and not in this collateral action. The right of action here is founded solely upon these irregularities, and the Court below committed no error in dismissing the action.

The judgment is affirmed.

SCHILLING v. HOLMES *et al.*

AN under tenant, who takes a lease and receives possession from the tenant, becomes the tenant of the landlord, subject to all the duties and liabilities of a tenant to the landlord.

One of the most important duties of a tenant is to peaceably and quietly surrender the premises to the landlord as soon as the tenancy has expired.

If a stranger intrudes upon the premises and takes possession, either forcibly or otherwise, it is the duty of the tenant to take proper legal proceedings to regain the possession, so that he may surrender the same to the landlord.

The tenant is liable to pay rent until he has restored full and complete possession to the landlord, and his liability to pay the rent is not discharged by an eviction, unless under a title superior to the landlord's, or by some agency of the landlord.

If the tenant is evicted by a wrong-doer, the landlord is not bound to indemnify him.

When the notice to quit, in order to enable the landlord to determine the tenancy, is served on the original lessee, that notice binds the under tenants who acquire possession from the tenant after its service.

Those who lease from the tenant, after the landlord has served on him notice to quit, are liable to the landlord for double the monthly value of the premises.

APPEAL from the County Court of the County of San Francisco.

The facts are stated in the opinion of the Court.

John Reynolds, for Appellant and Respondent Schilling.

Is the tenant who is ousted by a stranger released from liability to his landlord for rent? The landlord is not bound to protect his tenant against trespassers. (Smith's Landlord and Tenant, 211, and cases there cited.) A trespass by the lessor does not operate as a suspension of the rent. (Wm. Saund. 204.) Nor does a trespass by a stranger. (*Paradine v. Jane*, Alleyne, 26.)

W. W. Chipman, for Holmes, Appellant and Respondent.

The allegation of the complaint is, that defendant Holmes held and occupied under the superior tenant, Becker, and not from the plaintiff; if so, this holding over of this superior tenant by his agent or subordinate Holmes, and a dismissal of the action against the head, dismissed the whole. The Court should have dismissed as to Holmes for want of jurisdiction. (6 Johns. B. 272; 3 Id. 422; 10 B. & C. 816.)

CROCKER, J. delivered the opinion of the Court — NORRIS, J. concurring.

The complaint in this case avers that, on the first day of May, 1861, the plaintiff, being the owner of a certain building in the City of San Francisco, leased the lower story of the same to the defendant Becker, for one month, for the monthly rent of seventy-five dollars; that Becker underlet portions thereof to Holmes and the other defendants; that Becker paid the rent up to September 1st; that on the first day of August, the plaintiff served on Becker a written notice, to quit and surrender the premises, on the first day of September, 1861; that a similar notice was also served on Becker, September 3d, requiring him to immediately surrender the possession; that on the fourth day of September, Becker removed from the premises, and left the other defendants in possession; and the latter have been in possession ever since; and that on the seventeenth day of September, he served a written notice on said other defendants, requiring them to quit and surrender the premises to him. He prays to be restored to the possession, and for damages and costs. The action was commenced before a Justice of the Peace, on the twenty-first day of September. The case was twice transferred, on the application of the defendants, from one Justice's Court to another; and on the ninth day of October, the plaintiff recovered judgment against the defendants Holmes and Kent, from which they appealed to the County Court. The Justice dismissed the action as against Becker, and all the other defendants except Holmes and Kent.

In the County Court, a jury was waived, and the cause was tried

Schilling v. Holmes.

by the Court, who filed its findings of facts, and rendered judgment in favor of the plaintiff, and against the defendant Holmes, on the sixth day of October, 1862, for the possession of the premises, and one hundred and fifty dollars—trebled damages, for rents and costs. From this judgment both parties have appealed to this Court.

The Court below found that on the nineteenth day of September, 1861, Kent removed from the premises, leaving Holmes in the possession of the whole; that Holmes continued in possession until October 11th, when he was forcibly ejected therefrom by one Horber; that on the same day he commenced an action of forcible entry against Horber and the plaintiff in this action, Schilling, and on the nineteenth of October, recovered judgment therein against Horber and Schilling; that an appeal was taken from that judgment to the County Court, where Holmes recovered judgment against Horber for the restitution of the premises, and for treble the value of one and one-third month's rent, at seventy-five dollars per month, and Schilling recovered judgment therein against Holmes; that Horber was the agent of Schilling at the time of said forcible entry, "for the purpose of letting the said premises and collecting the rents thereof; and had general supervision of the premises." As a conclusion of law, the Court found that the plaintiff was entitled to the restitution of the premises, and the value of two-thirds of a month's rent, at seventy-five dollars per month.

The plaintiff contends that he is entitled to recover the rent of the premises against Holmes, as well after, as before, the forcible entry of Horber; and that the Court below erred in not rendering judgment for the rent which accrued subsequent to that time. When Becker removed from the premises, and Holmes, his under tenant, continued in possession, the latter became the tenant of Schilling, subject to all the duties and liabilities of a tenant to a landlord. One of the most important duties of a tenant is to peaceably and quietly surrender the premises to the landlord as soon as the tenancy has expired; and a failure or refusal to thus surrender, subjects the tenant to the penalties of the statute relating to tenants holding over after the expiration of their terms.

Schilling v. Holmes.

The entire possession must be delivered up, or the tenant's responsibility will not cease. If a stranger has intruded upon the premises, and has wrongfully taken the possession from the tenant, either forcibly or otherwise, it is the duty of the tenant to take proper legal proceedings to regain the possession, that he may perform the duty imposed on him by law, of surrendering the possession to his landlord. But until the tenant has performed this duty of restoring full and complete possession to his landlord, he still remains liable to the latter for the rent. His liability to pay the rent is not discharged by an eviction, unless under a title superior to the landlord's, or by some agency of the landlord. (Taylor's Landlord and Tenant, Sec. 378.)

If he is evicted by a wrong-doer, the landlord is not bound to indemnify him against it; but if the tenant is evicted or disturbed by the act of the landlord, or the acts of those who claim under or paramount to him, the landlord is bound to indemnify him; "but not against the tortious acts of third persons, for which the law affords the tenant a direct remedy against those who commit it." (Smith's Landlord and Tenant, 211 and notes.) It follows, that if the defendant was evicted by the act of the plaintiff, or any person claiming under him, or acting as his agent therein, then the defendant is not liable to pay the rent from the date of such eviction; but if Horber was a wrong-doer, or was not acting as the agent of the plaintiff in evicting the defendant, then the defendant still continues liable for the rent, until he prosecutes his remedy against the wrong-doer, and regains the possession from him and restores it to the plaintiff.

The defendant has treated Horber as a wrong-doer, and attempted to implicate the plaintiff in the act of eviction, by instituting proper legal proceedings against Horber, and his landlord, Schilling. He succeeded in that action against Horber, but failed to implicate Schilling in the act; and the latter therefore recovered judgment against him in the forcible entry proceeding. The Court found that Horber was Schilling's agent for certain purposes, but it found, also, that "there was no testimony that said Horber had direction from the plaintiff to make such forcible entry, or any unlawful entry, or to do any unlawful act." This shows that the eviction was not by

the plaintiff, or any one authorized by him; and the defendant therefore still continued liable for the rent. It was his duty, upon obtaining judgment for the restitution of the premises, to procure the proper writ, and upon being reinstated in the possession, to immediately surrender the premises to the plaintiff, and thus discharge himself from the liability for the rent. If he has not done so, that is his fault. It follows that the Court erred in failing to include in its judgment the rent which accrued subsequent to the date of the forcible entry.

The defendant, under his appeal, assigns for error that the Court should have dismissed the action, because the notice to quit, served August 1st, 1861, was not served on him, but on Becker, under whom he claimed; and he contends that he was entitled to a personal notice to enable the plaintiff to determine the tenancy. The service of the notice to quit upon the original lessee, Becker, was sufficient; and that notice bound the under tenants, and especially Holmes, as to the possession acquired by him after the notice was served on Becker. The statute would be liable to continued evasions if any other rule were to be adopted. It would only be necessary for the tenant, after service of a notice, to sub-let to another, transfer the possession to him, and thus defeat the rights of the landlord, by successive transfers of this kind, for an indefinite period of time. (*Birdsall v. Phillips*, 17 Wend. 464.)

The defendant, however, contends that the fifth section of the Act of 1861, relating to landlords and tenants (Stat. 1861, 514), requires that in such case the notice must be served on the person who comes in under the tenant, before the plaintiff is entitled to recover more than single damages under the statute. The first and second sections prescribe upon whom, and how, this notice to determine the tenancy must be served; and the notice, in this case, was properly served, under the provisions of that act. Sec. 5 then provides, substantially, that if after such notice has been duly served, the "tenant or any other person who may have come into the possession of lands or tenements, under or by collusion with such tenant, shall willfully hold over," etc., he shall pay double the monthly value of the premises. This provision evidently accords with the rule which we have laid down upon this subject, and treats

Ladd v. Ruggles.

the after-occupying tenant as bound by the notice previously served.

The defendant also contends that the Court erred in trebling the value of the monthly rents, in rendering judgment. The Statute of 1861, being the latest law upon the subject, governs in such case, and that statute provides only for doubling the value of the monthly rents; and the Court below therefore erred in this respect. We see no abuse of the discretion vested in the Court below in its refusal to permit the defendant to file an amended answer.

The judgment is reversed, and the cause remanded.

LADD *v.* RUGGLES.

A COMMENCED an action against B on a money demand and to foreclose a mortgage given to secure his debt. On motion of A's attorney the prayer for foreclosure of the mortgage and sale of the property was stricken out and a money judgment taken: *held*, that this was an abandonment and waiver of A's right to a foreclosure and sale of the mortgaged property.

APPEAL from the District Court, Fifteenth Judicial District, Butte County.

The facts are stated in the opinion of the Court.

H. O. Beatty, for Appellant.

Harris & Burt, for Respondent.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an appeal from an order refusing to enter a decree of foreclosure of a mortgage. It appears that on the thirty-first day of December, 1856, an action was commenced for the foreclosure of a mortgage, the parties appeared, a trial was had by the Court (a jury having been waived), and on the trial the plaintiffs moved to amend their complaint by striking out the prayer for the sale of the property, which was granted. The Court found for the plaintiff,

Swinford v. Rogers.

the amount of the debt, and a personal money judgment therefor was accordingly rendered against the defendant on the twenty-third day of February, 1857. On the twenty-first day of April, 1863, the surviving plaintiff moved the Court, on notice, to enter a decree of foreclosure of the mortgage, which was refused, and he thereupon takes this appeal.

The appellant contends that although the prayer for the sale of the property was stricken out of the complaint, yet as there was a prayer for general relief, he was then and still is entitled under it to a decree of foreclosure and for a sale of the property. After having stricken out, on his own motion, the prayer for a sale of the mortgaged property, he could not ask that relief, as he had thus openly abandoned and waived that portion of his claim to relief. But even if that was not the effect of his motion and the order granting it, and even if he could have claimed that kind of decree under his prayer for general relief, he should have required the Court at the time of rendition of the judgment to grant him that further relief; or, before the expiration of the term, moved the Court to amend the judgment in that respect. Having failed to do so, it is too late afterwards to do it. If such application had been made and refused, his remedy would have been by an appeal, within the statutory time, to correct the error, if error it had been.

The order of the Court below is affirmed.

SWINFORD *et al.* v. ROGERS *et al.*

A CONVEYANCE of property made and received with intent to defraud creditors is void, though there may have been a full and valuable consideration paid therefor. The fraud taints and vitiates it, and it will not be allowed to stand even as security for advances actually made.

Where the fraudulent vendee has held the property, or converted the same to his own use, the Court will compel him to account for the value thereof, and direct the proceeds to be paid over to the creditors of the vendor.

APPEAL from the District Court, Ninth Judicial District, Shasta County.

Swinford v. Rogers.

The facts are stated in the opinion of the Court.

E. Carter, for Appellants.

The appellants, Smith & Rogers, maintain: 1st. That the conveyance of all the property (the sale of all being one transaction) is honest, and valid in law, whether viewed as a conditional sale which had become absolute, as the Court decided it to be with reference to the ranch, or as a mortgage given to secure the payment of the \$2,600 and interest, etc.; and the transaction cannot be held to be fraudulent as against creditors. (*Dana v. Stanfords*, 10 Cal. 269; *Randall v. Buffington and Wife*, Id. 491; *St. John v. Northup*, 23 Bar. 30; *Burnham v. DeBevourse*, 8 How. Pr. 159.)

2d. The complaint does not support the judgment. (*White v. Pratt*, 13 Cal. 525; *Green v. Covillaud*, 10 Id. 317.) There is no allegation in the complaint to sustain a general money judgment against Smith & Rogers. (*Harris v. Taylor*, 15 Cal. 348; *Kinder v. Macy*, 7 Id. 206; *Meeker v. Harris*, 19 Id. 288, and cases cited; *McMahon v. Harrison*, 12 How. Pr.)

This sale was either a mortgage to secure the payment of the \$2,600, or it was a conditional sale which became absolute by forfeiture; but if the transaction was intended to create a trust for the benefit of creditors, as the Court below seemed to view it, it was void under the thirty-ninth section of the statute for the relief of insolvents, and could not create a trust or contract on which the creditors could obtain a money judgment against Smith & Rogers; the only remedy of the creditors in such case would be to seek the property, notwithstanding the assignment. (*Grachen v. Page*, 6 Cal. 138; *Cheever v. Hays*, 3 Id. 471.)

R. T. Sprague, for Respondents.

CROCKER, J. delivered the opinion of the Court—NORRIS, J. concurring.

This is an action, in the nature of a suit in equity, brought by a judgment creditor to reach the property of his debtor, fraudulently conveyed, and to apply the same upon his judgment. The case was tried by the Court, who found in favor of the plaintiffs, and a

Swinford v. Rogers.

judgment was rendered against the fraudulent vendors for the amount due on the plaintiffs' judgments; that a certain portion of the property fraudulently conveyed be sold, and the proceeds be applied upon the judgment; and that execution for the balance of the judgment issue against their property. The defendants appeal from this judgment.

It appears from the record that on the thirtieth day of March, 1861, one of the defendants, J. P. Lane, who is the plaintiffs' judgment debtor, with his wife, and one W. R. Lane, executed to the defendants Smith & Rogers, a deed for the conveyance of a certain ranch in Shasta County, and certain ditch property, and also executed a bill of sale for certain personal property on the ranch. The Court found that the sale of the ranch was made in good faith, as a *conditional sale*, to become absolute, unless J. P. Lane redeemed the same by the payment of a sum of about \$2,650, due to Smith & Rogers, upon demands held by them, and some other debts of J. P. Lane, which they had agreed to pay; and that Lane had not redeemed the ranch from this sale. The Court also found that the sale and conveyance of the balance of the property to Smith & Rogers was without consideration, and made for the purpose of hindering, delaying and defrauding the creditors of J. P. Lane; that they agreed that Lane might dispose of the personal property conveyed, and the growing crops on the land, for the benefit of his creditors; that they violated this agreement, and appropriated the growing crops, and sold the personal property, and converted the same to their own use; and that they have received therefrom and hold money more than sufficient to pay the plaintiff's judgment. The Court ordered that the conveyance of the mining ditches be canceled, and that the said ditches be sold, and the proceeds applied to the payment of the plaintiffs' debt.

The appellants contend that as the Court found that the sale as to a portion of the property was made for a valuable consideration, and in good faith, they should have so found as to all the property—it being all one transaction. It may be that the Court below considered it their duty to uphold the sale as to the ranch, because it was made upon a valuable consideration; but the law is well settled, that a conveyance made with intent to defraud creditors is

Swinford v. Rogers.

void, though there may have been a full and valuable consideration paid therefor. The fraud taints and vitiates it. (1 Story's Eq. Sec. 369.) And it will not be allowed to stand even as security for advances actually made. (*Goodwin v. Hammond*, 13 Cal. 170.) The sale and conveyance of all this property being but one transaction, and it being found that the sale as to a part of the property was made for the purpose of defrauding creditors, the Court below would have been justified in holding the whole transaction fraudulent and void. The fraud would taint the whole. (*McKenty v. Gladwin*, 10 Cal. 228; *Seales v. Scott*, 13 Cal. 78.) The finding, then, is more favorable to the defendants than it should have been; and they cannot, therefore, complain of it, or ask this Court to reverse the judgment on that ground.

The appellants also contend that the Court erred in rendering a personal money judgment against the fraudulent vendees, Smith & Rogers, and that the allegations of the complaint are not sufficient to sustain such a judgment. As a general rule, a Court of Equity declares the fraudulent conveyance void, and directs that the property be sold for the satisfaction of the creditors' debt; but where a fraudulent vendee sells the property, or converts the same to his own use, that kind of relief is rendered impracticable, and he is clearly liable to account for the value thereof, and pay the same to the creditors of the vendor. (*Ludlow v. Kidd*, 4 Ham. 244; *Sparrow v. Chester*, 19 Me. 79; *Jones v. Henry*, 3 Littell, 428.) In this case, the complaint avers the facts of such sale and conversion, and the Court found these averments to be true; and that the value of the property, thus sold and converted, greatly exceeded the amount due to the plaintiffs on their judgment. Under these circumstances, there was no error in rendering a judgment against the fraudulent vendees, in the form of a personal money judgment, for the amount due the plaintiffs. We see no error in the record prejudicial to the appellants.

The judgment is therefore affirmed.

Tustin v. Faught.

TUSTIN v. FAUGHT *et al.*

WHERE the grantor named in the body of a deed signs a different name from that recited in the body of the deed, it is not entitled to be admitted in evidence, until it has been shown by parol proof that the person who executed the deed was the same one whose name is recited in the body.

Where real estate is conveyed to a married woman by a deed which recites a consideration of money paid, as well as love and affection, the land conveyed becomes the common property of the husband and wife, and the deed of the husband alone is sufficient to convey it.

A defendant in an action of ejectment may show in defense a title to the demanded property acquired by him after the commencement of the action.

APPEAL from the District Court, Seventh Judicial District, Sonoma County.

John Currey, for Appellants.

If the Court below refused to consider the title of the appellants, of which they gave evidence at the trial, because they did not show that they had title at the commencement of the action, then we contend that the Court erred, because the defendants, who were in the possession of the demanded premises at the commencement of the action must, in the absence of direct proof to the contrary, be presumed to have been in such possession lawfully and rightfully.

In *Hill v. Draper* (10 Barb. 458), the Court say: "The defendants in possession of the disputed premises, are presumed to have a valid title thereto, and the plaintiffs, to entitle themselves to recover, must overcome that presumption by proving title out of the defendants and in themselves." (*Jayne v. Price*, 5 Taunt. 329; *Carpenter v. Weeks*, 2 Hill, 341; 10 Johns. 339; 11 Id. 504; Best on Presumptions, 87.) This rule is the doctrine of the common law, of which our statute (Wood's Dig. 46, Sec. 9) is only declaratory. This statute says, in effect, that the occupation of real property by any other person than the real owner, shall be deemed to be under and in subordination to the legal title, unless it shall appear that such premises have been held adversely to such legal title. As to the rule at common law, see 3 Johns. Cases, 109, 124; 2 Ind. 125.

That the possession of the occupant is adverse to the true title

Tustin v. Faught.

will never be presumed from the mere act of possession; and if relied on as in opposition to the real title, its adverse character must be plainly and positively proved. (1 Wash. C. C. 78-80; 6 Cow. 125; 2 Wend. 13, 140; 2 Har. & John. 112-125; 7 Wheat. 59-109; 4 Wash. C. C. 38; 4 Wend. 423, 672.)

If we are right in respect to the position of the defendants, from two of whom the intervenors derived title, then such intervenors had the same rights of defense as their grantors had, with whose rights their own were connected as successors in interest.

F. D. Colton and M. M. Estee, for Respondent.

If it should be held that some or all of the appellants took an interest in the premises from their deeds, then we contend that, as it was acquired after the commencement of the action, it cannot avail the appellants. But they contend that being in possession at the commencement of the action, the presumption would be, that they were in possession under those tenants in common, from whom plaintiff did not derive title. We reply:

1st. They endeavored to show title, and failed. The presumption is, that they proved all the right to possession which they had.

2d. In their answers they claim title; they do not claim or pretend that they ever had license to enter.

3d. Appellants in their answers do not deny the possession of plaintiff, and their ouster of him. If they entered under a title, they should show it. If one tenant in common ousts another, the presumption would be, that he had another and paramount title.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action to recover possession of a tract of land in Sonoma County—a portion of the Rancho “Laguna de San Antonio.” Both parties claim title under Bartolome Bojorques, the grantee of the Mexican Government. The Court rendered a judgment against all the defendants except Gaston, from which, and from an order overruling a motion for a new trial, they appeal.

The plaintiff, to maintain the action, introduced in evidence a deed of conveyance, dated December 8th, 1855, executed by Bar-

Tustin v. Fought.

tolome Bojorques and eleven others. The defendants made several objections to this deed, one of which was that it was an unexecuted instrument. It appears, from an examination of the record, that the names of twelve persons, mostly Spanish names, are described as the grantors in the body of the conveyance, and that the names and seals of twelve persons, mostly Spanish, are attached as signatures to the deed, but these vary from each other; some of the names in the body of the deed do not appear in the same terms among the signatures, while several signatures do not appear in the same words among the names in the body of the deed. Whether they were in fact all the same persons, under different names, it is unnecessary to determine; for this objection of the defendants is untenable. The deed shows clearly, upon inspection, that several of the persons named in the body of the instrument signed their names to it; and to that extent, at least, it was executed, and properly admissible in evidence. This objection was made to a similar deed in the case of *Colton v. Seavey et al.* (22 Cal. 496), and was overruled.

It was also objected to this deed, that its execution was not so proved as to entitle it to be received in evidence. This objection is also untenable. The execution of the conveyance appears to have been acknowledged, by all the parties who signed the deed, before a Notary Public, who was also the subscribing witness to it — except as to one grantor, whose acknowledgment was taken before the County Clerk — and duly certified to by him.

The defendants introduced in evidence a deed from Bartolome Bojorques to Pedro Bojorques and seven others, his children, for the undivided eight-ninths of the rancho, dated November 20th, 1851. These grantees are the same persons under whom the plaintiff claims title, and by whom, with their husbands, he claims his deed was executed. One of the grantees in this deed was Marcella Lopez, whose name appears in the body of the plaintiff's deed as Maria Marcella Lopez, but her name does not appear among the signatures, at least not in either of those terms; and if it appears in another name, that fact should have been proved. On the second day of February, 1857, Marcella Lopez and her husband executed to Richardson & Hunt a conveyance of the

undivided one-ninth of the rancho. On the 12th day of June, 1857, Richardson & Hunt conveyed to the defendant Freeman the tract of land described in the complaint; and afterwards, on the third day of April, 1858, Hunt conveyed to Freeman the undivided one-fourth of all his then interest in the rancho. These two last deeds were not executed, however, until after April 15th, 1857, the date of the commencement of this action. It appears, therefore, that at the time of the commencement of this action, the plaintiff was the owner, as tenant in common with others, of an undivided interest in the rancho, including the premises in controversy, the extent of that interest depending upon the number of the grantees named in the deed of November 20th, 1851, who signed the deed to him. It also appears, that, at the time of the commencement of this action, the defendant Freeman was a stranger to the title, but that he afterward acquired an interest to the extent of the undivided one-ninth in the premises in controversy, and from that time, to wit: June 12th, 1857, he was a tenant in common therein with the plaintiff.

It further appears from the record that Howe and his wife, Angela de la Luce Howe, daughter of Bartolome Bojorques, executed a deed to Hopkins & Bennett, dated July 22d, 1857, conveying the undivided one-ninth of the rancho. Also, that Richardson executed a deed to Hopkins & Bennett, dated July 23d, 1857, conveying the undivided one-eighteenth of the rancho. To the first of these deeds it is objected that it conveyed no title or interest in the premises, because the grantors, Howe and his wife, had previously, by the deed of December 8th, 1855, conveyed all their interest in the premises in controversy to the plaintiff. An examination of this latter deed shows that Henry Howe is properly named in the body of the deed, and his name duly appears among the signatures thereto. The name of Angela de la Luce Howe appears in the body of the deed, and Maria de la Luce Howe among the signatures; and it is evident that these different names refer to the same person. But it is urged that the certificate of the acknowledgment to the deed to the plaintiff, so far as it relates to the wives of the several grantors, is defective. This part of the certificate is in these words: After naming the wives, it proceeds "being exam-

Tustin v. Faught.

ined by me, separate and apart from their husbands, acknowledged to me that they signed the same without fear or compulsion from them." This is clearly defective, because it does not show that they were made acquainted with the contents of the conveyance, or that the examination was "without the hearing" of their husbands, or that they executed the same without "undue influence" of their husbands, or that they did "not wish to retract the execution of the same." To this objection it is replied, that the conveyance from Bartolome Bojorques to his children is not a deed of gift, but of bargain and sale upon the consideration of four hundred and sixty-one dollars, money paid, as well as love and affection, and therefore the title vested in Henry Howe, the husband, and the wife acquired no separate estate therein, but it became and was the common property of the husband and wife, and the deed of the husband alone was sufficient to convey it. The deed being one of bargain and sale, founded upon a money consideration, and not a deed of gift, the property conveyed became common property, and the deed of the husband was sufficient without the signature of the wife. (*Meyer v. Kinzer*, 12 Cal. 253.) It follows that no title or estate was conveyed by this deed to Hopkins & Bennett, dated July 22d, 1857, and it is not necessary therefore to follow out the title claimed under it.

It will also be found that the other deed from Richardson to Hopkins & Bennett, conveyed no title or interest in or to the premises in controversy to the grantees. This deed is dated July 23d, 1857, and it was not recorded until August 5th, 1857; but prior to those dates, to wit: the twelfth day of June, 1857, Richardson & Hunt had conveyed their interest in the premises in controversy, to Freeman, and this deed was duly recorded August 3d, 1857. It was therefore both dated and recorded first. It follows that no title or estate passed by this deed, and it is not necessary to trace out the title claimed under it.

This examination shows that none of the defendants or intervenors who appeal, except Freeman, had any title to the premises, either at the commencement of the action or at the time of trial. The Court, among other findings, found as follows: "That the defendants in said action and intervenors therein, excepting the de-

Tustin v. Faught.

fendant Martin Gaston" (who is not a party to the appeal), "proved no valid title in themselves, or either of them, in or to said lands described in plaintiff's complaint, or any part thereof; that previous to the commencement of this action the said defendants entered upon the said lands described in plaintiff's complaint and ejected the plaintiff therefrom, and ever since said time have been in possession thereof." The Court also found that the plaintiff was the owner of the undivided two-thirds of the premises in controversy, and that he was entitled to the possession of the land against all the defendants and intervenors, except Gaston, and entitled to a judgment against them for the restitution of the premises and for costs, and judgment was rendered accordingly.

The finding as to want of title in the defendants and intervenors who appeal is correct as to all of them, except as to Freeman, who, as we have already shown, became the owner, on the twelfth day of June, 1857, of the undivided one-ninth of the premises. The Court below probably held that a defendant could not show a title acquired since the commencement of the action; and as Freeman's title was acquired since, it was probably for that reason excluded. But there is no good reason why a defendant may not show such after-acquiring title. (*Moore v. Tice*, 22 Cal. 513; *Smith v. Billett*, 15 Id. 26.) By that title Freeman became the tenant in common with the plaintiff. Whether he did any act, after he became such tenant in common, which would amount to an ouster of the plaintiff, does not appear in the record, except in the general finding of the Court that, previous to the commencement of the action, all the defendants entered and ousted the plaintiff. But this does not show any ouster after Freeman became tenant in common. From that time he may have acknowledged the plaintiff's title, and have avoided any act or declaration which would constitute an ouster of the plaintiff. We have recently laid down the rules which govern the rights of tenants in common, and what will constitute an ouster in such cases. (*Carpentier v. Webster*, decided at the July Term, 1863.) No judgment for damages was claimed or rendered, and the question is one, therefore, merely of the right of possession. The plaintiff is clearly entitled to the possession of the premises to the extent of the interest

O'Brien v. Brady.

acquired by him by the deed of December 8th, 1855, which the Court finds was the undivided two-thirds, the correctness of which we have no certain means of determining from the record before us. The defendant Freeman is entitled only to the possession of the undivided one-ninth of the premises in controversy, and it will be necessary to ascertain the extent of his possession, and whether he has ousted the plaintiff, his co-tenant, for which purpose a new trial as to Freeman will be necessary.

The judgment is therefore affirmed with the costs of appeal, as to all the defendants and intervenors, except as to the defendant Freeman, and the judgment against the said Freeman is reversed, and the cause remanded for a new trial as to him.

In the case of *Carpentier v. Webster*, a rehearing was granted, and the case is still pending.— *REPORTER.*

O'BRIEN v. BRADY.

When the motion for a new trial is based upon newly-discovered evidence, or that the verdict is against evidence, an enlarged discretion is vested in the Court below; and the Supreme Court will rarely interfere with the action of the Court below, in granting a new trial.

When a new trial is granted by the Court below, entirely upon alleged errors of law, the Supreme Court will review the action of the Court below, as in other cases.

APPEAL from the District Court, Tenth Judicial District, Yuba County.

The facts are stated in the opinion of the Court.

Henry K. Mitchell, for Appellant.

Rowe & Goodwin, for Respondent.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an appeal from an order granting a new trial. The grounds of the motion for a new trial were, newly-discovered evidence, insufficiency of the evidence to justify the verdict, and that the verdict is contrary to law and the instructions of the Court.

Brady v. O'Brien.

The appellant contends that the affidavits of newly-discovered evidence do not make out such a case as entitles the defendant to a new trial. Where the motion is founded upon newly-discovered evidence, or that the verdict is against the evidence, an enlarged discretion is vested in the Court below in the granting of new trials; and this Court will rarely interfere with their action in granting the motion on such grounds. This case comes within this rule, and we do not find any abuse of this discretion to justify a reversal of the order. Where the motion for a new trial is founded entirely upon alleged errors of law, in the proceedings of the Court below, and the order for a new trial is granted solely upon that ground, this Court will review such action of the Court, as in other cases, where questions of law and not matters of mere discretion are involved. This case, however, does not come within this exception to the general rule.

The order is affirmed.

BRADY v. O'BRIEN.

If the statement and notice of motion for new trial are defective, in not setting forth, specifically, the grounds of the motion, an objection should be made on this ground, in the Court below, to enable the Supreme Court to review the action of the Court below.

APPEAL from the District Court, Tenth Judicial District, Yuba County.

Henry K. Mitchell, for Appellant.

Rowe & Goodwin, for Respondent.

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is an appeal from an order granting a new trial. It is urged that the statement and notice of motion for a new trial are defective in not setting forth, specifically, the grounds of the motion. The record does not show that any objection was made on this ground in the Court below, which should have been done, to enable

Colman v. Clements.

us to review the action of the Court. If the objection had been made there, probably the Court would have allowed an amendment in that respect; or the parties may have consented to waive that objection. Error will not be presumed, but must be clearly shown by the record. If the objection had been made on that ground, in a proper mode, and the Court had overruled it, then such action could have been reviewed by this Court on appeal.

The order is affirmed.

COLMAN *et al.* v. CLEMENTS *et al.*

IN an action of ejectment to recover possession of a mining claim, where the complaint alleges in general terms that the plaintiffs are the owners of the mining ground in controversy, they are entitled to show in evidence the rules and customs of the mining district in support of this alleged ownership without averring such rules and customs in the complaint.

The possession of one tenant in common is *presumed* to be the possession of all, and in order to rebut this presumption and make the possession adverse, it must be shown that the possession was with the intent to hold adversely, and such intent must be indicated by acts calculated to exclude the co-tenant. If written laws exist in a mining district, and the proof renders it doubtful whether they are in force, both the mining laws and parol proof of the mining customs may be offered in evidence.

Where a forfeiture is claimed under a mining regulation or custom, this regulation or custom will be most strictly construed against the claim of forfeiture. A judgment recovered in ejectment against a portion of several co-tenants will not to be reversed because all the co-tenants are not made parties defendant.

APPEAL from the District Court, Sixteenth Judicial District, Calaveras County.

The facts are stated in the opinion of the Court.

Tod Robinson, for Appellants.

By the rules of pleading, no one can claim a benefit or a forfeiture under a private act of the Legislature, without setting forth the act in his declaration or answer. Our own Practice Act, Sec. 61 (Wood's Dig. 795), requires this to be done, but excuses the setting forth the act in full, and makes it sufficient to refer to its title and the date of its passage. (1 Chitty on Pl. 217.)

Colman v. Clements.

The possession of one tenant in common is the possession of a co-tenant only so long as the one holding recognizes the co-tenant. (Adams on Eject. 136; *Humbert v. Trinity Church*, 24 Wend. 587.)

Coffroth & Spaulding, for Respondents.

In ejectment, the only facts necessary to be alleged are: 1st. Plaintiff's seizin. 2d. Defendant in possession at commencement of suit. 3d. That defendant withholds possession thereof from plaintiff. We hold that the local customs are as susceptible of proof as any other style of evidence, without being set up in the complaint.

All persons holding as tenants in common, joint tenants, or coparceners, or any number less than all, may jointly or severally bring or defend any civil action for the enforcement or protection of the rights of such party. (Wood's Dig. 248, Art. 1375; *Waring v. Crow*, 11 Cal. 366; *Pico v. Columbet*, 12 Id. 419.)

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is an action brought by four plaintiffs against eight defendants to recover the possession of the undivided five-thirtieths of a mining claim in Calaveras County. It appears that about the fifth of February, 1861, one Samuel Colman, with two others, took up and marked out 4,500 feet of a copper claim in the name of themselves and others, amounting to thirty persons in all. These names included the present plaintiffs and defendants. Some of these names were included without the previous knowledge or consent of the parties. Colman afterward sold out his interest to one of the plaintiffs, William Colman. Afterward, sometime about the first of June, 1861, twenty-three of the persons named in the original location, with seven others, formed a new company and relocated the same ground in their own names, and have continued in possession ever since, claiming that the original location had been abandoned by failure on the part of those left out of the new organization to perform the work required by the mining rules and customs. Only

Colman v. Clements.

eight out of the thirty new locators are made defendants, and these eight were among the number named in the original location. The case was tried by a jury, who found for the plaintiffs, and a judgment was rendered accordingly, from which the defendants appeal.

On the trial, the plaintiffs offered to prove the mining laws and customs, to which the defendants objected that they had not been mentioned or set forth in the pleadings, and could not, therefore, be proved. The complaint alleges, in general terms, that the plaintiffs are the owners of the undivided five-thirtieths of the mining ground in controversy, which is denied in general terms by the answer. So far as the title of the plaintiffs depended upon mining rules and customs, or acts done in pursuance thereof, such proof tended to support such title, and it was not necessary to set forth such mining rules and customs in the pleadings. The Court below did not therefore err in overruling this objection of the defendants.

On the trial, the Court instructed the jury that the possession of one locator was the possession of all, and the defendants then asked that the following instructions be given: "That the possession of one tenant is the possession of his co-tenants only so long as the tenant in possession recognizes the co-tenants," which the Court refused to give, and this is assigned as error. The possession of one tenant in common is presumed to be the possession of all. But such possession may in fact be adverse to that of the co-tenant. The instruction asked for is founded upon the idea that the mere fact that the tenant in possession does not "recognize the co-tenant" constitutes an adverse possession; and the case of *Humbert v. Trinity Church* (24 Wend. 577), is cited in support of the position. An examination of the able opinion of Justice Cowen, in that case, shows that more is required than is stated in the instructions asked for. He holds that the possession of the tenant must be with the intent to hold adversely, and it must appear that such intent has been "indicated by acts calculated to exclude the complainants from all participation as tenants in common." In the case of *Northrop v. Wright* (24 Wend. 221), it was held that a possession by a tenant in common for twenty-seven years, during which he had not recognized the right of his co-tenant, was not sufficient to presume an ouster. There was, therefore, no error in refusing to give the instruction in the peculiar form in which it was worded.

Colman v. Clements.

Parol evidence had been given of the mining laws and customs. The written laws were afterwards introduced, and the defendants then moved to strike out the parol proof, which was refused by the Court, and this is assigned as error. When the parol evidence was offered, no objection was made that these mining laws were in writing or that the latter was the better evidence, and it is doubtful, therefore, whether the case does not come within the rule laid down in *Kiler v. Kimball* (10 Cal. 267). But it seems there was some question as to whether these written laws were in force at the time when they were sought to be applied to the facts in the case. There was, therefore, no impropriety in leaving both the parol and written evidence to the jury.

One of these mining laws was as follows: "There shall be one day's work done on each claim every thirty days from the first of May until the first of December in each year." The defendants asked the Court to instruct the jury as follows: "That under the mining laws, in evidence, it was necessary for one day's work to be done every thirty days after May until December, for each individual claim, and not one day's work for a company's claim, in order to avoid the presumption of abandonment; which was refused by the Court, and this is assigned as error. The claim in this case is a joint one; that is, four thousand five hundred feet located in the joint names of thirty persons. No location was made of any particular portion of the four thousand five hundred feet to any one locator, and it would therefore be impossible for each locator to do his day's work upon his own claim, if this section of the mining laws is to be construed as applying solely to each individual locator. The word "claim" is used, which is general in its character, and properly includes all kinds of claims; joint, as well as separate. If it had been intended to include, or apply only to the claim of each locator, whether made jointly with others, or separately to himself alone, it should have been expressed in clear terms. As the parties claim a forfeiture under it, it is to be strictly construed against the claim of forfeiture. In other words, the parties who claim a forfeiture under it, must show that the case comes within the strict letter of the rule. (*Von Schmidt v. Huntington*, 1 Cal. 70; *Waring v. Crow*, 11 Id. 371.) This point is therefore overruled.

Pierson v. McCahill.

It is objected that all the co-tenants should have been made parties, that the adjudication is incomplete, and that the judgment cannot be enforced without them. We can readily see that difficulties may arise about the enforcement of the judgment, and that it would have been more advantageous to have made all the co-tenants parties; but it can hardly be deemed essential in cases of this kind, or that a judgment of this kind is erroneous because they are not all brought in. (*Waring v. Crow*, 11 Cal. 371.) If the action had been against them as a mining partnership, in the nature of a suit in equity, it would have been necessary to have made all persons interested in the claim or the subject matter parties, and no judgment could have been properly rendered until they had all been made parties. (1 Daniel's Ch. Pr. 315-318; Story's Eq. Pl. Secs. 166-168.)

We have thus disposed of all the material points raised by the defendants, and find no error prejudicial to the appellants in the action of the Court below.

The judgment is therefore affirmed.

See *Dutch Flat Water Co. v. Mooney* (12 Cal. 534):—REPORTER.

PIERSON v. McCAHILL.

An appeal from an order refusing to change the venue of an action, operates as a stay of all further proceedings in the case in the Court below, until such appeal is determined.

An undertaking in the sum of three hundred dollars, as required by the three hundred and forty-eighth section of the Practice Act, is sufficient to perfect such appeal and stay proceedings.

If one of the terms of a written agreement is left out by mistake when the same is drafted, parol evidence of that fact may be received, and the agreement reformed and made to correspond with the intentions of the parties.

APPEAL from the Fifth Judicial District, San Joaquin County.

The facts which do not appear in the opinion will be found stated in 21 Cal. 122.

Pierson v. McCahill.

George W. Tyler, for Appellant.

The Practice Act (Sec. 347) provides that an appeal may be taken from the District Court to the Supreme Court "from an order refusing to change the place of trial, after a motion is made therefor, in the cases provided by law."

Plaintiff moved for a change of venue, on the ground that "the convenience of witnesses and the ends of justice would be promoted by the change," which is one of "the cases provided by law." (Pr. Act, Sec. 21.)

It will be seen that this is not one of the cases provided by the statute, in which it is necessary to file an additional bond, other than the bond for three hundred dollars, as provided in Sec. 348. Such being the case, it is plain that the appeal from the order of the Court refusing to change the place of trial was a "stay of all proceedings" in the case.

It is a well-established proposition of law, that a plea of payment of a smaller sum is not a good plea in bar of an action for a greater; and the only ground upon which Courts have sustained composition agreements is, that not to sustain them would work a fraud upon other creditors, or might work such fraud. They have therefore held, that the promise of one creditor was a good consideration for the promise of another.

The principle of the rule does not exist in this case. Here, all the balance of the creditors have been paid, and have given receipts in full of all demands to the defendant.

"When the reason of a rule no longer exists, the rule itself ceases," is a maxim too well known and recognized to be disregarded.

The Court will bear in mind that this is in effect a bill for a specific performance of the contract, as well as a bill to reform a mistake in the instrument itself; and the findings of the Chancellor, and the decree entered, is for a reformation of the instrument, and then for a specific performance of the contract.

I lay down the proposition, without fear of successful contradiction, that the weight of authority is in favor of the doctrine that Courts of Equity never interfere in cases of this kind. (Com.

Dig. Chancery, 2 C. 16; *Jaynes v. Statham*, 3 Atk. 388; *Garrard v. Grenling*, 2 Swanst. 257; *Pitcairne v. Oubourne*, 2 Ves. 375; *Mason v. Armitage*, 13 Id. 25; *Clark v. Grant*, 14 Id. 519; *Hepburn v. Dunlap*, 1 Wheat. 197; *Clowes v. Higginson*, 1 Ves. & B. 524; *Winch v. Winchester*, 1 Id. 375; *Ramsbottom v. Golden*, 1 Id. 165; *Flood v. Finley*, 2 Ball & B. 53; *Townsend v. Stangroom*, 6 Ves. 325; *Price v. Dyer*.) The foregoing authorities as to the point that Courts are not bound to interfere, but that it is merely a matter of discretion; and the following, as to whether they will exercise that discretion in a case of this kind, deciding that they will not. (*Woolam v. Hiam*, 7 Ves. 211; *Higginson v. Clowes*, 15 Id. 516; *Clinan v. Cook*, 1 Sch. & Lef. 38, 39; *Clowes v. Higginson*, 1 Ves. & B. 524; *Rich v. Jackson*, 6 Ves. 335, 4 Bro. Ch. 514; *Ogilvie v. Foljambe*, 3 Meriv. 53, 63; Jeremy on Eq. Jur. B. 3, Pt. 2, Ch. 4, Sec. 1, 432.)

I do not contend but what an equitable defense to an action at law may be plead and determined in the same suit; but I do contend that they must be tried separately, and this Court has so decided in several cases. (See *Weber v. Marshall*, 19 Cal. 447; *Arguello v. Edinger*, 10 Id. 159.) The only question then that could be passed upon by the Court, was the one raised by the amended answer, setting up a mistake in the written agreement. This was an equitable defense to only a part of the amount sued for, in case the Judge, sitting as a Chancellor, should decree a reformation of the instrument. As to the amount due us, providing a reformation was ordered; and as to whether there was a tender of amount due before suit was brought; and as to whether the one hundred dollars had been garnisheed prior to the commencement of this suit; are questions for a jury to pass upon, and the Chancellor has nothing to do with them. We had no right to claim a trial by jury on the equitable defense, but we had a right on the legal, and we have never waived that right. Under the old practice, a party would have been driven to his bill in equity to reform the instrument. Our practice has, perhaps, changed it so that the defense may be set up in an action at law; but in a case of that kind, the equitable issue should be first tried by the Court, sitting as a Chancellor, and if a reformation is decreed, then the

case is ready for trial, by a jury, unless a jury is waived, upon the legal issues raised by the pleadings. (*Weber v. Marshall*, 19 Cal. 447.)

The Court erred in ordering a reformation of the agreement upon the evidence offered in this case.

Hall & Scaniker, for Respondent.

The power of the Court to hear and determine the cause, was not suspended by the appeal from the order refusing change of venue, under the operation of Sec. 353 of the Practice Act. That section has reference to the "preceding sections" (Secs. 346-352), wherein a stay is provided for, of judgments or orders, commanding some act or thing to be done; and the section restricts the stay, in general terms, to "the matter embraced therein;" saving the right of the Court to proceed "upon any other matter." But the section in question clearly was not intended to give to an undertaking, under Sec. 348, the effect of a stay in any case, for the latter section purports only to provide an indemnity against costs and to render the appeal complete, whilst the implication arising from the express directions of the next succeeding section deny to Sec. 348 any greater effect.

Besides, the order of refusal was not an order commanding the plaintiff to do any act or thing; it merely denied to the plaintiff the claim which he made, which was, that he should not be required to go to trial in that Court.

The trial was proceeded with, not by operation of the order, but under provisions of law, and the practice of the Court. (Practice Act, Sec. 356; *Merced Mining Co. v. Fremont*, 7 Cal. 130; *Hicks v. Michael*, 15 Id. 108.)

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This case has been previously before this Court on two separate appeals. One will be found reported in 21 Cal. 122, and the other in 22 Id. 127. In the first appeal the judgment for the defendant was reversed. The second case was an appeal from interlocutory orders, one of which was a denial of a motion to change the venue,

in which the action of the Court below was affirmed. While this second appeal was pending, the action was brought on for trial by the defendant, and the plaintiff applied to the Court for a continuance, upon the ground, among others, that the appeal from the order refusing to change the place of trial was still pending. The Court refused the continuance, and compelled the plaintiff to go to trial, which he now assigns as error.

The plaintiff contends that, having filed the undertaking on this appeal in the sum of three hundred dollars, required by Sec. 348 of the Practice Act, the appeal was perfected, and it operated as a stay of all further proceedings in the case in the Court below until such appeal was determined, under the provisions of Sec. 353. We think such is the proper construction of the statute upon the subject. In cases of appeal from an order refusing a change of venue, the statute has required no other or further undertaking than that prescribed by Sec. 348. The necessity that there should be a stay of proceedings in an appeal from such an order is apparent; as otherwise the party appealing might be forced to a trial in the wrong county, before the appeal was determined, and thus he would lose all benefit from his appeal in case the order should be reversed; or else we would be compelled to hold that such reversal would operate as a reversal of any judgment which might in the meantime have been rendered against the appellant.

Sec. 353 was evidently intended to provide for a stay of proceedings in cases of this kind. It is true that that section provides that "the Court below may proceed upon any other matter included in the action, and not affected by the judgment, or order appealed from." But the very matter affected by the order appealed from in this case was the right of the Court below to try the case, and whether the trial should not be had in some other county, before another Court. It was a matter affecting the *trial* of the case, and no trial could properly be had until the appeal from the order relating to the proper place for that trial had been determined. All other matters, except the trial of the case, could be properly proceeded with during the pendency of the appeal. It follows that the Court erred in refusing the continuance.

The defendant's witnesses testified that Henderson was the agent

selected by the creditors to receive the proceeds of the goods for the creditors, and that the William Higgins mentioned in the agreement was but a sub-agent of Henderson; and this was objected to by the plaintiff, on the ground that it was allowing parol testimony to vary the written agreement as to who was to take charge of and sell the goods. We do not consider this objection tenable. It was merely explanatory of the relation of one of the parties to the agent named; Henderson being one of the creditors who signed the agreement. If the creditors saw fit, after the agreement was executed, to change their agent, and put Henderson instead of Higgins to sell the goods, they had a right so to do; and parol proof of that fact was not varying the agreement, but merely showed a subsequent change therein.

The appellant further contends that the Court below erred in finding that there was a mistake in the agreement as alleged in the answer, and erred in correcting the mistake, and in rendering judgment according to the agreement, as thus corrected. The simple question to be determined was, whether one of the terms of the agreement had been omitted by mistake in drafting the contract. It was purely a question of fact, to be determined from all the evidence and all the circumstances of the case. It appears that an agreement had been drawn up by an attorney; but, it being quite voluminous, the parties requested Miller, one of the creditors, to shorten it. He undertook to do so, but by mistake left out one of the terms of the agreement, as drawn up by the attorney, to wit: that the defendant was to be released upon the payment of fifty per cent. upon his debts. It does not appear to be disputed that this was one of the terms of the first instrument drawn by the attorney, and that that instrument embodied the contract of the parties. Although the parol evidence is conflicting, yet this fact is a very strong circumstance to sustain the finding of the Court. We see no more reason for disturbing this finding of the Court in this case than in other cases. The weight of testimony, we think, is in favor of the finding. The judgment should not, therefore, be disturbed on this ground; but as the Court erred in refusing the continuance of the cause, for the reason above given, the judgment is reversed, and the cause remanded for a new trial.

Northam v. Gordon.

NORTHAM *et al.* v. GORDON.

THE purchaser of a judgment entered by default, takes it subject to the right of the defendant upon showing sufficient grounds, to have the default and judgment set aside, and to be let in to defend the action; and in this respect stands in no better position than his assignor.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Tompkins & Belknap, for Appellants.

Hepburn & Dwinelle, for Respondent.

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

A judgment was duly entered against the defendant in this case by default, on the twenty-third day of September, 1862, and immediately, upon the same day, the plaintiffs assigned the judgment to one Kahman. The defendant, a few days afterward, applied to the Court, upon good and sufficient grounds, to set aside the default and judgment, and let him in to defend the action. The assignee of the judgment opposed the motion, on the ground that he was a *bona fide* purchaser, and that the defendant had no right to such relief, as against him. The Court granted the motion, set aside the default and judgment, and the assignee has taken this appeal. The assignee stands in no better position in this matter than the assignor, as was held by this Court in *Wright v. Levy* (12 Cal. 262); *Fore v. Manlove* (18 Id. 436). In purchasing the judgment, he took it subject to the right of the defendant to have the default and judgment set aside upon a proper showing.

Goldman v. Davis.

GOLDMAN v. DAVIS.

THE contract of the indorser of a promissory note is a written one, and his liability a conditional one to pay upon a proper demand and notice.

This written contract cannot be changed from a conditional to an absolute one, by parol evidence of a verbal promise made by the indorser at the time of the indorsement to pay the note without demand or notice.

APPEAL from the Sixth Judicial District, Sacramento County.

The facts are stated in the opinion of the Court.

George R. Moore, for Appellant.

P. L. Edwards, for Respondent.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action against the defendant as indorser upon a promissory note executed by one H. Davis. The complaint avers that the defendant waived demand, notice, and protest; that he agreed to pay the note, and that the plaintiff might look to him solely for such payment. The case was tried by the Court and a judgment was rendered for the plaintiff; from which, and from an order overruling a motion for a new trial, the plaintiff appeals.

On the trial, the plaintiff offered evidence to prove that at the time the note was executed the defendant agreed to pay the note, or that he would see it paid, and that he might look to him for the pay; to which the defendant objected that the agreement of the parties was in writing, consisting of the defendant's signature as indorser of the note, and that his liability under the written indorsement could not be varied by any parol evidence of what occurred before or at the time of the execution of the note and its indorsement; but the Court overruled the objection, and this is assigned as error. The Court clearly erred in this ruling, as it was an attempt to vary the terms of a written contract, and change it from a conditional liability, depending upon a proper demand and notice to the indorser being given to render him liable, to an unconditional promise, by parol evidence of statements made before and at the

Lathrop v. Middleton.

time of the execution of the written contract. The law deems all such stipulations merged in the writing, which, in the absence of fraud, accident, or mistake, is treated as the exclusive medium of ascertaining the agreement to which the parties bound themselves. (*Hoare v. Graham*, 8 Camp. 57; *Free v. Hawkins*, 8 Taunt. 92; Bayley on Bills, Chap. 12, 521-523, and notes.)

The judgment is therefore reversed and the cause remanded for a new trial.

LATHROP v. MIDDLETON.

A FERRYBOAT used for the transportation of passengers, teams, etc., across a stream is not exempt from execution because the ferry is on the mail route, and the boat is used also to convey the United States mail across the stream. To levy on and sell such boat by virtue of an execution is not an obstruction to the passage of the mail within the meaning of the Act of Congress making it a penal offense to "knowingly and willfully obstruct or retard the passage of the mail or of any driver or carrier, or of any horse or carriage carrying the same."

APPEAL from the Fifteenth Judicial District, Butte County.

The plaintiff, at the time of the levy of the executions, was and had been for five years a regularly licensed ferryman, having a ferry across Feather River, near the town of Oroville, on the main traveled route from Oroville to Red Bluff.

J. E. N. Lewis, for Appellant.

Smith & Rosenbaum, for Respondent.

By Sec. 21, Wood's Digest, 462, a ferryman is bound to keep good and safe boats at all times, for the crossing of passengers, etc. By Sec. 20, same act, it is provided that all ferrymen shall carry, free of charge, all expresses and dispatches sent by military commanders in time of war or insurrection. Secs. 8 and 9 of Act of Congress of March 3d, 1825, imposes a heavy penalty on a ferryman who neglects to keep a proper ferry, or who refuses or neglects to transport the mails.

Lathrop v. Middleton.

The fact that the boat was not actually in use at the time of levy can make no difference, as a ferryman is bound to keep on hand as many boats as are necessary (Wood's Dig. 562), and complaint clearly shows that said boat was absolutely necessary. To say that nothing is exempt from forced sale unless it is so by express statute, is not supported by the decisions. The money in the hands of the treasurer is not so exempt in an execution against the county; yet this Court held, in *Gilman v. Contra Costa County* (8 Cal. 52), that such funds are not subject to levy.

By the Statutes of New York, professional, literary, and surgical instruments are not expressly exempt; yet it was held in the *Robinson Case* (3 Abbott, 466) that such are not subject to levy. A wagon is nowhere exempt by the statute of that State; yet it was held in *Eastman v. Coswell* (8 How. 75) that a one-horse wagon used by a physician in making his professional visits is not subject to levy, although the same Court had previously decided, in *Morse v. Keyes* (6 How. 18), that a lumber wagon is not exempt; and the distinction is placed on the ground of public policy. In that case the Court says exemption laws are not only to operate in favor of the debtor, but also in favor of the public.

There is no express statute exempting a Judge's library in this State; yet no one will contend that such a library would be liable to levy. If there is any such rule as exempting property from forced sale from public policy, this case at bar is certainly one of them. When property is of such a nature that an attachment of it would produce a sacrifice and great injury to the defendant, without benefiting the plaintiff, it is not subject to levy. (Drake on Attachment, Sec. 249.) Thus it was held in *Wallace v. Parker* (8 Vermont, 440) and in *Pelthallow v. Dwight* (7 Mass. 38), that corn in the field is not subject to levy on execution. So in *Worris v. Watson* (2 Foster, 364), it was held that a growing crop of grass cannot be attached.

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is an action to enjoin the defendant, the Sheriff of Butte County, from selling a ferryboat belonging to the plaintiff under an

Roberts v. Chan Tin Pen.

execution against him, and to require him to release the levy thereon. It appears that the Sheriff, having two executions against the plaintiff, levied the same upon the ferryboat, which was at the time in an unfinished condition, and had never been used at the ferry. The plaintiff contends that the United States mail from Oroville to Shasta crosses the river at his ferry, and therefore his ferryboats are exempt from forced sale on execution. The statute of this State provides what property shall be exempt from sale on execution; but ferryboats, even on mail routes, are not included in the list. Nor is there any Act of Congress which exempts such property.

In *Parker v. Porter* (6 Louisiana, 169) a levy of an attachment was made on a steamboat used to carry the United States mails; but no mails were on the boat at the time, though they were brought on soon after, and it was held that the levy was valid, and was not an obstruction to the passage of the mail within the Act of Congress making it a penal offense to "knowingly and willfully obstruct or retard the passage of the mail, or of any driver or carrier, or of any horse or carriage carrying the same;" held, further, that this act must be strictly construed when under its provisions it is sought to protect property used in the transportation of the mails from the pursuit of creditors, in derogation of a right recognized by the laws of the State.

The property in this case was clearly liable to the levy, and the Court erred in enjoining the sale and ordering the defendant to release the levy.

The judgment is therefore reversed and the cause remanded.

ROBERTS v. CHAN TIN PEN *et al.*

THE rule that a party must particularly specify his objections to evidence when offered, applies only to those objections which relate to the question whether the evidence is admissible or not, and does not relate to the question as to the weight to be given to the evidence after it is admitted, or to matters tending to overthrow, contradict, or invalidate it.

Roberts v. Chan Tin Paa.

When the complaint in ejectment is general in its terms, and makes no mention of deeds, and the answer is equally general in its denials, and on the trial plaintiff relies on tax deeds to recover, the defendant has a right to introduce any evidence allowed by the statute, to show the invalidity of the tax deeds, or the title acquired under them.

If the plaintiff relies on tax deeds to recover, the defendant has a right to show that the land assessed to him included a tract in which he had no right, title, interest, or claim.

When the assessment is not of an undivided interest in, but of an entire tract or parcel of land, the Tax Collector has no power or authority to sell an undivided interest therein for the non-payment of taxes.

The owner of the property assessed, and in default of his doing so, the Tax Collector has a right to designate at or before the time of sale any portion less than the whole tract which will be sold; but when this designation is made, the parcel sold must be particularly located by metes and bounds in the general tract, so that the purchaser may know its exact boundaries and what part of the tract remains unsold.

If the description of the tract sold at the time of the sale is general, as "fourteen feet" in a certain lot, the sale is void for uncertainty, and the defect cannot be cured by inserting a proper description in the certificate of purchase or collector's deed.

APPEAL from the Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

S. H. Brodie, for Appellants.

The assessments were void, because the property of the See Yup Company was wrongly assessed, in that an alley eight feet front on Pine Street by one hundred and thirty-seven and one-half feet deep was added to it, which was neither owned, possessed, nor claimed by said company, nor by these defendants; but over it they had the right of way only, and their recorded deed showed it. (3 Kent's Com. 419.)

The Assessor has no power to join in one assessment two pieces of land owned by different persons. (Stat. 1859, 346, Sec. 3; *Terrill v. Graves et al.*, 18 Cal. 149; *Barker v. Blake*, 36 Me., 433; *Blackwell on Tax Titles*, 175, 176.)

1st. By such an assessment A would be made to pay B's debt.

2d. Such an assessment is beyond the Assessor's power, because it might deprive the property owner of his right to designate to the

collector the piece he wishes sold, should less than the whole suffice to pay the taxes, which right the statute secures to him. (Stat. 1857, 332, Sec. 17.)

3d. An assessment joining A's land with that of B, would be void further, because if A should designate to the collector B's land as the piece to be sold, if less than the whole be taken, and B should designate A's land, the collector could not sell at all, because it is only when the owner fails to designate that the Tax Collector has any power to designate what portion shall be bid upon. (Id.)

The deed of Hunt following the sale of one-eighth was void, because it is only when "an undivided interest is assessed" — which was not the case here — that the Tax Collector can sell an undivided interest. (Id.; Black. on Tax T. 332.)

Again, both deeds were void, because:

1st. Uncertainty of the land sold ("one-eighth" and "fourteen feet"). (*Kelsey v. Abbott*, 13 Cal. 619.)

2d. Variance between the piece bid on and that described in the said deeds respectively.

3d. The pieces mentioned in and intended to be conveyed by said deeds were not sold at auction, but only at private sale; for only "one-eighth" and "fourteen feet" were knocked off at auction, and the officer had no power to make a private sale. (Black. on Tax T. 313.)

4th. The Tax Collector's act, in conveying by metes and bounds, amounted to an attempted exercise of the power to partition the land between the owner assessed and the supposed purchaser of part.

A partition can only be had by agreement of parties, or else by decree of a Court. Of course, the Tax Collector has no such power given him by law. It would be monstrous if the law should confer such a power; for if the officer may sell a certain number of feet without locating them, and then convey by metes and bounds what portion of the property he pleases, it is easy to see that if an enemy should purchase, the officer might convey to him the least valuable portion; while if a friend was the successful bidder, he would obtain that part of the land which was best located, most valuable, and covered, perhaps, with costly improvements. (Id. 338.)

J. J. Papy, for Respondent.

The defendant objected to the introduction of both these deeds upon the ground that they were null and void upon their faces. The defendant did not offer to show in what the deeds were null and void; therefore, the ruling of the Court was correct. (*Kiler et al. v. Kimball et al.*, 10 Cal. 267; *Martin v. Travers*, 12 Id. 243.)

The deeds being admitted as evidence without legal objection, or without objection at all, they are "declared to be all the requisites essential to the validity of the sale made for taxes, or assessments." (Stat. 1859, 349, Sec. 23.)

And the deed conveys to the purchaser the absolute title to the lands described in the deed, clear of all encumbrances, etc. (Id.)

And such deed shall be conclusive proof of the matters by it set forth; except, that the Court may examine only in regard to such deed, and may hear any testimony in relation thereto, as follows, etc. (Id.)

The Court has already decided that a defendant is limited to the defenses authorized by statute. (*Mills v. Tukey*, 22 Cal. 373.)

If the defendants failed to present their objections at the time of the offer of the deeds in evidence, and also failed to allege any one of them as defenses in their answer, then they are estopped from controverting any one of the allegations of the deeds. They are conclusive, so far as they can convey title; and nothing but a superior outstanding title can avail the defendants. This they have not. (For the meaning of the word "conclusive," see *Bouvier's Law Dictionary*, *Burrill*, *Webster*, etc.)

The statute finally determines that all the statements in the deed are true—not to be rebutted. When matters are pronounced "conclusive," they are rendered effectually so, by not permitting the party to give any evidence against them. (Greenl. 204.)

The answer of the defendants, being a simple general denial, they could not avail themselves of any testimony. They could not contradict the plaintiff's evidence, except to show a superior outstanding title in a third party. "Matters in avoidance must be specially pleaded. They cannot be used under an answer which is

a simple denial of the allegations of the bill." (*Gaskill v. Moore*, 4 Cal. 233; *Piercy v. Sabin*, 10 Id. 22.) In which the Court say: "If the onus of proof is thrown upon defendant, it is new matter." (*Payne & Dewey v. Treadwell*, 16 Cal. 244.)

The first two exceptions in the statute, and the only ones upon which defendants can rely, are:

1st. "That the property, or a larger part of which it is a portion, was not assessed or equalized according to law."

2d. "That the taxes, or a portion of them, were not levied by law, or by some person or body under authority of law."

Plaintiff insists that under these exceptions, the defendants cannot give any evidence relative to the manner of conducting the sale, because the sale, or act of the Tax Collector, is no part of the assessment or equalization; nor is it levying the tax. The assessment, equalization, and unlawful levy of the tax, can alone be examined into, under a proper averment in the answer. Everything else not allowed by statute is excluded, and the deed made conclusive.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action to recover possession of a lot in the City of San Francisco, the plaintiff claiming title thereto under two tax deeds. He recovered judgment, from which the defendants appeal.

The plaintiff introduced in evidence the two tax deeds—one executed by J. Hunt as Tax Collector, under a sale for delinquent taxes for the year 1859–1860, conveying a portion of the premises described in the complaint; and another executed by E. H. Washburn as Tax Collector, under a sale for delinquent taxes for the year 1860–1861, conveying the remainder of the premises.

After the plaintiff had closed his testimony, the defendants introduced in evidence a deed, under which they claimed title, which showed that a lane or alley, eight feet wide, on the west side of the premises deeded to them, was not included therein; and they also offered to prove by a witness, that this alley was not possessed or owned by the defendants, but that it was an open alley, over which the owners of the adjoining property had a right

of way only. The Court excluded the testimony, and this ruling is assigned as error. When the tax deeds were offered in evidence, the defendants objected to their introduction, on the ground, first, that no preliminary evidence, laying the basis for their introduction, had been offered; second, that they were void on their face; which objections were overruled by the Court. The complaint in this case is general in its terms, making no reference to the tax deeds, or the peculiar character of the title under which the plaintiff claimed. The answer is equally general in its denials and averments. The respondent insists that the Court properly overruled this objection, because, first, the point it was sought to sustain by the evidence was not specifically made as an objection to the introduction of the tax deeds, citing 10 Cal. 267; 12 Id. 243; second, the matter was not specifically set forth as a defense in the answer. These objections of the respondent also apply to the other evidence offered by defendants attacking the tax deeds, which was ruled out by the Court. The rule that a party must specify his objections to evidence when offered, applies only to those objections which relate to the question whether the evidence is admissible or not, and does not relate to the question as to the weight to be given to the evidence after it is admitted, or to matters tending to contradict, overthrow, or invalidate it. It, therefore, has no application to the present case. The objection that these matters are not set forth in the answer is equally untenable. Under the general denials of the answer, the defendants had a clear right to introduce any evidence allowed by the statute, to show the invalidity of the tax deeds, or the title acquired under them. The respondent also insists, that, as the statute only permits a tax deed to be attacked upon certain points, therefore these points must be specifically stated in the answer. But this is also untenable. The statute expressly declares, that Courts of Law and Equity may examine in regard to such deed, and may hear any testimony in relation thereto to show the points on which the permitted objections are founded. It is a matter, therefore, of evidence, and not of pleading. Besides, as the complaint makes no reference to a tax deed or title, the defendants were not bound to make any reference to it in their answer.

The statute authorized the Court to hear testimony to show "that the property, or a larger parcel, of which it is a portion, was not assessed or equalized, as required by law," and under this the defendants had a right to show that the lot or portion of a lot assessed to them included a tract in which they had no right, title, interest, or claim, and which was not in their possession, charge, or control; and if this eight-foot alley was thus improperly included in the assessment, the defendant had a right to prove those facts. We think, however, that the exclusion of the parol evidence worked no injury in this respect to the defendants; as the deed introduced by them shows that they had an interest in this alley to the extent of a right of way over it, as appurtenant to adjoining property conveyed by the deed. The alley does not appear to have been a public highway. The fact that it was included in the assessment with such adjoining property was not, therefore, sufficient to invalidate the assessment.

The property assessed in 1859, and which is the same as that described in the deed to the defendants, except that it includes the alley, was offered for sale by the Tax Collector in December, 1859, and at that sale plaintiff bought "one-eighth" of the whole premises. The evidence shows that there was no statement or designation made, before or at the time of the sale, to the bidder, of the particular portion or location of the part he should bid on, should less than the whole be taken; nor was any designation thereof made until the certificates of purchase were made out, which was from two weeks to two months after the sale.

The property assessed in 1860 is also the same as that described in defendant's deed, except that it includes the alley; and it was offered for sale by the Tax Collector in December, 1860, when the plaintiff purchased "fourteen feet" of the premises. No designation was made, at the time of the sale, of the particular portion to be taken by the purchaser, when less than the whole property was bid for. The evidence shows that this fourteen feet was not located or specifically designated until some time after the sale.

The deeds made in pursuance of these sales do not conform to the purchases made in any respect. The Hunt deed, instead of conveying the "one-eighth" of the premises assessed, describes

an irregular tract, three feet one and one-quarter inches wide at one end, and eight feet seven and one-eighth inches at the other, and running across the premises one hundred and thirty-seven feet six inches in length. The Washburn deed conveys a strip fourteen feet wide at each end, and running across the premises one hundred and thirty-seven feet six inches in length, and includes a portion of the premises conveyed by the Hunt deed.

The statute under which the sale was made (Wood's Dig. 619, Sec. 17) authorized the owner of the property to designate, prior to the commencement of the sale, what portion of the property he wishes bid on; but, if he did not so designate, "then the Tax Collector shall designate; and the person who will take the least quantity or smallest part of the land; or, in case an undivided interest is assessed, then the smallest portion of such interest, etc., etc., shall be declared to be the purchaser." It will be noticed that it is only in case that an "undivided interest is assessed," that a portion of such interest can be bid for. In this case, no undivided interest in the property was assessed; and the Tax Collector had no power or authority to sell an undivided interest therein to the plaintiff. It is clear also, that the intention of the statute is, that, when there is a sale of a less portion than the whole, and the owner has not designated the portion he wishes sold, and the Tax Collector is thus authorized to designate, such designation must be made before or at the time of the sale of the particular tract put up for sale, and that such designation cannot be made afterward. By the terms used in the statute, it is evident that the designation, whether by the owner or by the Tax Collector, must precede the actual sale to the purchaser. And, independent of these terms, if the statute had left it ambiguous, the necessity of such designation before the property is sold is apparent. It is important that the purchaser shall know what portion of the premises he is purchasing, that he may be able to bid understandingly; and it is of the greatest importance to the owner, as thereby the competition will be closer among the bidders. Besides, if the designation is not made until afterward, a door is left open for the grossest frauds. It follows, that there was not, in fact, any sale of the particular tracts described in the tax deeds. The property

really sold was not sufficiently described to enable it to be located, or to render the sale valid. If the tax deeds had correctly described the tracts really sold according to the facts; that is, "one-eighth" and "fourteen feet" of the assessed premises—they would have been clearly void for uncertainty of description. It does not show whether the "fourteen feet" are fourteen square feet or fourteen feet square, or in what portion of the premises it was intended to be located—whether on any side or in the center; and the same difficulty exists as to the "one-eighth." This uncertainty of description could not be remedied after the sale by the Tax Collector; for that would be virtually attempting to make a new sale, not at public auction, but in the most private manner. This objection to the title claimed under the tax deeds is properly included within the statutory provision upon this subject, which permits proof "that, at a proper time and place, the property was not sold at public auction, by a proper officer or by a person acting *de facto* as such officer." It in fact shows, that the property attempted to be conveyed by the tax deeds was never sold at all. It follows, that the tax deeds conveyed no title to the purchaser.

Sec. 32 of the Revenue Law in force at the time these taxes were levied and sales were made (Wood's Digest, 623), provides, that every tax levied under the provisions of that act shall be a judgment against the person and a lien upon the property assessed, "which judgment shall not be satisfied or the lien be removed, until the taxes are all paid or the property has absolutely vested in a purchaser under a sale for taxes." Sec. 20 also provides that this lien of the State is transferred to and vested in the purchaser at the tax sale, upon filing the certificate of purchase with the County Recorder; and it can only be divested by payment of the taxes and a per centage. No title having vested in the purchaser under this sale for taxes, it is a question whether this lien for taxes does not still exist upon the property; and also whether, under Sec. 20, the purchaser cannot in equity be subrogated to the rights of the State, and enforce this lien accordingly. But, as these questions have not been discussed by the counsel for the parties, and were not raised in the Court below, it is unnecessary to determine them at the present time.

The judgment is reversed and the cause remanded.

Holmes v. Ohm.

HOLMES v. OHM *et al.*

IN an action on an undertaking on appeal, it is a sufficient averment of the delivery of the undertaking, if the complaint show that it was filed in the Clerk's office.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

John Reynolds, for Appellant.

W. W. Chipman, for Respondent.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action upon an undertaking on appeal. The defendants demurred to the complaint, on the ground that it did not aver any delivery. The complaint avers that the defendants executed the undertaking sued on, copying the same in full into the complaint, with the indorsement thereon, showing that the undertaking was filed in the Clerk's office on the twenty-seventh day of March, 1862. This is clearly sufficient to entitle the plaintiff to recover thereon. These undertakings are not required by the statute to be delivered to the obligee when executed, but to be filed in the Clerk's office, for the use and benefit of the parties entitled to them.

The judgment is therefore affirmed.

JACKSON *et al.* v. THE SACRAMENTO VALLEY RAIL-ROAD COMPANY.

THE liability of a railroad company, as common carriers, differs from their liability as warehousemen.

As common carriers, they are bound to safely transport and deliver goods to the point of their destination, unless the same are lost by the act of God or the public enemy; and the burden of proving that they are thus lost, rests upon the company.

When the goods arrive at the point of destination, and are placed in the warehouse of the company, its liability as warehousemen commences, and from that

Jackson v. Sacramento Valley Railroad Co.

time it is bound only to use ordinary care and diligence in safely keeping and delivering the goods; and the burden of proof in case of loss is on the bailor. In an action against a railroad company for loss of goods as common carriers, where the proofs render it uncertain whether the goods are lost while being transported, or after being deposited in the warehouse, and there is no proof of want of ordinary care, the judgment will be reversed.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

The facts are stated in the opinion of the Court.

William S. Wood, for Appellants.

The transportation of goods, and the storage of goods, are contracts of a different character; and though one person or company may render both services, yet the two contracts are not to be confounded, or blended, because the legal liabilities attending the two are different. (*Thomas v. Boston & Prov. B. Corp.*, 10 Met. 476.)

And where such suitable warehouses are provided, and the goods which are not called for on their arrival at their places of destination are unloaded and separated from the goods of other persons, and stored safely in such warehouses or depots, the duty of the proprietors, as common carriers, is in our judgment terminated. They have done all they agreed to do, etc. (*Thomas v. Boston & Prov. B. Corp.*, 10 Met. 477.)

If for any cause the consignee is not at the place to receive his goods from the cars, as unladen, and in consequence of this they are placed in the depot, the transit ceases. (*Norway Plains Co. v. Boston & M. R.*, 1 Gray, 276; *Rowe v. Pickford*, 8 Taunt. 83; *In re Webb*, Id. 443; *Foster v. Frampton*, 6 Barn. & Cres. 107.)

When goods were conveyed by a carrier by water, and deposited in the carrier's warehouse for the convenience of the vendor, to be delivered out as he should want: *held*, that the transit was at an end, etc. (*Allan v. Grippen*, 6 Crompt. & Jerv. 218.) As a common carrier, defendant was responsible for the goods, at all events, and plaintiffs were only required to show that they never received the goods; while as a warehouseman, defendant is only liable for ordinary negligence, and the burden of proof is on the plaintiffs to show that defendant failed to exercise that care of the goods which prudent men ordinarily exercise in the care of their own

property. With certain exceptions, which will hereafter be taken notice of, as to innkeepers and common carriers, it would seem that the burden of proof of negligence is on the bailor, and proof merely of loss is not sufficient to put the bailee on his defense. (Story on Bail. Sec. 410; *Tompkins v. Saltmarsh*, 14 Sergt. & Rawle, 272.) When the loss is shown, the proof of negligence or want of due care is thrown upon the bailor, and the bailee is not bound to prove affirmatively that he used reasonable care. (2 Kent's Com. 791; *Bunyan v. Caldwell*, 7 Humph. 134.)

A warehouseman not chargeable with negligence is not responsible for goods intrusted to him, when stolen or embezzled by his storekeeper or servant, and the *onus* of showing negligence is on the owners. (*Schmidt v. Blood*, 9 Wend. 268; *Finnucane v. Small*, 1 Esp. 319.)

H. O. Beatty, for Respondents.

This case is reduced to a single proposition. A warehouseman takes goods to store for hire. The depositor demands them, and he cannot or will not account for them. Is this not sufficient evidence of carelessness? If not, it would always be in the power of a warehouseman to eat, to burn, or otherwise consume all such articles as were suitable for food, fuel, or other consumption, and the depositor could never make proof of his losses.

The common law never made any such foolish rules. He who takes an article to keep for hire, must return it or account for its loss. When the keeper has shown the loss by fire, by theft, or robbery, then the burden of proof as to negligence may be thrown on the depositor; but not until then. This rule is clearly laid down in a note to a case in 7 Cow. 501, 3d Ed.: "The distinction would seem to be, that when there is a total default to deliver the goods bailed, on demand, the *onus* of accounting for the default lies with the bailee; otherwise he shall be deemed to have converted the goods to his own use, and trover will lie (2 Salt. 655); but when he has shown a loss, or where the goods are injured, the law will not intend negligence. The *onus* is then shifted upon the plaintiff." None of the authorities cited by the appellants contradict this rule. Appellants' counsel first quotes part of a section from Story on

Jackson v. Sacramento Valley Railroad Co.

Bailments. It is only necessary to read the balance of the section, to show how limited and inapplicable to this case is the rule laid down.

The quotation from Kent is in conformity to respondents' views: "When the loss is shown," that is, theft, robbery, etc., "then the burden of proving negligence is shifted to the plaintiff." So in the case from 9 Wendell. The embezzlement by the storekeeper's servant being shown, the negligence of the master must be proved. In the case of *Schmidt v. Blood* (9 Wend. 271), the Court uses this expression: "The *onus* of showing negligence seems to be on the plaintiff, unless there is a total fault in delivering or accounting for the goods." Here is the case in a nutshell — there was a total failure to account for the goods in dispute. Not having accounted for them, the presumption is, the bailee, either negligently or intentionally, converted them. But whatever the legal presumption might be, there was some evidence tending to show negligence. The inability of the bailees to give any account of the goods was at least some evidence of carelessness. It satisfied the jury and the Court below. It is not a case for the interference of this Court.

CROCKER, J. delivered the opinion of the Court—NORRIS, J. concurring.

This is an action against the defendants, as common carriers, for the value of certain goods received by them as such, and which it is alleged they failed to deliver to the plaintiff. The case was tried by a jury, who, under the direction of the Court, found the following special verdict: "1st. Were the packages of goods in question in this suit, at the depôt of defendant, among other packages of the plaintiffs at the time the agent of plaintiffs signed the receipts for the same? Answer: No. 2d. Were the packages in question delivered to and received by the agent of plaintiffs? Answer: No. 3d. Were the said packages lost to plaintiffs by the carelessness, want of ordinary care, or ordinary negligence of defendants or their agents? Answer: Yes." On this verdict the Court rendered a judgment for the plaintiffs for the sum of two hundred and five dollars and costs of suit; from which defendants appeal.

One important question involved in this case is the extent of

Jackson v. Sacramento Valley Railroad Co.

liability incurred by railroad companies engaged in the transportation of goods. There is no doubt that after they receive goods, and while the same are being transported from the place of receipt, and until they arrive at the depôt or warehouse of the company where they are to be delivered, the latter are bound to perform all the duties and incur all the liabilities and responsibilities of common carriers. Although the general rule is, that goods received by a common carrier must be actually delivered to the consignee at his residence or place of business, yet this rule is varied by well established customs and usages. Thus, it does not apply to railroad companies, whose well-established custom is to receive and deliver goods at regular stations and depôts or warehouses, and who do not assume any obligations to receive or deliver goods at any other places. After goods are received, and while they are *in transitu* from the station or depôt where they are received to the station or depôt where they are to be delivered, they are acting as common carriers, and are liable as such accordingly; but when the goods arrive at the proper depôt for delivery, if the consignee or his agent is not present ready to receive them, it is the duty of the company to deposit them in their warehouse for safe keeping until the consignee is ready to receive them, or at least to keep them a reasonable time for that purpose. But their liability as common carriers ceases in such cases when the goods are deposited in the warehouse; and from that time their liability as warehousemen commences, and continues until they deliver the goods to the consignee, or in case of his unreasonable delay, they place them in charge of some other warehouseman, to keep for the consignee. (Angell on Carriers, Secs. 301-305; Story on Bailments, Sec. 448.)

If the goods are lost, injured, or destroyed while they are in the custody of the railroad company as common carriers, or if they fail to deliver them at the proper place, either to the consignee or in their warehouse, they are liable to the owner as common carriers, under the rules of law relating thereto; but if they are safely delivered in the proper warehouse of the company and afterwards lost, injured, destroyed, or not delivered to the proper person, then their liability is that of warehousemen, and not of common carriers. The liabilities of these two classes of persons is entirely

different, and it is, therefore, important that the point of change of liability should be clearly defined. In this respect the special verdict is fatally defective, as it does not find whether or not the goods in question were deposited in the warehouse of the company; but it merely finds that they were not in the depôt "among other packages of plaintiffs at the time the agent of plaintiffs signed the receipt for the same," which the evidence shows was not given until several days afterwards. This finding is merely to the effect that they were not with a particular lot of goods in the depôt; but it leaves the important facts whether they had not been deposited in the depôt, and whether they were not at some other place in the depôt at that time, uncertain and undetermined.

It was the duty of the defendants, *as common carriers*, to safely deliver the goods at Folsom, the termination of their road, at all events, unless the goods were lost by the act of God, or the public enemy; and the burden of proof to show that the goods were so lost was upon them. But as warehousemen, they were bound only to use ordinary care and diligence in safely keeping and delivering the goods; and the burden of proof, in case of loss, to show that such loss occurred for want of ordinary care and diligence on their part, is upon the plaintiff. (Story on Bail. Secs. 444-451, 454.)

But the plaintiff contends that it can make no difference in what character the defendants are to be held liable, as the jury found, by their special verdict, that the goods were lost by the carelessness and want of ordinary care, or negligence of the defendants. On the other hand, the defendants insist that the complaint charges them as common carriers, and not as warehousemen; and that the plaintiff is therefore bound to prove that the loss occurred before the goods reached the depot at Folsom. We do not think this objection of the defendants to the complaint sufficient to justify us in reversing the judgment on that ground. Although the complaint is very specific in charging the defendants as common carriers; yet we do not see that they have been taken by surprise in any way, or misled thereby, or prevented from setting up every defense they may have had to the action. In this class of cases, there is certainly great propriety in stating the two characters in which the defendants acted; but it is not, perhaps, essential to the sufficiency of the complaint.

Jackson v. Sacramento Valley Railroad Co.

The defendants also insist, that this third finding of the special verdict is contrary to the evidence, and that the evidence showed clearly that the goods in question were safely deposited in the warehouse of the defendants at Folsom; and that the plaintiff, on whom the burden of proof lay, failed to produce any evidence of carelessness or negligence on their part; but on the contrary, the defendants proved the greatest degree of care in the matter. We have examined the evidence, and these positions of the defendants are fully sustained by the record. It is not a case of conflict of testimony, where the jury are the sole judges; but there is a total want of proof by the plaintiff, of negligence on the part of the defendants as warehousemen.

The proof of care on the part of the defendants is full and ample; and these facts, in connection with the failure to find whether the loss occurred before, or after, the arrival of the cars at Folsom, leave the questions involved in this case in such a state of uncertainty as to render a new trial necessary, in order that all the questions involved in the case may be fully and properly determined under the rules of law applicable to such cases.

It seems that when the plaintiff's agent called at the defendants' depôt at Folsom, for the goods, he signed a receipt for all the plaintiff's goods; which receipt included not only the goods in controversy, but a large number of packages of other goods received at the depôt at about the same time. A question arose as to the effect of this receipt. The receipt thus given is *prima facie*, but not conclusive, evidence of the delivery of the goods to the plaintiff. It was open to explanation and proof, to show that although the delivery of the goods was acknowledged, yet that in fact they were not thus delivered. (*Hawley v. Bader*, 15 Cal. 46.) But the burden of proof in such case is upon the plaintiff, to show any error or mistake in the receipt.

The judgment is reversed, and the cause remanded for a new trial.

Whitney v. Stone.

WHITNEY v. STONE.

WHEN an agreement in writing is entered into under the three hundred and eightieth section of the Practice Act, to submit questions of difference relative to the partition of lands to the award of arbitrators, and the arbitrators meet and make their award, a Court of Equity will decree a specific performance of the award.

The fact that such agreement contains a clause by which each party binds himself to the other in a sum certain, as a penalty, in case he refuses to abide by and perform the award, does not deprive a Court of Equity of its power to decree a specific performance, even though the party refusing to perform should offer to pay the penalty agreed upon.

APPEAL from the District Court, Ninth Judicial District, Siskiyou County.

The facts are stated in the opinion of the Court.

E. Steele, for Appellants.

J. Berry, for Respondent.

CROCKER, J. delivered the opinion of the Court — NORRIS, J. concurring.

This is an action for the specific performance of an award made by arbitrators, under and in pursuance of an agreement made by the parties. The defendant demurred to the complaint on the ground that the same did not state facts sufficient to constitute a cause of action. The Court sustained the demurrer, holding that the remedy of the plaintiff was not by a suit for a specific performance, but an action to recover the penalty of five hundred dollars stipulated in the agreement, submitting the matters in controversy to the arbitrators, and agreeing to abide by and perform the award. A final judgment was rendered against the plaintiff, from which he appeals.

The complaint avers that the defendant, on the thirty-first day of October, 1860, conveyed to the plaintiff the undivided one-half of certain tracts of land in Siskiyou County, and that they then entered into a partnership and farmed the land as copartners until the twenty-second of March, 1862, when differences and misunder-

Whitney v. Stone.

standings having arisen between them relative to the farm and the business, they entered into an agreement to submit the same to arbitrators. This agreement is set out in the complaint, and recites that a controversy existed between the parties relative to the control and management of their partnership farm, and they therein agreed "to submit the controversy to be settled by a division of the said farm, together with all the improvements and appurtenances thereunto belonging," to certain persons therein named as arbitrators; and they further agreed therein to abide by, keep, and perform the award made by such arbitrators; and they also bound themselves each to the other in the sum of five hundred dollars, "to be due and subject to immediate collection by either one at the time and after the other shall have refused to abide by, keep, and perform toward the other according to the award of said arbitrators." The complaint further avers that the arbitrators duly met and made their award, by which they divided the ranch between the parties, specifying the lines of division, providing for the removal of fences to the partition lines by the parties, each to bear half the expense of such removal; and it was further awarded that the plaintiff should give to the defendant his two promissory notes for one hundred and fifty dollars each; that the parties should cancel all bonds and obligations in reference to the purchase money of the ranch; that the defendant should give to the plaintiff a new bond for the south half of the ranch, which they had awarded to the latter, for a warranty deed to be given, as soon as the defendant should have perfected his title; that the plaintiff should give a new obligation for the payment of the purchase money of the land; and other awards about the use of the water on the ranch; and a division of the personal property between the parties, which division was then made, and the property as divided delivered to the parties. The complaint avers that the plaintiff has performed in part, and is ready and willing to perform all the award required of him; that he duly executed and delivered the two promissory notes as required by the award, but the defendant has refused to execute any bond, covenant, or assurance as required by the award, though requested so to do; that all of the award has been complied with by both parties, except as to the conveyance of the real estate and the

Bartholomew v. Hook.

removal of the fences; that the defendant is in the possession of the premises and refuses to let the plaintiff enjoy the exclusive possession of the premises partitioned to him by the award; and that he has tendered to the defendant the proper releases and bonds, duly executed, and also tendered a proper deed for the defendant to execute, which he refused to do.

Under Sec. 380 of the Practice Act, the parties had a right to submit the question relating to the partition of the land to the award of the arbitrators. The Court erred in holding that the plaintiff could not maintain a suit for a specific performance of the award, and that he was confined to an action to recover the penalty stipulated in the articles of submission. Courts of Equity have, in numerous cases, decreed the specific performance of awards, though not made rules or orders of Court for the performance of some specific thing, such as the conveyance of an estate, an assignment of securities, and the like. (Fry on Specific Performance, Sec. 974.) It makes no difference that the agreement contains a stipulation to pay a certain sum as a penalty in case of a non-compliance with or refusal to perform the award. A Court of Equity looks to the substance of the agreement, and not to its form, and will afford the party a remedy by decreeing a specific performance, where such relief is proper; and it will not suffer the party to escape from a specific performance, even if he should offer to pay the penalty agreed upon. (*Chamberlain v. Blue*, 6 Blackf. 491; 2 Story's Eq. Secs. 715, 751.) It follows that the Court erred in sustaining the demurrer.

The judgment is therefore reversed, and the defendant is ordered to answer the complaint within ten days after service of notice of the filing of the *remittitur* in the Court below.

BARTHOLOMEW v. HOOK AND WIFE.

A JUDGMENT recovered against the husband, after the first day of June, 1862, and before the filing of a declaration of homestead, becomes a lien on the homestead property, and renders it liable to be sold under the execution issued on the judgment.

Bartholomew v. Hook.

If, however, after the judgment is docketed, the wife file a declaration of homestead, she acquires thereby such an interest in the homestead, as to enable her to maintain an action against the Sheriff to compel him to exhaust the husband's personal property, before proceeding to sell the homestead.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

The facts are stated in the opinion of the Court.

John B. Hall, for Appellant.

Tod Robinson, for Respondents.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action brought by a wife against the Sheriff of San Joaquin County and others, to enjoin him from selling a certain lot which she claims as a homestead, on an execution against her husband, and to require him to levy upon the personal property of her husband for the satisfaction of the execution. The case was tried by the Court, and a judgment was rendered for the defendants, from which she appeals.

It appears that the house and lot in question has been occupied by the plaintiff and her husband as their homestead ever since June, 1859; but no declaration of homestead was made and filed until the plaintiff did so on the eleventh day of June, 1862. On the sixth day of June, 1862, the husband confessed a judgment for \$1,000, in favor of the defendant Huffman, on which an execution issued June 7th, which was levied upon the lot in question; and the Sheriff was about to sell the property when this action was commenced, and a temporary injunction granted. It appears that the husband has a large amount of personal property liable to levy and sale on execution, valued at about \$5,000, as well as other assets, which the wife contends should be first levied upon and sold, before the real estate can be sold; and also claims that the property levied upon is her homestead, and therefore not liable to sale on execution. The plaintiff notified the Sheriff, that she claimed the property as her homestead, and also gave him notice of the personal property

liable to execution, and required him to first levy on and sell the same. It also appears that the defendant Huffman holds a mortgage for \$4,000 on a portion of the personal property.

Under the provisions of the Homestead Law, as amended in 1862 (Stats. 1862, 519, 520), the time for the filing the declaration of homestead was extended to June 1st, 1862; and Sec. 6, as amended, provides that the filing of such declaration, after that date, shall not "affect or impair any alienation, sale, mortgage, or other contract or lien lawfully executed or obtained prior to the time of the filing for record of such declaration." The declaration of homestead not having been filed, in this case, until after the first day of June, and after the judgment lien had attached, it follows that the homestead is liable to be sold under the execution issued on the judgment.

But the first clause of the two hundred and tenth section of the Practice Act requires that an execution of this kind against the property of the debtor "shall require the Sheriff to satisfy the judgment, with interest, *out of the personal property of such debtor*, and if sufficient personal property cannot be procured, then out of his real property." Under this law, it was clearly the duty of the Sheriff to levy upon and first sell the personal property of the execution debtor; and then, if the proceeds of the same proved insufficient, he should have proceeded and sold the real property of the debtor. Especially was this his duty, when notified by the plaintiff, and required to levy upon the personal property.

There may be cases in which the execution debtor would have the right to direct the sale of his real estate, in preference to his personal property (*Maybury v. Jones*, 4 Yeates, 21); but that right cannot be exercised so as to prejudice the rights of other persons. The plaintiff had such an interest in the homestead that the husband could not direct that property to be sold, before exhausting his personal property, without her consent, or contrary to her wishes. The Sheriff disobeyed the command of his writ, and exceeded his authority, in refusing to levy upon and first sell the personal property. The Court therefore erred in rendering a judgment in favor of the defendants.

The judgment is reversed and the cause remanded.

People v. Smith.

THE PEOPLE v. SMITH.

WHERE the bailee of property obtains possession of it from the owner, with the intent of stealing it, and carries out that intent, he is guilty of larceny, and should be indicted for that crime.

If, however, the intent to steal did not exist at the time of taking possession of the property by the bailee, but was conceived afterwards, the indictment should be laid under the seventy-first section of the Act concerning Crimes and Punishments.

APPEAL from the Court of Sessions, of the County of Sacramento.

The facts are stated in the opinion of the Court.

Rodgers and McConnell, for Appellant.

F. M. Pixley, Attorney-General, for Respondent.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

The defendant was indicted and convicted of the crime of grand larceny, in stealing a horse. The evidence showed that the defendant hired the horse of the keepers of a livery stable, and in that way obtained the possession. The defendant insists that the Court below erred in admitting evidence of these facts, under the indictment, claiming that it showed that the defendant had committed an offense indictable under the seventy-first section of the act relating to crimes and punishments. This objection is not well taken. If the defendant, at the time he hired the horse, intended to steal it, he was properly indicted for grand larceny; and the evidence was therefore admissible, without averring the alleged bailment in the indictment. (*People v. Jersey*, 18 Cal. 337.) If, however, the intent to steal did not exist at the time of taking the possession of the property by the bailee, but was conceived afterwards, then the indictment should have been laid under Sec. 71, and should have averred the facts necessary to show that the defendant was the bailee of the property. (*People v. Poggi*, 19 Cal. 600.)

The defendant asked the Court to instruct the jury as follows: "If the jury find that the defendant hired the horse of the persons

People v. O'Connell.

named in the indictment as the owners thereof, and converted the same, of which he was bailee, to his own use, with intent to steal the same, he cannot be convicted under the indictment as charged, and must be acquitted." He also asked for another instruction subsequently to the same effect, both of which the Court refused; and this is assigned as error. The instructions, as asked by the defendant, were correctly refused. As has been already shown, the defendant could properly be convicted under the indictment, if the intent to steal existed at the time he obtained possession of the horse; and this point is entirely ignored in the instructions asked for.

The Court, after fully and correctly charging the jury that the "intent to steal" and the "felonious intent" must have existed at the time he acquired possession of the property, in reiterating it used the word "fraudulent" instead of the word "felonious," in several places; and this is assigned for error. Although the word "fraudulent" was thus improperly used instead of "felonious," yet it is evident that the jury were not misled thereby, and the defendant suffered no injury in consequence of it. The Court had repeatedly used the word "felonious," and terms of equivalent import, in the charge, in explaining this very point; and taking the whole charge together, as given by the Court, the jury could not have misunderstood the meaning of the Court. The evidence is sufficient to show that the defendant acquired possession of the property with the felonious intent of stealing the same.

The judgment is affirmed.

THE PEOPLE v. O'CONNELL *et al.*

A judgment by default should not be set aside by the Court, unless the defendant shows by competent proof, that the judgment was entered through mistake, inadvertence, surprise, or excusable neglect on his part; and the payment of costs should be imposed as a condition of setting aside the judgment.

APPEAL from the District Court, Fourth Judicial District, Contra Costa County.

The facts are stated in the opinion of the Court.

People v. O'Connell.

Mark Shepard, for Appellants.

E. W. F. Sloan, for Respondents.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an appeal from an order setting aside a judgment by default, entered in an action for delinquent taxes. The judgment was rendered on the twenty-fifth day of March, 1862, against the defendant O'Connell and the real estate described in the complaint, for the amount of taxes, per centage, and costs. The record shows that the summons was duly served on the defendant O'Connell and the real estate in the manner prescribed by the statute, on the thirtieth day of January, 1862, and that defaults were duly entered on the seventeenth day of February and the twenty-fifth day of March. On the ninth day of June, 1862, the defendants, without any affidavit or other showing, moved the Court to vacate the judgment, which was granted, and an order was entered accordingly, from which the plaintiffs appeal.

Sec. 68 of the Practice Act authorizes the Court, "upon such terms as may be just, and upon payment of costs, to relieve any party or his legal representatives from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." The order itself is erroneous, in not imposing the payment of costs, as a condition of setting aside the judgment. But the Court also erred in making the order in the absence of any showing or proof on the part of the defendant, that the judgment was entered through mistake, inadvertence, surprise, or excusable neglect on his part. The facts should be made to appear by affidavit, or other proper proof, showing that the case is one provided for by said section to authorize the Court to make the order.

The order is reversed.

Kittredge v. Stevens.

KITTREDGE v. STEVENS.

AN order made by a Court on a motion is a final adjudication upon the subject matter, unless appealed from within the statutory time; nor can the statutory time for appeal be extended by subsequent renewal of the motion, even if it be varied in its terms, provided it is substantially the same motion.

APPEAL from the District Court, Fourth Judicial District, Contra Costa County.

The facts are stated in the opinion of the Court.

Spencer & Reichert, for Appellants.

Brown & Whitman, for Respondents.

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is an action for the recovery of a debt due on a promissory note, and to enforce an alleged lien upon certain real estate purchased by the defendant with the money for which the note was executed. The case has been previously before this Court, and will be found reported in 16 Cal. 381. That was an appeal from a judgment for the equitable relief claimed in the complaint, rendered subsequent to a personal judgment for the amount of the debt; and this Court held that such second judgment, for the additional relief, was improperly granted, and therefore reversed the decree. When the case went back to the Court below, the plaintiff moved to set aside the personal money judgment entered by the Clerk upon the default, which motion was sustained by the Court, and the order entered accordingly on the seventeenth day of May, 1861. To this motion the defendant objected, and filed his bill of exceptions. The plaintiff also moved the Court for a new decree against the defendant, which was heard on testimony reported by one Theobald, and on file in the cause, and on the pleadings and papers on file, and the Court, on the eighteenth day of May, 1861, denied the motion for a decree. Afterward, on the fourteenth day of January, 1862, the plaintiff again made the same motion for a decree, in conformity with the prayer for relief contained in the complaint,

Kittredge v. Stevens.

which was denied by the Court, and an appeal was taken from this last order refusing to enter a decree, which it appears, was afterwards dismissed. On the twenty-fifth day of April, 1862, the plaintiff applied to the Clerk to enter a decree upon the original default, in accordance with the prayer of the complaint, which the Clerk declined to do; and the plaintiff, then, on the twentieth day of January, 1863, moved the Court for an order directing the Clerk to enter in the judgment book a decree which had been signed by the Judge of the Court, and filed on the twenty-first day of January, 1860, in vacation; and that upon such entry the Clerk issue an order of sale, which motion was denied, and this appeal is taken from this order denying said motion.

The decree, signed and filed by the Judge, January 21st, 1860, is the same in terms as the decree rendered May 10th, 1860, and from which the defendant appealed to this Court, and which this Court reversed on such appeal. The validity of that judgment or decree has therefore been adjudicated and determined by this Court. The mere fact that the plaintiff has since, on his own motion, had the previous money judgment set aside, does not avoid the effect of this final adjudication. Nor can its effect be avoided by this motion to enter a judgment in the judgment book upon a decree signed and filed by the Judge, previous to the one appealed from, and which is the same in its terms. The decree rendered May 10th, 1860, was reversed, because there had been a final judgment previously rendered in the action; and this objection applies equally to the decree filed January 21st, 1860, and which the plaintiff sought by his motion appealed from to have entered in the judgment book.

Further, the plaintiff, on the eighteenth day of May, 1861, and again, on the fourteenth day of January, 1862, moved the Court for substantially the same relief sought by this motion of January 20th, 1863, from which this appeal is taken. The first two motions were made for the entry of a decree, and the last one, that the Clerk enter the decree in the judgment book; and though they thus differ in terms, yet they are substantially the same. If the Court erred in its action on these motions, the error was committed on the eighteenth day of May, 1861, and the appeal should have been from the order then entered, and within the time required by

Meeker v. Harris.

the statute. This limitation of the statutory time for an appeal cannot be evaded by subsequent renewals of the motion, even though they be varied in their terms, provided they are substantially the same.

We do not consider that the original money judgment entered by the Clerk upon default was absolutely void. The plaintiff, if he saw proper, had a clear right to waive this claim to relief by sale of the property demanded in his complaint, and rely upon a money judgment alone; and that was substantially the effect of his taking such a judgment, and especially when he took out execution thereon to enforce it. The right of a Clerk to enter a mere money judgment upon a default cannot be denied. When the plaintiff elected to take a money judgment, he waived his right to any further relief.

For these reasons, there was no error in the refusal of the Court to make the order, and it is therefore affirmed.

MEEKER *et al.* v. HARRIS.

THE Supreme Court has jurisdiction to review the action of the District Court on appeal from an order recalling an execution for costs or refusing to issue one, when the amount of costs exceeds two hundred dollars.

If items are included in the bill of costs which are not properly taxable, it affords no just ground for refusing to issue an execution or recalling one; but the remedy is by motion to retax.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

The facts are stated in the opinion of the Court.

J. H. Gass, for Appellants.

Hereford & Williams, for Respondents.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

Meeker v. Harris.

This is an appeal from an order made by the Court below after judgment, directing the return of an execution issued on the judgment for the costs, and also from an order refusing to issue an execution on the same judgment for the costs. The respondent objects that this Court has no jurisdiction of the appeal, because the matter in dispute relates entirely to the costs. It is true that the matter in dispute relates to the costs, but as those costs exceed the sum of two hundred dollars, the case is within the jurisdiction of this Court. In the cases of *Dumphy v. Guindon* (13 Cal. 28) and *Votan v. Reese* (20 Cal. 89), referred to by the respondent, the matter in dispute related entirely to the subsequent matter of the action; and it was held that the costs were merely incidental to the action, and could not therefore be added to the demand sued for in order to give this Court jurisdiction. Those cases differ essentially from the present, as the alleged error in the action of the Court below affected not the subject matter of the action, but only the incidental matter of costs. The costs of an action may become a matter in dispute, as much so as the principal subject of the action; and when they amount to a sum sufficient to bring the case within the jurisdiction of this Court, its jurisdiction attaches. This objection of the respondent is therefore overruled.

The plaintiffs are entitled to an execution for the costs due on the judgment in accordance with the decree of the District Court, as modified, on appeal, by this Court. If they have included in their bills of costs items to which they are not legally entitled, the remedy of the defendants is by motion to retax the costs and to strike out the objectionable items, and the Court, under its general power over its own process and writs, could order a stay of proceedings on the execution until such motion could be heard and determined. But the mere fact that some of the items of costs are not legally chargeable against the defendants, affords no just ground for recalling the execution or denying another.

The orders of the Court below, appealed from, are therefore reversed, and the cause remanded.

The above decision relates to the Constitution as it existed before the recent amendments.—REPORTER.

O'Grady v. Barnhisel.

O'GRADY v. BARNHISEL.

A ~~sale~~ executed by a collector of taxes for property sold for non-payment of taxes, which recites generally that the property was duly assessed, and that the taxes were levied upon it according to law, is *prima facie* evidence of title in the grantee, and is entitled to be received in evidence as such without any further proofs.

It is not necessary that a deed for taxes recite each act of the officers in making the assessment and levying the tax, etc., but a general recitation of the conclusions resulting from those acts is sufficient.

Such a deed is *prima facie* evidence that all the proceedings in relation to the tax were regular and in accordance with law, and the burden of showing that any irregularity occurred, is thrown upon the one asserting its invalidity.

An assessment of land to "A B, and all claimants, known and unknown," is valid and effectual as against the property, even if A B was neither the owner of, nor in possession of the property at the time of the assessment.

The tax law creates two remedies, one against the person and the other against the property, each having a distinct and separate existence; and a mistake in the name of the person to whom the property should have been assessed, does not affect the validity of the tax as against the property itself.

The expense of filing a certificate of sale in the Recorder's office, is not a proper item of costs to be charged by the collector at the sale.

A slight mistake made by the collector in computing the amount of taxes and costs, by which the property was sold for a small sum more than the amount actually due, does not invalidate the sale, particularly when it is not made to appear that the owner of the land suffered any injury by the mistake.

APPEAL from the District Court, Seventh Judicial District, Contra Costa County.

The facts are stated in the opinion of the Court.

John Currey, for Appellant.

If the real estate to be assessed or listed has an owner, who is known to the Assessor (and who may in most cases be known to him, if he seeks by diligent inquiry and examination to ascertain his name), it should be assessed to him. Or if the owner be unknown to the Assessor, but the property is in the possession, charge, or control of a person, firm, or corporation, it should be so listed. If the owner be unknown to the Assessor, and the land is unoccupied, then, and not until then, can the Assessor lawfully assess or list the same as the property of an unknown owner.

The premises demanded in this case were listed and assessed,

O'Grady v. Barnhisel.

as appears by said certificate to "Joaquin Castro and wife, and all claimants and owners, known or unknown." Who, from this designation, could determine to whom the land was assessed? Was it assessed to Castro and wife, or to the claimants and owners known, or to the claimants and owners unknown? To which of the three classes of persons, and who were "all claimants and owners known?"

Again: Another objection to the certificate and tax deed, rendering the same radically insufficient as *prima facie* evidence of title to the premises in the purchaser at the tax sale, consists in the fact that the matters which the statute requires should be stated in the certificate (Sec. 18), and again stated in the deed (Sec. 22), are not stated except in general terms, following almost literally the language of the statute. The statute (Sec. 18) provides that the Tax Collector shall issue to the purchaser a certificate stating substantially the facts constitutive of the authority of the Tax Collector to sell and convey the premises, among which are, that the property was assessed, giving (when known) the name of the person to whom it was assessed; that taxes were levied upon it according to law; that these taxes had not been paid; that publication of the intention to sell for taxes was made, as provided by law, and describing the manner of said publication, etc. The Tax Collector seemed to content himself with a statement in his certificate and deed, that "Taxes for State and County purposes were duly levied by the Legislature, and by the Board of Supervisors of Contra Costa County, for the year 1858-1859, upon all property within said county, not exempt by law from execution;" also, that "all of said property was duly assessed by the Assessor of said county," and that the premises in controversy, according to the deuplicate assessment roll, "were assessed, as aforesaid, to 'Joaquin Castro and wife, and all claimants known or unknown,' and that the taxes thereon were not paid;" and also, "that on the Saturday next preceding the third Monday in November, 1858, I completed a list of all persons and property then owing any taxes, called the delinquent tax list; and on or before the fourth Monday in the said November, I caused said list to be published, giving, in said publication, the name of the owner (when known), and of all owners and claimants known or unknown."

O'Grady v. Barnhissel.

Perhaps no doctrine is better settled than that no intendment is to be made in favor of the regularity of proceedings of courts or officers of inferior or special jurisdiction. (*Whitwell v. Barbier*, 7 Cal. 64; *Haynes v. Meek*, 10 Id. 116; *Foot v. Stevens*, 17 Wend. 483; *Hart v. Seixas*, 21 Id. 40; *Bloom v. Burdick*, 1 Hill, 189; *Sharp v. Spier*, 4 Hill, 86; *Striker v. Kelly*, 7 Id. 25, 29; *Borden v. Fitch*, 15 Johns. 121; *Mills v. Martin*, 19 Id. 7; *Bigelow v. Stearns*, Id. 39; *Jones v. Reed*, 1 Johns. Cas. 20.)

The recitals in a tax deed are not, unless made so by statute, evidence against the owner of the property; but the facts recited must be proved by evidence *aliunde*, and the *onus probandi* rests upon the purchaser, or those claiming under him, to prove the facts upon which his alleged title depends. (See *Sharp v. Spier* and *Striker v. Kelly*, *supra*; Blackwell on Tax Titles, 93, 94, and the many cases there cited.) But it may be answered to the argument and authorities on this point, that our statute makes the tax deed which contains a substantial statement of the matters stated in the certificate, *prima facie* evidence of title in the grantee, and even conclusive evidence of the matters by it set forth. This may be even so; yet, nevertheless, it is not any the less necessary that the facts constitutive of the power to sell and convey, and on which the purchaser's right and title is made to depend, should be proved. The statute has not shifted the burden of proof from the party who would sustain such right and title; but has furnished a different mode of proof, by providing that a certificate shall be made by a certain officer, embodying a statement of essential facts, which, with others that must transpire subsequently, before a conveyance can be made, shall be, by the same officer, set forth in the tax-deed; and that this deed, containing therein a statement of the performance of the acts and the occurrence of the facts which operate to divest the owner of his estate, and transfer it to the purchaser, shall be the witness; or, in other words, the evidence of the performance of such prerequisite acts, and the occurrence of the essential facts. Such deed, bearing witness of the essential acts and circumstances, must be produced by the party relying upon it; otherwise, he must share the fate of all litigants who fail to prove what they allege.

Neither the certificate nor deed, under which plaintiff claims the land, shows that taxes were levied on it according to law. It is not enough for the Tax Collector to certify, in terms, that taxes were levied on the land according to law. He should state what was done and *when* done. If it was undertaken to be done after the first Monday of March, then taxes were not levied according to any law. (Act of 1857, 339, Sec. 42.)

Would any Court tolerate the assumption of an inferior officer in declaring that that was done according to law, which a Court of superior jurisdiction would not so determine without evidence of it? Unless taxes were levied on this land as required by the statute, the tax did not become a judgment against the person, or a lien against the property; because before them the tax must have been levied as provided by this act. By a line of decisions that have hitherto stood unbroken, the law has been firmly established, that in order to divest the owner of his land, and transfer it to another by means of sales for taxes, it is essential that every act and thing constitutive of the officer's authority to sell, must precede its exercise. (4 Wheat. 77; 6 Id. 119; 4 Hill, 86; 7 Id. 29; 1 Leigh, 250, 251; 10 Cal. 632; 13 Id. 618; Blackwell on Tax Titles, 45-60.) Otherwise the sale is *coram non judice* and void.

The twenty-third section of the act says the deed shall be conclusive proof of the matters by it set forth. Is the statement of the Tax Collector in the certificate and deed, that "by virtue and authority of law, and according thereto, taxes for State and county purposes were duly levied by the Legislature, and by the Board of Supervisors for Contra Costa County, for the years 1858-1859, upon all the property within said county not exempt by law from execution; that all said property was duly assessed by the Assessor of said county," the setting forth any matter of fact done and performed by the Supervisors or Assessor? An officer who certifies that a series of acts were done according to law, or duly or legally done, does not state any traversable fact. Such words in pleading have in general no effect. For such terms are not only indefinite, but offer matter of law instead of fact, and consequently are not traversable. (Gould's Plead. 182, Sec. 29.)

E. W. F. Sloan and George Cadwalader, for Respondent.

COPB, J. delivered the opinion of the Court — FIELD, C. J. and NORTON, J. concurring.

This is an action of ejectment, in which the plaintiff recovered upon a tax deed purporting to have been executed on a sale for taxes under the Revenue Act of 1857. The deed was admitted in evidence against the objection of the defendants, and various grounds are now urged in support of the objection thus taken. These grounds involve the construction of certain provisions of the act referred to, and attack the validity of the deed on account of a supposed non-compliance with these provisions. It is contended that the matters, a statement of which is required by the act in order to render the deed effectual, are insufficiently set forth, and that the deed is therefore inoperative. Sec. 18 of the act provides that "after receiving the taxes and costs for any property sold, the Tax Collector shall, as soon as practicable, issue to the purchaser a certificate in duplicate, stating substantially that the property was assessed," etc.; specifying particularly the matters to be stated. Sec. 22 provides that the deed shall state the same matters substantially as stated in the certificate; and Sec. 23 provides that a deed conforming to the requirements of the act shall be *prima facie* evidence of title in the grantee.

The deed in this case states that the property was duly assessed; and that the taxes were levied upon it according to law; and states in the same manner other matters required by the act. The defendants claim that this mode of statement is not sufficient, and that there is no authority in the act for a deed setting forth the matters necessary to be stated in the forms of legal conclusions. Their position is that the deed must state the facts, and that the existence of these matters must appear from the facts stated; and that a statement amounting merely to a conclusion of law is not within the meaning of the act. This view is urged with much earnestness and force of argument; but a careful consideration of the act leads us to a construction different from that adopted by the learned counsel. The act must be construed with reference to the

objects intended to be accomplished by it, and it will hardly be claimed that an interpretation which defeats this object is admissible. Of course, the primary object was to provide revenue for the support of the Government, and the provisions in question constitute a part of the machinery devised for that purpose. The stringency of these provisions was intended to facilitate the collection, and to overcome as far as possible the difficulties which had always been experienced in enforcing payment. It had become proverbial, that a tax title was no title at all; and a sale for taxes was as near a mockery as any proceeding having the appearance of legal sanction could be. The principal cause was the difficulty in proving the various steps essential to the validity of such a sale; and the intention was to change to rule of evidence upon that subject, and throw the burden of proof upon the party asserting the invalidity. The view contended for would entirely defeat this intention; for if the facts are to be stated in the deed, the effect is precisely the same as to require them to be shown *aliunde*. The only difference is in the mode of proof, and the embarrassment is rather increased than diminished; for if any material fact be omitted, the deed is invalid, and cannot be given in evidence. The purchaser is subjected to the double risk of an error in the previous proceedings, and a mistake in setting these proceedings forth in the deed, either of which would be fatal. These results are plainly in contravention of the purpose intended, and the language of the act is no less conclusive. The general provision is, that the matter specified shall be stated; but in respect to the publication of the notice of sale, it is provided that the manner of publication shall be described. If it were intended that the same particularity should be observed in other respects, that intention would doubtless have been expressed; and the maxim *expressio unius est exclusio alterius* applies. We regard the deed as conforming substantially to the requirements of the act; and our conclusion is, that no error was committed in allowing it to be given in evidence. It is true, some of the matters set forth are stated by way of recital; but as they distinctly appear, there is nothing in the manner of stating them, for which the deed could properly have been rejected. The point in regard to publication is more of a criticism than an objection, for the deed

undoubtedly shows that the publication was made as provided in the act.

This disposes of the question arising upon the face of the deed, and brings us to the consideration of certain matters relied upon as invalidating the sale. The property was assessed to Joaquin Castro and wife, "and all claimants and owners known or unknown," and it is objected that Castro and wife were not the owners, and that the assessment was insufficient and void. The evidence shows that the property had belonged to the wife, and that she, together with her husband, had conveyed it to an infant daughter, who held it at the time of the assessment. The defendants, however, were in possession of it, and they contend that it was necessary to assess it either to them or to the owner, and that assessing it to Castro and wife was a fatal error. The act provides that property shall be assessed to the "person, firm, corporation, association, or company owning it, or having the possession, charge, or control of it, and to all owners and claimants known or unknown." The position taken ignores that portion of the assessment relating to "claimants and owners known or unknown," and counsel regards it as superfluous and nugatory in determining the effect of the assessment. As the defendants were in possession, he considers the assessment a mere nullity, and contends that an assessment to "owners and claimants known or unknown" is of no validity, unless the possession is vacant. This view is in conflict with what we understand to be the meaning of the act, and we think that counsel has mistaken the purport and object of the provision referred to. The words "and to all owners and claimants known or unknown," were intended to be incorporated in every assessment; and their effect is to bind the property, irrespective of the ownership or possession. The assessment is required to be made to the owner or possessor, and as against the person assessed it operates as a judgment, and has the force and effect of an execution upon all property owned by him in the county. It is also to be made to "owners and claimants known or unknown," and the intention was that it should be effectual as against the property regardless of the person, placing it in this respect upon the footing of a proceeding *in rem*. The counsel reads the act as requiring

the assessment to be made to the owner, if known; if the owner is unknown, to the person in possession; or if the possession is vacant, to the owner as unknown. This clearly is not the proper reading, for the provision is that it shall be made to the owner or person in possession, "and to all owners and claimants known or unknown." Whether made to the owner himself, or to the person in possession, it is also to be made to "owners and claimants, known or unknown," and the provision as understood by counsel is inconsistent with itself. It may be claimed as resulting from this view, that the omission of these words would invalidate as assessment, though correctly made as to the person, and that a compliance with both conditions is necessary to render the assessment effectual. This, however, can hardly be considered a reasonable construction, for the additional clause was evidently intended as a precautionary requirement, the object being to avoid the consequences of an error in regard to the person. The language used is inconsistent with any other interpretation, for it includes owners and claimants that are known, as well as those that are unknown, and the effect upon them was intended to be the same. If the proper person is assessed, no advantage could be derived from assessing him again in a different form, and the assessment would not be affected by a failure to do so. It is only where a mistake is made in this respect that the general words of the provision are important; and the object in requiring them could only have been to provide a cure for the mistake, so far as to give validity to the assessment as against the property. We regard the act as creating two remedies; one against the person and the other against the property, each having a distinct and separate existence, and the efficiency of the one not depending upon that of the other. The object was to compel a prompt observance of the duty devolving upon the citizen to pay his taxes, and an assessment binding at once the person and the property was resorted to as the means best calculated to accomplish that object. It is no answer to say that the owner may be taken by surprise, and lose his property without any fault or negligence on his part, for he has an easy method of obtaining information, and nothing to do but to pay his taxes. He is as likely to be surprised by an assessment to the person in possession, as by an assessment to "owners and

claimants known or unknown," and the argument applies with equal force to the two modes of assessment. It is our duty to construe the act in accordance with the intention of its framers, and the rule of strict construction so earnestly invoked would be grossly misapplied if used to defeat that intention. In the view taken by us, it is immaterial to whom the property is assessed; for an assessment, in the form required, binds the property itself, and is not vitiated by a mistake as to the person. It is true, the act provides that the Assessor shall make diligent inquiry to ascertain the owner; but a mere mistake as to the fact of ownership is not sufficient to invalidate the assessment. It is possible that a wilful omission, or even negligence in the performance of the duty enjoined, would render the assessment invalid; but where the assessment is made upon due inquiry and in good faith, a mistake of this character will not affect it. In the present case, it is evident that the error committed was not the result of negligence or design, and it is not pretended that any person was misled by the manner in which the assessment was made. There is no evidence that the Assessor was aware of the conveyance, and the presumption is that he did his duty, and used reasonable diligence to ascertain who the owner was. It is true, the records of the county would have furnished the necessary information, but these records were only notice to purchasers and incumbrancers, and no inference of actual notice can be drawn from them. Admitting, however, that he had full knowledge of the fact, it by no means follows that the error arose from neglect of duty or any improper conduct. The daughter receiving the conveyance was a minor, and attained her majority only a few months prior to the assessment, up to which time her father had the control and management of her property. During her nonage he was the proper person to assess it to, and no advantage would have resulted from the use of her name, nor the assessment have been more or less effectual on that account. The assessment to him three or four months after she became of age was a mistake, requiring unusual care in the Assessor to be avoided, and there is no doubt that it was innocently made.

A point is taken in regard to the figures in the assessment roll, but we are unable to discover anything amounting to a non-compli-

O'Grady v. Barnhisel.

ance with the law. It is claimed that the figures are not intelligible, and that the items of the tax are so stated as to render explanation necessary to ascertain the amount. It appears, however, that these items are set down in columns, and that each column is appropriately ruled for dollars and cents, and its meaning indicated by the proper heading. The proof upon this subject is derived from the testimony of the collector, but the record shows that he testified from the roll itself.

The counsel is mistaken in asserting that the property was sold for more than the amount due. He states that the items in the assessment roll foot up at fifty-one dollars, but the slightest care would have shown him that they are correctly fotted up at fifty-two dollars and fifty cents.

The only error disclosed by the record is in the award of damages, the amount awarded being greater than the amount claimed. For this error it would be necessary to reverse the judgment, but the plaintiff offers to remit the excess, and we shall order a modification to that extent. The judgment thus modified is correct, and must be affirmed.

Ordered accordingly.

After the foregoing opinion had been delivered, a rehearing was granted.

Upon the rehearing, CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

In this case a rehearing was granted, and it has again been submitted upon some additional questions not directly passed upon in the former opinion. We adhere to the principles there laid down, and it will therefore be considered as forming part of the present opinion.

Upon the rehearing, it was urged that the amount for which the property was sold exceeded the amount of taxes and costs actually due in the sum of five and one-half cents, which is estimated as follows: Amount of taxes, fifty-two dollars and fifty cents; five per cent. thereon for delinquency, two dollars and sixty-two and one-half cents; statute allowance for certificate of sale, two dollars;

costs of advertising the property, fifty cents. Total amount the property should have been sold for, fifty-seven dollars and sixty-two and one-half cents; amount for which the property was sold, fifty-seven dollars and sixty-eight cents — making an overplus of five and one-half cents. But the respondent insists that there should be included in the estimate of taxes and costs the sum of fifty cents for filing the certificate of sale in the Recorder's office, as required under Secs. 20 and 21 of the Revenue Law of 1857, under which the property was sold, and that by adding this sum to the other amounts of taxes and costs, the result will be that the property sold for forty-four and one-half cents less than the amount really due. We do not think this item is a proper one to be included in the amount for which the property was to be sold. Sec. 17 of the act in question provides that the person who will take the least quantity of the tract or the smallest portion therein of the interest taxed, and "pay the *taxes and costs due*, including two dollars which the Tax Collector shall be entitled to receive for the duplicate certificate of sale, shall be declared to be the purchaser." The evident meaning is, that the purchaser shall pay the "costs due," at the time of the sale, as any other costs cannot properly be said to be "due;" and as it specially includes only the costs of the certificates, which accrued after the sale, it is clear that it was not intended to include any other subsequent costs. It follows that the fees of the Recorder for filing the certificate should not be included. Those fees are for the purchaser to pay when he files his duplicate certificate with the Recorder, as the filing is for his benefit.

The respondent insists, however, that the overplus in this case is so small that the sale should not be invalidated on that ground, and that the maxim *de minimus non curat lex* is properly applicable. We are satisfied that we ought not to treat the sale as void for this trifling excess. If we could in any way see that the owner of the land had suffered any injury by the mistake in the estimate by the Tax Collector of the amount due, it would be very different. The tract assessed for taxes, the whole of which was bid off by the purchaser at the tax sale, includes, it seems, about two hundred acres; and it can hardly be presumed that the purchaser would have bid for a less quantity had the amount been stated at the trifling sum

O'Grady v. Barnhisel.

of five and one-half cents less. The mistake may have occurred in the calculation, or it may have been occasioned by an error in making or copying the figures; but it is evident that it was unintentional, and without any design to injure the parties interested. If the owner of the property had offered to redeem it within the time prescribed by law, and had tendered the amount really due at the time of the tax sale, with the proper statutory allowances, his redemption would have been good, though he should have omitted in his tender this excess in the sale; but no such tender was made. If this had been a sale under an ordinary judgment and execution, it could not be pretended for a moment that the sale would have been void on this account. It is true, that the mode of selling property at a tax sale is different from an ordinary sale on execution; but that difference is not sufficient to hold a tax sale void for so trifling a matter. Sec. 32 of the Act of 1857 provides, that every tax levied under the provisions or authority of this act is hereby made a *judgment* against the person and a *lien* against the property assessed; which lien shall attach, and judgment date, as of the first Monday in March of each year, and shall have the full force and effect of an execution against all property of the delinquent," etc. It is evident that the Legislature intended by this provision to subject sales of property to the same legal rules as govern sales to enforce judgments and liens against property in the ordinary course of legal proceedings, although the mode of bidding is different. In New Hampshire, executions are extended upon the real estate by appointing appraisers, who set off to the judgment creditor a sufficient quantity of the land to pay the amount due on the execution at its appraised value, which operates as a conveyance of the property and a satisfaction of the judgment without any sale at public auction; and the Courts there hold that such extent is not void because the appraised value of the land thus set off exceeds by a trifling sum the amount due on the execution. (*Burnham v. Aiken*, 6 N. H. 307; *Avery v. Bowman*, 40 Id. 453.)

The judgment as modified by the previous opinion is affirmed.

Gassner v. Patterson.

GASSNER v. PATTERSON AND TIMSON.

~~Neither~~ the Chattel Mortgage Act of 1857, nor the amendment thereto in 1861, include furniture and fixtures of saloons among the property which may be mortgaged under its provisions.

A chattel mortgage made under the Act of 1857, and the amendment of 1861, is of no validity, except between the parties thereto, unless the provisions of the act are strictly complied with.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

The mortgage which Gassner, the appellant, sought to foreclose in this action, was given for the purchase money of the billiard tables. The tables remained in Patterson's possession until purchased by Timson, when they were delivered to Timson, who was in possession when the suit was brought. The other facts appear in the opinion.

William S. Wood and Winans & Hyer, for Appellant.

Inadequacy of price, though a fact admissible in evidence to establish fraud, is never of itself sufficient to annul a sale under execution. (*Cole v. White*, 24 Wend. 125; *Smith v. Randall*, 6 Cal. 50.)

Henry Starr, for Respondent.

CROCKER, J. delivered the opinion of the Court — COPE, C. J. and NORTON, J. concurring.

This is an action to foreclose a mortgage, for eight hundred and twenty-four dollars and interest, on two billiard tables, executed by Patterson to the plaintiff, to secure the purchase money thereof. The tables had been sold by a Constable to the defendant Timson for twenty-five dollars each, on an execution against Patterson, and he claims to hold the property free of the mortgage. The evidence shows that Timson, before and after the time of his purchase, had full notice of the mortgage.

It appears that Patterson was the keeper of a saloon, and therefore it is contended that it is not such property as is subject to the

Gassner v. Patterson.

provisions of the Chattel Mortgage Act of 1857, as amended in 1861. (Stat. of 1861, 197.) The mortgage does not set out the rate of interest to be paid on the sum secured, or when or where the mortgage debt is payable. In other respects, the Chattel Mortgage Act seems to have been complied with; but the defendant Timson claims that these defects render the mortgage invalid as against him. Sec. 17 of the Statute of Frauds provides that "No mortgage of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee," with an exception in favor of growing crops, which it is not necessary to notice. This continued to be the law respecting chattel mortgages, up to 1857, when the stringency of its provisions were relaxed in favor of certain kinds of property, among which were "upholstery and furniture used in hotels and public boarding-houses, when mortgaged to secure the purchase money of the identical articles mortgaged, and not otherwise;" but neither this clause nor any other in the Act of 1857, or the amendment thereto of 1861, includes the furniture and fixtures of saloons among the property which may be mortgaged under that act. The first section of that act also provides that "No mortgage made by virtue of this act, shall have any legal force or effect (except between the parties thereto), unless the residence of the mortgagor and mortgagee, their profession, trade, or occupation, the sum to be secured, the rate of interest to be paid, when and where payable, shall be set out in the mortgage; and the mortgagor and mortgagee shall make affidavit that the mortgage is *bona fide*, and made without any design to defraud or delay creditors, which affidavit shall be attached to such mortgage." Sec. 3 also provides, that "No chattel mortgage shall be valid (except between the parties thereto), unless the same shall have been made, executed, and recorded, in conformity to the provisions of this act.

These provisions are plain, simple, and most imperative in their terms. The privilege of holding a lien upon certain kinds of personal property, in the possession of the mortgagor, is accorded to the mortgagee, in certain cases, upon the performance of certain conditions. These conditions are few, and easily performed, and

there need be no difficulty, with ordinary care, in fully complying with them. But they are made essential to the validity of the mortgage. The Courts have no right, no power, to extend the statute by construction, so as to include property not mentioned in it, or to dispense with any of the conditions the Legislature has seen fit to impose. If we should once begin and attempt to relieve parties in cases of hardship, the law would be in danger of being frittered away, and its benefits entirely lost to the community. The present case is perhaps one of hardship upon the plaintiff, but it is a consequence of his own oversight and neglect. Statutes of a similar character in other States, have been so construed as to hold the parties to a strict performance of the conditions on which the validity of the mortgage depends. (*Chenyworth v. Daily*, 7 Ind. 284; *Diover v. McLaughlin*, 2 Wend. 596; *Clayborn v. Hill*, 1 Wash. 177; *Meyer v. Gorham*, 5 Cal. 322.)

But the respondent insists that the defendant Timson is not a "purchaser in good faith," and therefore he cannot hold the property free of the mortgage, and refers to Sec. 15 of the Statute of Frauds. That section, however, does not apply to this case, which is governed, as we have shown, by Sec. 17 of the Statute of Frauds, and the Chattel Mortgage Act, which make no exception of that kind. They declare the mortgage void, as "against any other person than the parties thereto." The case referred to by the respondent's counsel, were under statutes differing entirely from our own, and are not, therefore, proper guides.

It is urged that the Constable only sold the mortgagor's interest in the property, subject to the mortgage, and therefore the purchaser took subject to the mortgage. It appears that the Constable attempted to sell in that way; but, failing to get any bids, he put it up at last without saying anything about the mortgage. We do not consider that the mode of selling can make any essential difference, as the purchaser would be entitled to the property; and whether his title was subject to the lien of the mortgage, depends upon the fact whether the lien was valid or not. (*Hull v. Camley*, 1 Kern. 506.) So the sale to Timson cannot be held void on the ground of inadequacy of price. It seems it was the highest bid that could be obtained. It was apparent that the purchaser would be liable to a

Fall v. Paine.

lawsuit with the mortgagee, which sufficiently accounts for the small sum bid. (*Smith v. Randall*, 6 Cal. 50; *Cole v. White*, 24 Wend. 141.) Besides, the plaintiff has not been injured in any way, by the inadequacy of price. It is the loss of the mortgagor, and not of the plaintiff.

The judgment is reversed and the cause remanded.

FALL *et al.* v. PAINE *et al.*

BOARDS of Supervisors have jurisdiction conferred upon them by statute, to determine whether the public convenience requires a bridge or ferry within one mile of any other regularly licensed bridge or ferry; and it is a question, whether their determination upon this point is not final and conclusive. If, however, their determination on such matter is not final, it must be reviewed by *certiorari*, and cannot be attacked in a collateral action.

APPEAL from the District Court, Tenth Judicial District, Sutter County.

The facts appear in the opinion of the Court.

F. B. Reardan, for Appellants.

The exercise of the power to determine whether another ferry is required by public convenience, is the exercise of a judicial power, and the Board of Supervisors cannot exercise it arbitrarily. (8 Cal. 61, 62; 13 Id. 12; 14 Id. 499-501; 10 Id. 345.)

O. Lindley, T. S. Belcher, and Z. Montgomery, for Respondents.

CROOKER, J. delivered the opinion of the Court — CORN, C. J. and NORTON, J. concurring.

This is an appeal from an order refusing an injunction. The complaint avers that the plaintiffs are the owners of a toll-bridge over Feather River, between Yuba City and Marysville; that the defendants are running a ferry, within one mile of the bridge, under a license issued by the Board of Supervisors of Yuba County, who had improperly determined, upon the application for the ferry license, that the public convenience required a ferry within one mile of the

Kalkman v. Baylis.

bridge; and alleging numerous irregularities in the action of the Board of Supervisors in granting the ferry license, and also that they erred in deciding that the public convenience required a ferry at that place.

The plaintiffs have mistaken their remedy in this case. The Board of Supervisors is a special tribunal, with mixed powers, administrative and judicial; and it has full jurisdiction conferred upon it by the statute over all matters relating to bridges and ferries. Many questions of a judicial character come before it in determining such matters. Their decision in such cases is not final and conclusive, but their judgments and orders cannot be attacked in a collateral action, as is attempted in this case. (*Waugh v. Chauncey*, 13 Cal. 11; *Thomas v. Armstrong*, 7 Id. 287.) It is a question whether the judgment and determination of the board upon the point whether a ferry is demanded by public convenience within one mile of a regularly established ferry or bridge, is not final and conclusive, as a matter confided to their sound discretion. The judgments and orders of the board, in proper cases, where their action is not final and conclusive, can be reviewed by *certiorari*. (*People v. El Dorado Co.*, 8 Cal. 58; *People v. Marin Co.*, 10 Id. 344.) If the plaintiffs have any remedy to set aside the action of the board in granting the ferry license, it is by writ of *certiorari*, and not by the present action.

The order is therefore affirmed.

KALKMAN *et al.* v. BAYLIS *et al.*

The complaint contained three counts. The first, on a special contract for the erection of a warehouse; the second, for extra work on the building; and the third, for work and labor done, and materials furnished in its erection. The answer denied the allegations of the first two counts; but failed to deny the allegations of the third.

The parties stipulated that the evidence should be taken by a referee, and the cause tried before the Court on the evidence. The Court, instead of finding the facts from the evidence, found the allegations of the third count correct, because not denied.

Held, that this was error, and that the Court should have regarded the allegations of the third count as denied, and found the facts from the evidence.

APPEAL from the District Court, Seventh Judicial District, Sonoma County.

The facts appear in the opinion of the Court.

W. H. Jones, Robinson, Beatty, and Heacock, for Appellants.

Wilkins & Temple, and *J. B. Harmon*, for Respondents.

NORTON, J. delivered the opinion of the Court.—COPB. C. J. and CROCKER, J. concurring.

In the complaint, the plaintiffs for the first cause of action, set forth a special agreement for the building of a warehouse by them for the defendants, and aver a performance on their part. For a second cause of action, they aver the performance of certain extra work on the said building. For a third cause of action, they aver that the defendants were, on a day specified, indebted to them in the sum of \$1,360 for work and labor done, and materials furnished in the building of a warehouse, at the defendants' request, of which sum two hundred and fifty dollars have been paid, and that there is now due the sum of \$1,110. The complaint is verified. A motion made to strike the third cause of action from the complaint was denied. The answer denies, specifically, all the allegations relating to the first and second causes of action. It then denies that the defendants are indebted to the plaintiffs in the sum of \$1,110, or any other sum. This denial is not applied in explicit terms to the third cause of action; but that is the only one in which that sum was claimed to be due. After the answer was filed, the parties stipulated that a referee be appointed to take and report the evidence; and that the case be tried upon such evidence. The evidence was taken and reported to the Court, and the action tried, as is stated in the finding, "upon the pleadings and upon the evidence reported" by the referee. In its finding the Court says it "finds from the admission in said pleadings from the failure of the defendants to answer the third count in the plaintiffs' complaint, the following facts, to wit:" and then proceeds to set forth as facts found the matters which are alleged in that third count. From the judgment entered upon this finding, the defendants appeal.

Kalkman v. Bayls.

Under the old system of pleading and practice, if no issue was taken upon one of the counts of the declaration, no trial or verdict could be had upon it, and no judgment taken, as upon an issue tried. In this case, the Court below have made a finding, which is in the nature of a verdict rendered upon this third cause of action. This finding is based wholly upon the allegations of the third cause of action taken as true, because that count was not denied by the answer. If the action had been tried by a jury, and a general verdict rendered, it would have applied to the cause of action or counts upon which issues had been taken. And so we think the findings must be upon the issues joined. If there was an issue joined on the third cause of action, the evidence should, under the circumstances of this case, have been taken into consideration in making the finding. It was taken as applicable to the issues, and no objection made that the cause of action stood admitted; and it was for that reason immaterial. In the case of *Baker v. Washington* (5 Stew. & Porter, 142), in which, after verdict, an objection was taken that there was no plea filed, the Court say, instead of allowing the objection taken at that time to prevail: "We will rather presume that there was one which was dropped from the record, or that by mutual agreement, express or implied, the same was dispensed with." In this case there was an answer plainly intended to controvert the third cause of action, though it is liable to the objection that it only denied the conclusion of law, instead of the facts from which the conclusion resulted. The answer does not, specifically, deny the allegations of fact averred in this third cause of action; but if every material fact is for that reason taken to be true, then there was no issue to be tried as to this cause of action. The parties stipulated that the action should be tried on the evidence to be taken before the referee. After such a stipulation, and after a large mass of testimony was taken as upon an issue joined, it must be held that the parties have agreed to consider the third cause of action, or count, as being controverted. The findings, therefore, should have been based upon the evidence; and it was error to make a finding and render a judgment upon the third count as being confessed.

Judgment reversed, and cause remanded, and a new trial ordered.

Maye v. Yappen.

MAYE *et al.* v. YAPPEN *et al.*

WHEN two mining claims adjoin each other, and the owners of one claim work across the dividing line and take away gold-bearing earth from the other claim, the fact that they did so in ignorance of the location of the dividing line, is no excuse or justification, and it is error to admit evidence of such ignorance as an excuse for the trespass or in mitigation of damages.

In an action of trespass to recover damages for injury to a mining claim, the right of the plaintiffs to recover the damages which they have actually sustained, is not affected by the fact that the trespass was not willful in its character.

The fact that plaintiff tells defendant that he did not know where the line ran, but that defendant need not be uneasy, for he was not near the line, and had fifty feet still to run before he could reach it, does not amount to a license or permission from plaintiff for defendant to work on plaintiff's ground; nor does it estop plaintiff from recovering the damage he has actually sustained.

When a party has the means of ascertaining a boundary line, he is guilty of negligence in not ascertaining its location.

Where a trespass is committed by entering upon and taking away the gold-bearing earth from a mining claim, and the same is not done willfully or with a malicious intent, and the action is brought for an injury to the land itself, the true measure of damages is the value of the gold-bearing earth at the time it is separated from the surrounding soil, and becomes a chattel.

In estimating the damages, the expense of separating the earth from the gold after it is moved to the place of washing, is to be deducted from the value of the gold.

If, however, a demand is made for the possession of the gold after it is separated from the earth, and an action is then brought for the conversion of the chattel, the measure of damages would be the value of the gold detained.

APPEAL from the District Court, Eleventh Judicial District, Placer County.

The facts are stated in the opinion of the Court.

Tuttle & Fellows, for Appellants.

P. L. Edwards and *H. O. Beatty*, for Respondents.

CROCKER, J. delivered the opinion of the Court — COPE, C. J. and NORTON, J. concurring.

This is an action to recover damages, in the sum of \$2,000, which the plaintiffs allege they sustained, by reason of the acts of the defendants, in entering upon the mining claim of the plaintiffs, and taking away gold and gold-bearing earth of that value. The

Mays v. Yappen.

case was tried by a jury, who found for the plaintiffs damages in the sum of fifty dollars, for which amount judgment was rendered, and the plaintiffs appeal therefrom, and from an order refusing a new trial.

The appellants contend that they were entitled to a judgment for the sum claimed in their complaint upon the pleadings. It does not appear, however, that they made any motion for judgment on the pleading in the Court below; and it is doubtful, therefore, whether the question can be raised in this Court for the first time. But the answer of the defendants was sufficient to raise issues for trial, and this objection, therefore, is not well taken.

It appears that the plaintiffs and defendants are the owners of adjoining mining claims, which are worked by deep under-ground tunnels. The fact that the defendants mined over the dividing line between the claims, and worked out a portion of the mining ground of the plaintiffs, is not disputed; but they contend that it was not done willfully or intentionally, but in ignorance of the locality of the dividing line, between the claims, under the surface; and that they were led to work over the line, by the representations of one of the plaintiffs, as to its locality, in relation to the tunnel and the place they were working. On the trial, the plaintiffs objected to all evidence showing that the defendants were ignorant of the location of this dividing line; but the Court overruled the objection, and permitted several of the defendants to testify to those facts, and this is assigned as error. The plaintiffs, in this action, were not entitled to vindictive or exemplary damages, but could only recover the damages they had actually sustained by being deprived of the gold or gold-bearing earth taken by the defendants from their mining ground. It follows, that the question whether the defendants acted willfully and maliciously, or ignorantly and innocently, in digging up and taking away the gold-bearing earth, is entirely immaterial. The defendants took property belonging to the plaintiffs, and have thereby injured them to a certain amount; and that amount is made no greater nor less by the fact that the act was done without any malicious intent. The right of the plaintiffs to recover damages, or the amount of the damages to which they may be entitled, is not affected by the fact that the trespass was not

Maye v. Yappen.

willful in its character. The ruling of the Court upon this question was therefore erroneous.

It appears, that when the defendants first commenced working in the vicinity of the ground belonging to the plaintiffs, one of the plaintiffs went into defendants' tunnel, where they were working, and he was asked if he knew where the line was, to which he replied that he did not know exactly. Afterwards, on the same day, the same plaintiff, Maye, stated to defendants that they need not be uneasy; that they were not near the line, and had forty or fifty feet still to run before they would reach it; and showed them a map of the plaintiffs' claim. The witness, who was one of the defendants, also stated that they only worked twenty-five feet further, and would not have done even that but for Maye's statement that they had fifty feet to go. Soon after this conversation, the defendants employed a surveyor to run the line, and they then learned that they had worked over on the plaintiffs' claim. This state of facts, the defendants claim, amounts to a license or permission from the plaintiffs to work the ground; or they estop the plaintiffs from recovering the damages caused by the working of the ground. It is clear that the facts do not show a license or permission to work the mining ground of the plaintiffs. They show mutual ignorance on the part of one of the plaintiffs, Maye, and the defendants, as to the location of the line in the tunnel; but they do not show any permission or consent, or even intention or willingness on his part, that the defendants might work the plaintiffs' mining ground. Whether or not the permission of one of the plaintiffs would bind the others, it is unnecessary to determine.

The rules relating to the doctrine of estoppel with respect to the title of property, laid down by this Court in *Bogg v. Merced Mining Co.* (14 Cal. 367), are as follows: 1st. That the party making the admission by his declarations or conduct was apprised of the true state of his own title. 2d. That he made the admission with express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud. 3d. That the other party was not only destitute of all knowledge, but of the means of acquiring such knowledge; and, 4th. That he relied directly upon such admission, and will be injured by allowing its truth to be dis-

Maye v. Yappen.

proved. It is evident that the facts of the present case do not bring it within the rules thus laid down. Maye, who made the statements, expressly stated that he did not know where the line ran in the tunnel; thus showing that he was not apprised of the true location of the plaintiffs' line under ground. His statements were, therefore, more in the nature of the expression of an opinion than an admission of facts. The location of the line on the surface of the ground was well known to both parties, or could have been readily ascertained; and the defendants, therefore, had the means of ascertaining, by means of a survey, the exact location of the line in the tunnel, and they were guilty of negligence in not informing themselves of this fact, especially when they knew that Maye did not himself know exactly where the line ran. The defendants had no right, therefore, to rely upon this statement of Maye's opinion, when he distinctly stated his own ignorance of the fact. They cannot therefore claim that it would operate as a fraud upon them to permit the plaintiffs to show the true location of the line, and to recover the damages caused by the trespass, that being the foundation of the doctrine of estoppel. It may be a question whether the relation of the plaintiffs to each other was such that the admissions of one would operate as an estoppel against the others; but that is a point not necessary to determine.

Upon these points, the Court gave the jury the following instruction: "If the jury believe from the evidence that the defendants were ignorant of the boundary lines between the plaintiffs and defendants, and in such ignorance, if they entered upon the ground of the plaintiffs in good faith, believing it to be their own, and were induced to do so by the acts and representations of plaintiffs themselves, then they will find for the defendants." This instruction was clearly erroneous. It does not correctly state the law upon this subject, as has already been shown.

The Court also gave the following instruction, which the appellants assign as error: "If the jury believe, from the testimony, that defendants entered upon plaintiffs' ground in good faith, believing it to be their own ground, and were misled into so doing by the acts or declarations of plaintiffs, then if the plaintiffs recover at all, they can only recover the net sums taken from plaintiffs'

ground, over and above the expense of extracting it." The plaintiffs claim that the rule of damages in such cases is the value of the property after it is separated from the freehold and becomes a chattel, or the value of the gold after it is extracted from the earth.

In the case of *Martin v. Porter* (5 M. & W. 352), which was an action of trespass *quare clausum fregit*, for entering a certain coal mine and carrying away the coal, and converting and disposing thereof to the use of the defendant, the plaintiff claimed that he had a right to hold the defendant liable for the value of the coal where gotten, and where it first existed as a chattel, without any deduction for the expense of getting it. The Judge at *nisi prius* held that in an action of trover, the plaintiff would have been entitled to the value of the coal as a chattel, either at the mouth of the pit or on the canal bank, if he had demanded it at either place; and the defendant had converted it, without allowing the latter anything for having worked and brought it there; but the action being trespass, he was entitled to the value of the coal as a chattel at the time when the defendant began to take it away, that is, as soon as it existed as a chattel, which value would be the sale price at the pit's mouth, after deducting the expense of carrying the coals from the place in the mine where they were got to the pit's mouth; and the jury found a verdict accordingly. The defendant moved the Court to reduce the damages to the average estimated value of the coal as lying undisturbed in its native bed. The Court refused the motion, holding that the rule had been correctly laid down by the Judge at the trial. The same rule was also adopted in *Wild v. Holt* (9 M. & W. 672), and *Morgan v. Powell* (3 Q. B. 278).

In *Ward v. Morewood* (cited in 3 Queen's Bench, 440), it was held by Parke, Baron, at *nisi prius*, that if there was fraud or negligence on the part of the defendant, they might give as damages, under the count in trover, the value of the coals at the time they first became chattels, on the principle laid down in *Martin v. Porter*; but if they thought that the defendant was not guilty of fraud or negligence, but acted fairly and honestly, in the full belief that he had a right to do what he did, they might give the fair value of the coal as if the coal field had been purchased from the plaintiff; and the jury adopted the latter estimate.

Maye v. Yappen.

The case of *Cushing v. Longfellow* (26 Maine, 306), was an action for *trespass* for cutting and removing mill logs. The plaintiff claimed the right to recover the value of the logs at a certain landing-place, and the defendant contended that the damages should be estimated according to the value of the timber when standing; but the Court held that the plaintiffs should recover the value of the logs as they were the moment after they were severed from the freehold. They also held, that the plaintiff might have demanded the logs at another place; and in an action of *trover*, have recovered the value of them there.

In *Baker v. Wheeler* (8 Wend. 505), which was an action of *trover*, it was held, that the party whose property has been tortiously taken, is entitled to the enhanced value until it has been so changed as to alter the title; and it was held to apply to saw logs converted into boards and plank; timber made into shingles, and wood converted into coal. (*Brown v. Sax*, 7 Cowen, 95; *Babcock v. Gill*, 10 J. R. 237; *Curtis v. Groat*, 7 Id. 168; 5 Id. 348.)

It will be noticed that the rule of damages in such cases depends, to some extent, upon the *form* of the action; whether the action is for an injury to the land itself, or for the conversion of a chattel which had been severed from the land. The complaint in this case alleges that the defendants, at divers times, wrongfully entered upon a portion of plaintiffs' mining claim, and extracted the gold and gold-bearing earth from a portion thereof, which gold and gold-bearing earth they wrongfully carried away and converted to their own use; and the value of the gold thus carried away is alleged to have been two thousand dollars. No demand of the possession of the gold after it was separated from the earth appears to have been made upon the defendants, and the gravamen of the action appears to be the injury done to the land itself by the acts of the defendants. The proper rule for damages, in a case like the present, is the value of the gold-bearing earth at the time it was separated from the surrounding soil and became a chattel. This seems to be a just and proper rule, and one established by the decisions upon this question. In estimating these damages, the expense of extracting the gold and separating it from the earth, after it is first moved

Gluckauf v. Bliven.

from its original location, is to be deducted from the value of the gold taken out of the mining ground of the plaintiffs. The instruction of the Court upon this point is very nearly correct, but it is proper that the rule should be accurately stated to the jury. The difference in the amount of damages may or may not be great, but we have no means of determining whether it is large or small.

The judgment is reversed and the cause remanded.

GLUCKAUF v. BLIVEN *et al.*

A MORTGAGE, executed after the passage of the amendatory Homestead Act of 1860, by both husband and wife, upon the homestead, is valid, although given for borrowed money, provided a declaration of homestead had been made and recorded at the time of its execution.

The second section of the amendatory Homestead Act of 1860, applies only to such homesteads as are held under the declaration provided for in that act, and has no application to homesteads held under the Act of 1851.

The facts are stated in the opinion of the Court.

H. O. Beatty, for Appellants.

James M. Burt, for Respondents.

CROCKER, J. delivered the opinion of the Court — COPE, C. J. concurring.

This is an action to foreclose a mortgage executed by Bliven and wife, upon certain real estate claimed by them as a homestead. Thomas and Ashmore are made defendants, as holders of judgments which are liens upon the property, subsequent to the mortgage. The Court found for the plaintiff, and rendered judgment accordingly, from which the defendants appeal.

Bliven and his wife filed a joint answer, in which they aver that at the time of the execution of the mortgage, they held and claimed the mortgaged premises as a homestead, and still continued to so hold and claim the same; that prior to the commencement of the action they duly selected said premises as a homestead, and duly made, acknowl-

Gluckauf v. Bliven.

edged, and recorded their declaration of homestead; that the mortgage was not created by any laborer's or vendor's lien, but for borrowed money, and the interest thereon; and "that they are man and wife, and were, long before executing said mortgage, residing upon and occupying said premises with their family, of which plaintiff had full knowledge;" and they ask that their homestead claim be reserved and protected. The pleadings are sworn to, and the plaintiff, in his application, denies that before, or at the time of the execution of the mortgage, they held or claimed the premises as a homestead; but he does not deny that they were married, and resided upon and occupied the premises with their family, as specifically alleged in the answer. The replication also avers that they, at the time of the execution of the mortgage, disclaimed all intention of claiming the premises as a homestead, and that the declaration of homestead was not filed until October 10th, 1861. It also avers that a part of the debt secured by the mortgage was for the purchase money of certain undivided interest in the mortgaged property purchased by Bliven. No evidence was introduced by either party in relation to the homestead claim, and it therefore rests entirely upon the pleadings. The Court found that at the time of the execution of the mortgage, Bliven and wife had not dedicated the premises as a homestead; that they did not then claim it as a homestead; that the mortgage was duly executed and acknowledged by Bliven and wife, and duly recorded on the thirtieth day of November, 1860; and also found the amount of the indebtedness, but did not find that any part of it was for the purchase money of the premises, or any interest therein.

The mortgage was executed at a time when the amendments to the Homestead Law, adopted on the twenty-eighth day of April, 1860, were in force; by Sec. 2 of which it was declared that "no mortgage or alienation of any kind, made for the purpose of securing a loan or indebtedness upon the homestead property, shall be valid for any purpose whatsoever; *provided*, that a mortgage or alienation to secure the purchase money or pay the purchase money shall be valid if the signature of the wife be obtained to the same, and acknowledged by her, separate and apart from her husband." The mortgage in this case contains the following clause: "And the

Satterlee v. San Francisco.

said parties of the first part do hereby abandon, renounce, and disclaim all homestead, as well as right of homestead, in and to said property." The declaration of homestead was not made, filed, or recorded in accordance with the provisions of the Act of 1860, at the time of the execution of the mortgage. The case comes, therefore, fully within the principles announced by this Court in the case of *Cohen v. Davis* (20 Cal. 187), in which it was held that Sec. 2 only applied to those cases where the parties had duly established their homestead right, according to the provisions of the Act of 1860; and that where the parties claimed a homestead at the time of executing the mortgage, under the provisions of the Act of 1851, the Act of 1860 did not apply. In the present case, at the time of the execution of the mortgage, all the homestead right claimed by Bliven and wife was under the Act of 1851; and under that law, which governed the rights of the parties, the mortgage was a valid incumbrance upon the property.

After the case had been tried and submitted, and while the Court had the same under advisement, Mrs. Bliven applied to the Court for leave to file a separate answer, and the defendant Thomas also applied for leave to file an amended answer, both of which applications were denied by the Court; and this is assigned as error. The late period at which these applications were made, debarred these defendants from all claim to file such answers as a matter of right, and they were therefore subject to the discretion of the Court, and there was no abuse of that discretion to justify us in disturbing the judgment on that ground.

The judgment is therefore affirmed.

SATTERLEE v. SAN FRANCISCO.

UNDER the charter of San Francisco in 1853, no ordinance could have any validity, unless it received the votes of a majority of all the members elected to the Board of Aldermen. The board consisted of eight members. One of the members elected that year was an alien, and ineligible, yet he was sworn in, and entered upon the discharge of his duties: *Held*, that there were eight members elected, and that it required five votes to pass an ordinance.

Satterlee v. San Francisco.

The validity of an election does not depend upon the eligibility of the candidates voted for, but upon its being held and conducted at the proper time and place, in the manner, and by the proper persons and officers as required by law. Although the person elected may not possess the necessary qualifications to entitle him to take or hold the office, yet if he enter upon the discharge of its duties, he becomes an officer *de facto*, and his right to hold the office can only be contested by direct proceedings for that purpose. The question of his eligibility or ineligibility can never be inquired into in a collateral action, and can only be raised in the Courts by a direct proceeding to contest the election or by a writ of *quo warranto*.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

At the sale of the city slip property in 1853, the plaintiff became the purchaser of two lots for the sum of \$22,000, and paid \$5,000 of the purchase money down, and in 1854 paid the further sum of \$2,490 on the purchase money. This action was brought to recover back the sums thus paid, and legal interest thereon, by reason of the failure of title, owing to the invalidity of the ordinance under which the sale was made.

Plaintiff had judgment in the Court below, and defendant appealed.

Shafter, Heydenfeldt & Goold, for Appellants.

Seven members only were elected to the Board of Assistant Aldermen in the fall of 1853. It appears in the record, that Hyde (the eighth man) was a candidate; that he was certified to the Board of Assistants as having been elected; that he took the necessary oaths, and was installed in office. But it also appears that he was a native of Ireland, born in the allegiance of the British crown; that he came to this country at an early day, and that he was not naturalized until long after Ordinance 481 was finally passed upon by the board, on the fifth of December, 1853.

In order to ascertain whether, in view of the foregoing facts, Hyde was elected a member of the board in any known legal sense, a test must be found to which the question can be subjected. Two only can be suggested: the test *de facto* and the test *de jure*. Which of the twain should be adopted here? The test *de facto* should not be used for the following reasons:

1. That test is applied only to public officers, corporations, and governments—or, more largely stated, to persons natural or artificial—never to events. The books speak of “valid elections,” “legal elections,” and “colorable elections,” but nowhere of “elections *de facto*.”

2. The *de facto* rule, when applied to public officers, is not used by the law from choice, but from public necessity, or for the purpose of preserving the rights of third persons; and when used for or against corporations, it is on the ground of “good faith,” and then it is worked by way of estoppel.

As a further reason why the election of Hyde should not be tested by the rule *de facto*, we suggest that that rule is adopted with a view to conserve an act done: as in the case of a judgment rendered, or any other official act done under color of authority, or in case of a contract made by a private company, holding itself out to the world as a corporation, etc.

The question of whether Hyde was ever elected a member of the Board of Assistants, is to be determined by the rule *de jure*. Under that rule, as he obviously lacked capacity to hold the office under the limitations of the charter, he was never elected at all.

The question is not, whether, at some time prior to his resignation, Hyde did not become an officer *de facto*; nor is it whether some ordinance which he may have voted for, and which for its validity may have depended upon his vote, shall be held good on the ground that he was an officer *de facto*, or be held bad on the ground that he was not something better than an officer *de facto*; but it is, was his election a *de facto* election; or, on the other hand, was it a mere nullity? An utterly void election is legally possible. (*Rex v. Mayor of Birmingham*, 7 A. & E. 254; *Dickey v. Hurlburt*, 5 Cal. 343; *People v. Porter*, 6 Id. 28; *People v. Johnson*, Id. 673; *People v. Weller*, 11 Id. 49; *People v. Martin*, 12 Id. 409; *People v. Westbrook*, 14 Id. 180.)

Nathaniel Bennett, for Respondent.

We maintain that Hyde was a “member elected” of the Board of Assistant Aldermen. We have seen that an election was duly held; that such election was not only an election *de facto*, but *de*

jure. It was conducted with all the formalities essential to make it an election *de jure*. The labored distinction of the counsel for appellants between an election *de facto* and an election *de jure*, falls to the ground. It appears to us, that the distinction between the terms *de facto* and *de jure*, as applicable to an election, is misapprehended. An election *de jure* is one which is held after all the necessary preliminary steps have been taken, such as proper notice, etc., and where it is held by the proper officers, and at the proper place and time. But there may be an election held, where all the circumstances required by law do not concur, and such would be an election *de facto*. The counsel confound the distinction between an election *de facto*, and an officer *de facto*. Now, Hyde was elected at an election held *de jure*; but, if he was destitute of the proper qualifications for a candidate, he became, after the election, an officer *de facto*; and being such officer *de facto*, all the results necessarily flow from his holding the office, whether they be of a positive or negative character — whether they be acts of commission or of omission — whether the enactment of ordinances, or the failure of ordinances proposed. If he was a “member elected” for any purpose, he was a “member elected” for all purposes, and as affecting all acts, as well negative as positive.

But what matters it whether Hyde was an “elected member” of the board or not? The result is the same. If he was not elected, his opponent was; and, whether the one or the other, eight Assistant Aldermen were elected; for no objection is raised that the candidate opposing Hyde had not the proper qualifications. That an election was held in September, 1853, is not denied. It is expressly admitted. At such election, one of the two candidates for the office of Assistant Alderman must be taken to have been elected — either Hyde or his opponent, Capt. H. S. Brown; and if either, the full number of eight Assistant Aldermen required by the charter, must be deemed to have been elected.

CROCKER, J. delivered the opinion of the Court — COPE, C. J. and NOERON, J. concurring.

This is one of numerous cases arising out of the attempted sale in 1853, by the municipal authorities of the City of San Francisco,

of property known as the City Slips; and depends entirely upon the validity of City Ordinance No. 481, which purported to authorize such sale. The charter of the City of San Francisco then in force, declared that no ordinance should be passed "unless by a majority of all the members elected to such Board." The Board by law consisted of eight members; but at the time this ordinance was passed, one of the members, Hyde, had resigned, leaving only seven in office, of whom four voted for the ordinance and three against it. It is contended that the charter required not less than five affirmative votes to pass an ordinance, and that as this ordinance received only four votes in its favor, it was not therefore legally passed; that it was no ordinance, and no right could be acquired under it. This construction of the charter has been sustained by repeated decisions of this Court. (*San Francisco v. Hazen*, 5 Cal. 169; *Holland v. San Francisco*, 7 Id. 361; *McCracken v. San Francisco*, 16 Id. 594; *Grogan v. San Francisco*, 18 Id. 590; *Pimental v. San Francisco*, 21 Id. 351.) The appellant contends, however, that some important questions were overlooked or not considered by the Court in those cases, and therefore asks that the whole subject be reviewed, and a new construction given to the clause of the charter in question; or that it be held inapplicable to the ordinance in question. Where a question involving pecuniary interests of such great value as the present one, has been fully adjudicated for a long period of time, and is sustained by numerous decisions; and where rights and interests of great value have been acquired under it, it ought not to be disturbed, except for the strongest reasons and under the most urgent necessity. It is with this general view of the subject that we propose to examine the questions raised by the appellants.

It is urged that in those cases it appeared to be an admitted fact that Hyde had been regularly elected a member of the Board, and that a few days before the passage of Ordinance 481, his place became vacant by voluntary resignation. It is claimed that the record in this case shows that he was not thus elected, because he was an alien, and not therefore eligible to the office; that the Board for that year consisted of seven members only, instead of eight, and therefore four constituted a "majority of all the members elected."

Satterlee v. San Francisco.

It is insisted that this is a new question, presented to the Court for the first time in this case; and that the decision in the cases above referred to are not decisive, even though the language of the opinions is broad enough to cover this question. In the *Grogan* case, it was stated that the clause of the charter in question was one "which this Court has held, required for the passage of an ordinance a majority of the votes of the entire number which the charter provided should be elected." And the opinions in the *Hazen* and *McCracken* cases are to the same effect. The proper construction of that clause of the charter was one of the matters to be adjudicated by the Court in those cases, and we cannot with propriety regard those decisions as mere *obiter dicta*.

It is not disputed that an election was duly held in the City of San Francisco in September, 1853; that Hyde was one of the candidates at that election; that he received a majority of all the votes cast for Assistant Alderman of the First Ward at such election; that he received a proper certificate of his election; that he took the required oath of office, and was duly installed into the office; that he was declared duly elected by the proper officers, and took his seat with the other members of the board, and acted as such from the time of his election to the date of his resignation, which was a few days before the passage of the ordinance in question. There is no question that the other seven members of the board were duly elected, and that they were eligible to the office. These facts show that there were eight "members elected," within the intent and meaning of the charter; and we hold that the number of "members elected" was not reduced from eight to seven by the mere fact that Hyde was not eligible to the office by reason of his alienage. The charter provides that each board should "judge of the qualifications of election of its own members." The board having declared him duly elected, his eligibility was so far determined by the body in which the power was vested by law, as that he became a member of the board, with the right to exercise the same powers and perform the same duties as other members, at least until his right to hold and retain the office had been duly adjudicated in a proper judicial proceeding instituted for that purpose. While he held the office he was an officer *de facto*, and his acts as such officer were entitled to credit accordingly.

It is urged that though there was an election *de facto* in the First Ward at that time, yet there was no election *de jure*, because the successful candidate was not eligible. We cannot subscribe to that view. The validity of an election does not depend upon the eligibility of the candidates, for if it did, it might be contended that an election would be invalid because an unsuccessful candidate was disqualified from holding the office voted for. The validity of an election depends upon its being held and conducted at the proper time and place, in the manner and by the proper persons and officers, as required by law. The election in this case was thus held, and it was therefore valid. The person receiving a majority of the votes at a valid election may not possess the necessary qualifications to entitle him to take or hold the office to which he is elected; but that is a question to be adjudicated by the proper tribunals.

In this case, the board to which Hyde was elected had the power to determine this question, and they are to be considered as having decided it when they declared him duly elected; but their action was not final. His right to take and hold the office might have been contested under the proceedings authorized by the election law, or by a writ of *quo warranto*. But the validity of the election, or his right to take and hold the office, cannot be inquired into in a collateral action or proceeding like the present. (*Turner v. Maloney*, 13 Cal. 621; *People v. Olds*, 3 Id. 174, 175; *People v. Collins*, 7 J. R. 549; *Wilcox v. Smith*, 5 Wend. 281; *Hall v. Luther*, 13 Id. 491; *Shore v. Scott River Water Company*, 17 Cal. 626.)

The case of *Searcy v. Grow* (15 Cal. 121), referred to by the appellant, does not conflict with this principle, as that was a proceeding under the election law contesting the election of the defendant, and was therefore a proceeding directly against the person claiming the office, to prevent him from taking or holding it. In the case of *Turner v. Maloney* (13 Cal. 621), it was directly held, that the question of eligibility of an officer could not be tried in a collateral proceeding. In that case it was an application for a *mandamus* to compel the Controller of State to draw his warrant for the plaintiff's salary as District Judge. It was opposed, on the

Wenborn v. Boston.

ground that the plaintiff was ineligible because he held the office of Inspector of Customs, a lucrative office under the United States — a similar question to that raised in the case of *Searcy v. Grow*.

But if we are mistaken in our views of this question, we would not feel justified in overturning the previous decisions of this Court construing this clause of the charter. To do so, would clearly violate the rule of *stare decisis*. Under these circumstances it is not necessary to inquire whether that construction is correct or not.

The judgment is affirmed.

WENBORN v. BOSTON *et al.* — CALDERWOOD *et al.*, INTERVENORS.

No APPEAL lies from an order denying a motion for leave to intervene.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

David Calderwood, for Appellants.

Crockett, Page, and *Tevis*, for Respondents.

CROCKER, J. delivered the opinion of the Court — COPE, C. J. and NORTON, J. concurring.

This is an appeal from an order denying a motion for leave to intervene, made by Calderwood and wife. The respondents contend that no appeal lies from such an order. The appellants reply, that as to them it is a final judgment. Sec. 336 of the Practice Act specifies the cases in which an appeal may be taken, and an order of this kind is not included among them. Nor can it properly be said to be included in the terms "final judgment," used in that section. The remedy of the appellants is by an appeal from the final judgment when rendered.

The appeal is dismissed.

Welch v. Allington.

WELCH v. ALLINGTON *et al.*

A being in debt to B, executes to him his promissory note for the amount due.

A afterwards gives to B, C's note for the same amount, and B surrenders up A's note, which is destroyed. C's note is not paid at maturity, and B sues A upon the original note, which had been given up: *Held*, that the action could be maintained, as there was no express agreement between A and B that C's note was to pay the debt, or that the note of A was to be extinguished by C's note: *Held*, further, that the reception of C's note, in the absence of any express agreement to the contrary, only operated as an extension of the time of payment of A's note until the maturity of C's.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

The facts are stated in the opinion of the Court.

Frank Hereford, for Appellant.

George B. Moore, for Respondents.

CROCKER, J. delivered the opinion of the Court — CORN, C. J. and NORTON, J. concurring.

This is an action upon a promissory note executed by Allington & Parker. It appears that Allington had given the plaintiff a non-negotiable note for the same amount as the note sued on, executed by one Smith, not at the time due, and therefore the note sued on was surrendered up to Allington. Smith, it appears, had a note against Allington, of an amount sufficient, as a set-off to the note thus transferred by Allington to the plaintiff, and when the plaintiff demanded the money due on Smith's note, the latter claimed the set-off and refused to pay. The plaintiff then brought this action upon the original note, which had been surrendered at the time of the exchange.

The appellant contends that the plaintiff had no right of action upon the original note until he had instituted suit against Smith, or it was shown that Smith was insolvent, or had absconded from the State. This point is not well taken. It was held by this Court in *Griffith v. Grogan* (12 Cal. 317), that when a promissory note is received upon an antecedent debt, such debt is not extinguished

Contra Costa Railroad Co. v. Moss.

thereby, unless the new note was, by express agreement, received in payment of the antecedent debt; that it only operated to extend, until the maturity of the note, the period for the payment of the debt. There is no evidence in this case of any express agreement that the new note was to be in payment of the old one, or that the debt due on the old note was to be extinguished by accepting the new one. The only fact tending that way was, that the old note was surrendered when the new note was received; but that was held insufficient to prove such an agreement in the case of *Olcott v. Rathbone* (5 Wend. 490). The law will not presume such an agreement, and it must be proved by the party relying upon it. The taking of the new note operated as an extension of the time of payment of the old note; and as soon as that extended time had expired, the plaintiff had a right to bring his action upon the old note, if the amount was not then paid; and he was under no obligation to sue on the note of Smith. His right of action upon the old note did not depend upon the contingency of an unsuccessful suit against Smith.

The judgment is affirmed.

**CONTRA COSTA COAL MINES RAILROAD COMPANY
v. J. MORA MOSS *et al.*, DEFENDANTS, AND MOUNT
DIABLO RAILROAD COMPANY, INTERVENORS.**

THE petition asking the Court to condemn land for railroad purposes under the Railroad Law of this State, in order to give the Court jurisdiction, should aver that petitioners have endeavored to contract for the land, sought to be acquired for the use of the railroad, and that they cannot contract for the purchase thereof.

The Court has full power to grant leave to amend such petition, whenever it shall be of opinion that justice may require it.

The question whether that clause of the Constitution prohibiting private property from being taken for public use without a just compensation, authorizes the Legislature to confer upon railroad companies the power of taking land from the owners upon the payment of a just compensation, has been fully put at rest, and the right and power firmly established by numerous decisions.

The question of the public character of railroads, and their necessity for public use, is one that partakes more of a political than a judicial character, and rests

Contra Costa Railroad Co. v. Moss.

much, if not entirely, in the sound discretion of the Legislature; and when the political department of the Government has recognized the public character and necessity for public use of any particular proposed railroad, Courts will rarely, if ever, in a proceeding to condemn lands, investigate and determine this preliminary question.

Under the general Railroad Law, all railroads are compelled to act as common carriers for the conveyance of all passengers and property that may come to their road for that purpose.

The Courts are not authorized to condemn lands for railroad purposes, unless it is shown by evidence that the petitioners have endeavored to contract for the purchase of the same, but have been unable to do so.

The general Railroad Law has not given to any company organized under it, the right to condemn or use any lands owned or previously located and appropriated for railroad purposes by another railroad company, except where it may be necessary for one railroad to cross another. Land once located by a company, who are proceeding in good faith and with reasonable diligence in the construction of their road, cannot be taken from it and appropriated by another company.

APPEAL from the District Court, Fourth Judicial District, Contra Costa County.

The facts are stated in the opinion of the Court.

John B. Felton and *J. W. Stephenson*, for Defendants and Intervenors, Appellants.

Pratt & Clarke, for Respondents.

CROCKER, J. delivered the opinion of the Court — **COPR, C. J.** and **NORTON, J.** concurring.

This is a proceeding under the general Railroad Law of this State to condemn land for railroad purposes. The defendants appeared and filed a demurrer to the petition of the railroad company, setting up various grounds. The Court sustained the demurrer and allowed the plaintiffs to amend their petition; and the granting leave to amend is now assigned as error. The principal grounds of the demurrer were, that the petition did not state that the land sought to be acquired was necessary for the purposes of the company; and that it did not show that the company could not contract for the purchase of the land. It is insisted that these averments were essential to give the Court jurisdiction of the proceedings; that the Court had no power to allow the plaintiffs to amend their

petition; and that the Court could not acquire jurisdiction by the amended petition; and that it was the duty of the Court, upon sustaining the demurrer, to dismiss the proceeding. Sec. 23d of the general Railroad Law of 1861, under which these proceedings were prosecuted, contains this provision: "If such company cannot contract for the purchase of any real estate, or any right, title, or interest therein, necessary for any of the purposes aforesaid, from the person or persons owning the same, then such company may acquire the same, for the purposes in this section expressed, by means of the special proceedings prescribed in this act." Under a clause of the same character, though differently worded, it was held, by this Court, that the person applying for a condemnation must have first sought and failed to buy the land from the owner. (*Gilmer v. Lime Point*, 19 Cal. 47.) The Legislature of 1863 (Stat. 1863, 613) so amended Sec. 23 of the general Railroad Law as no longer to make this inability to contract a condition or ground of jurisdiction in proceedings to condemn land. The power of the Legislature to declare the terms and conditions upon which such proceedings might be instituted, was fully sustained in that case.

Sec. 33 of the general Railroad Law contains this provision: "The said Court or Judge may make all such orders as may be necessary or proper in the special proceedings provided for in this act, and shall cause the pleadings and proceeding to be amended whenever justice shall require it to be done, and shall direct the manner of the service of all orders and notices not herein specially provided for." It is clear that the Court had full power, under this provision, to grant leave to the plaintiffs to amend their petition. The mere fact that the matters to be amended related to the jurisdiction of the Court over the proceedings can make no difference. The power to cause amendments to be made is granted in general terms, unqualified by anything which would justify the Court in refusing leave to amend in the matters objected to in this case. This point is therefore overruled.

It is next objected that the corporation, plaintiffs in this case, are a private company, incorporated for the advancement of their own private enterprise of coal mining, and not as common carriers for

the public convenience; and it is therefore urged that they have no right to condemn the land in question, and that the Legislature has no power to authorize them to take private property for such uses. The Constitution contains this provision: "Nor shall private property be taken for public use without just compensation." It is clear that the Legislature has no power to take the property of one person and give it to another, nor have they the power to compel one person to part with his property for the mere private use or benefit of another. It is equally true that they have the right to take private property for public use, upon paying a just compensation. At the commencement of the construction of railroads in the United States, where these constitutional provisions exist, one question much discussed was, whether the use of land for railroad purposes was a "public use" within those terms as used in the various State Constitutions, so that the Legislature would be authorized to confer upon railroad companies the power of taking the land from the owners, upon the payment of a just compensation, in the mode prescribed by the various railroad charters. It is unnecessary to refer to the arguments used during this discussion; for the question has been fully put at rest, and the right and power firmly established by numerous decisions. Nor do the counsel for the appellants question the general result of these decisions. They, however, contend that the railroad the plaintiffs are about constructing is not of such a character as entitles them to take the private property of other persons for its use or construction.

On the twenty-ninth day of April, 1861, (Stat. 1861, 264), the Legislature passed a law granting the railroad franchise in question to William Fitzpatrick and others, who were required therein to organize themselves, their associates and assigns, into a corporation under the Railroad Corporation Law. It granted to them the right of way over the lands of the State, and authority to construct and maintain a railroad, with the necessary branches, from the coal mines in Contra Costa County, through what is known as "Kirk's Pass," to some point on the San Joaquin River or Suisun Bay that would admit of the delivery of the road freight directly into the vessels employed in its water transportation, and the right to construct a wharf at such termination; with power to

collect such tolls and wharfage as might be allowed by the Board of Supervisors of Contra Costa County. In pursuance of this statute, the plaintiffs were organized as a railroad corporation under the general Railroad Law of 1861; and they by that, assumed, and are bound to perform all the duties and obligations imposed upon and required of other railroad corporations organized in this State. The necessity of the plaintiffs' railroad for public use is not only as fully established as that of any other railroad built by a corporation organized under the general Railroad Law, but its public character has received a special recognition by the passage of the special law above referred to. If the inquiry, whether the road is of "public use," can be gone into in the present case, it can in that of every railroad which may hereafter be constructed in the State; and in every proceeding to condemn land, the Courts could be called upon to investigate and determine this preliminary question. The question is one that partakes more of a political than a judicial character. It therefore rests much, if not entirely, in the sound discretion of the Legislature. (*Gilmer v. Lime Point*, 18 Cal. 251, 252.) It is their duty to define what kind of railroads shall be deemed of such a public character as to entitle them to take private property for the use of the road. There may possibly occur cases in which it might be the duty of the Courts to interfere to prevent the rights of private ownership of property from being invaded, under the pretense of an appropriation for public use; but we do not deem the present a case of that kind.

It is objected that the Act of 1861 does not make it obligatory upon a company formed under it to act as a common carrier for the expeditious conveyance of passengers and property, or make it a condition that the railroad shall be constructed between points of commercial importance, so that they can be used by the public as common carriers. And it is urged that the plaintiffs are constructing a railroad from a coal mine in the mountains through a desolate region to navigable waters, to enable it to get coal ready to market; that this is a mere private use; and therefore they have no right to appropriate the property of others to its purposes without their consent. The forty-fifth section of the general Railroad Law of 1861 provides that, "Every such company shall start and

Contra Costa Railroad Co. v. Moss.

run their cars for the transportation of persons and property, at such regular times as they shall fix by public notice, and shall furnish sufficient accommodations for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, offer, or be offered, for transportation, at the place of starting, and the junction of other railroads, and at siding and stopping places, established for receiving and discharging way passengers and freight; and shall take, transport, and discharge such passengers and property at, from, and to such places, on the due payment of tolls, freight, or fare therefor." And Sec. 46 provides that, "in case of refusal by such company or their agents so to take and transport any passengers or property, or to deliver the same at the regular appointed places, such company shall pay to the party aggrieved all damages which shall be sustained thereby, with costs of suit." The plaintiffs, in common with other railroad companies organized under this act, are bound by these provisions, which makes it obligatory upon them to act as common carriers for the conveyance of all passengers and property that may come to their road for that purpose. The fact that their road does not connect points of present commercial importance cannot affect the rights of the plaintiffs. Railroads often make commercial points by their construction, and a large and cheap supply of coal brought to a point connected with water navigation, is one of the great necessities of the State, and a matter in which the whole State is interested. If we were to enter into an investigation to determine what point were of sufficient "commercial importance" to justify the construction of railroads, we would find ourselves engaged in a difficult field, with very little to guide us.

The plaintiffs, by their amended petition, allege that they have endeavored to contract with the parties claiming the land sought to be acquired for the use of the railroad; and that they cannot contract for the purchase thereof; which averment is denied by the defendants in their answer filed to the amended petition. At the trial, the plaintiffs called one Cutter, as a witness, to prove this averment; who merely testified that, as agent of the company, he had endeavored to contract with one of the defendants, Pioche, for that portion included in the "New York Rancho," but showing no

attempt to contract with any other of the defendants. The defendants contend that the proof was insufficient to sustain the allegation of the amended petition upon this point, or to show that the plaintiffs were entitled, under the law, to institute these proceedings to condemn the land. On the other hand, the plaintiffs insist that the averment was unnecessary and immaterial, and therefore not necessary to be proved; because Sec. 24 of the general Railroad Law prescribes what the petition shall set forth; and this averment is not among them. Although this averment is not, apparently, required by Sec. 24, yet it is clear that the right of the plaintiffs to institute these special proceedings depends, under Sec. 23 as it stood before the amendment of 1863, upon the fact that they could not contract for the purchase of the land sought to be condemned. It was necessary, therefore, to aver and prove this fact, to give the Court jurisdiction of the case. There was no evidence of any attempt to contract with any of the defendants except Pioche; and the Court therefore had no authority to take any action in the case except against him. (*Gilmer v. Lime Point*, 19 Cal. 47; *Gilbert v. Columbia T. Co.*, 3 Johns. Cas. 107; *Adams v. Saratoga & Wash. R. R. Co.*, 10 N. Y. 328.)

It appears that Cutter, the witness who testified upon this matter, was one of the stockholders of the corporation plaintiff, and the defendants objected to his testifying, on that ground; but the Court overruled the objection, and this is assigned as error. It has been settled by several decisions of this Court, that stockholders of a corporation are not competent witnesses on behalf of the corporation. (*Mokelumne Hill Canal Co. v. Woodbury*, 14 Cal. 265; *McAuley v. York Mining Co.*, 6 Id. 80; *Wolf v. St. Louis Independent Water Co.*, 15 Id. 319.) It is unnecessary to determine whether the witness was admissible under Sec. 422 of the Practice Act, as amended in 1861, as no notice of the intention to examine him was given, as required by that act. The Court therefore erred in overruling the defendants' objection to this witness.

While these proceedings were pending in the District Court, the "Mount Diablo Railroad Company" filed their petition of intervention, averring that they were duly organized as a corporation on the thirteenth day of July, 1861, under the general Railroad Law

of that year, for the purpose of constructing a railroad from the San Joaquin River, at a place known as New York, to the coal mines in the hills back of that place; that they had located their line and filed a map thereof in the County Recorder's office on the thirteenth day of July, 1861; that they hold and own a certain strip of land over which their railroad is located, and which is necessary for the use of their road, describing it; that the greater part of the route proposed by the plaintiffs for their railroad is within and a part of the tract thus acquired by them for the purposes of its said road; and that the acquisition of the land set forth in plaintiff's petition, would interfere with and destroy the line of road laid out by them. It seems that there is a narrow pass, known as "Kirker's Pass," through which both of the lines of these two railroad companies are located, and it is difficult if not impossible for strips of land of the width prescribed by the Railroad Act to be located in this pass, so as that both roads could be constructed therein, without interfering with or running over a portion of the same land located by both companies. The general Railroad Law of this State has conferred no exclusive right upon any company organized under it to construct its road between any points in the State. Nor has it given to any company the right to condemn or use any lands owned or previously located and appropriated by another railroad company, except where it may be necessary for one railroad to cross another. Thus it is clear that one railroad company cannot locate its line along or upon the previously located line of another company, nor can it condemn or appropriate land along or upon the previously located line of another railroad company, except, as before stated, where it may be necessary for one railroad to cross another. Land once located by a company, who are proceeding, in good faith and with reasonable diligence, in the construction of their road, cannot be taken from it under these proceedings, and appropriated by another company for railroad purposes. By its priority of location and appropriation, the first company locating its line acquires a vested right to its line of road, and the land necessary for its construction, as prescribed by the Railroad Law, of which it cannot be divested by another company who seek to appropriate the land to the same use. The next question is, which of these two companies

Gallagher v. Williamson.

first located their line of railroad in this narrow pass, or at any other place where they interfere with each other? This question we are unable to determine from the record before us; and as the case will have to go back for a new trial, it can be determined by the Court below upon such evidence as may be brought before it, in accordance with the principles laid down in this opinion.

The order of the Court below, appointing Commissioners to ascertain and assess the compensation to be paid for the land sought to be appropriated by the plaintiffs, is set aside and reversed, and the case is remanded for a new trial.

GALLAGHER v. WILLIAMSON.

When property which has been sold is afterwards levied upon and sold under an execution by a creditor of the vendor, and suit is brought by the vendee to recover damages for the alleged wrongful taking, and the defense is, that the sale was made to defraud creditors, and that there was no immediate delivery or continuous change of possession, the statements of the vendor, whether made before or after the sale, are competent evidence to prove the fraud as against him. Whether the statements of the vendor are evidence against the vendee depends on circumstances. If made before the sale is completed, they are evidence against the vendee.

Confidential communications made by a client, to an attorney, respecting the business he is employed to transact, are privileged, and the attorney cannot be compelled to disclose them. But statements made by the client, to other persons at the time, or by other persons to him, are not thus privileged, and the attorney is bound to disclose them the same as any other witness.

On the trial, this interrogatory was put to a witness: "Did you see any difference in the appearance or management of things after the sale, from that before the sale, of the stage and horses to plaintiff?"

Held, to be a proper question, and not objectionable in cases of this character.

Where a Court instructs a jury upon what state of facts they may find a verdict for a party, the instruction should include all the facts in controversy material to the right of plaintiff, or defense of defendant.

APPEAL from the District Court, Seventh Judicial District, Solano County.

The facts are stated in the opinion of the Court.

The plaintiff recovered judgment in the Court below against the defendant, Williamson, and he appealed.

Gallagher v. Williamson.

John Currey, for Appellant.

Williams & Thornton, for Respondent.

CROCKER, J. delivered the opinion of the Court — COPE, C. J. and NORTON, J. concurring.

This is an action to recover damages for the alleged taking of a stage-coach, horses, and harness, by the defendant from the plaintiff. It appears that Patrick Gallagher, the plaintiff's brother, was formerly the owner of the property in controversy; and becoming embarrassed and insolvent, he executed a bill of sale to the plaintiff, at the request of a sister, Mrs. Giblin, dated August 20th, 1861, to secure, or in payment of, a debt due from Patrick to the plaintiff. At that time, Patrick was indebted to the defendant, Williamson, who commenced an action thereon a few days afterwards; and on the sixteenth day of September, recovered judgment thereon, for \$1,104.58 and costs; on which judgment an execution issued, which was duly levied upon the property in question, and the same was afterwards sold on the execution. These acts constitute the alleged taking. The defendant contended that the sale to the plaintiff was made to defraud the creditors of Patrick Gallagher, of whom he was one, and that there was no immediate delivery or continuous possession in the plaintiff within the Statute of Frauds; and that the sale was therefore void as to him.

It seems the bill of sale was made in the night time of August 29th, in the absence of the plaintiff—the contract on his behalf being made by Mrs. Giblin, who acted as his agent. At the trial, one Lay was called as a witness for the defendant, and testified that he had a conversation with Patrick Gallagher the next morning, to wit: August 30th, about the transaction, in which the latter told him the purpose for which the bill of sale had been made. He was then asked to state what he told him upon the subject; to which the plaintiff objected; that such statements were mere hearsay, and they were made after the bill of sale was executed. The Court sustained the objection, and this is assigned as error. The Court clearly erred in its ruling on this point. The defendants had an undoubted right to prove that the vendor made this bill of sale

for the purpose of defrauding his creditors; and his statements upon the subject, whether made before or after the execution of the bill of sale, were competent evidence to prove that fact, as against him. Whether such statements were evidence against the vendee, depends upon circumstances. The defendant insists, that at the time this conversation occurred, the sale had not been completed; that Mrs. Giblin had no authority from the plaintiff to make the contract; and he did not, until afterward, know of the sale to him, or ratify it. If these statements were made to the witness before the sale was in fact completed, they were admissible in evidence against the plaintiff, as statements made by the vendor before he had finally parted with his title to the property; and whether they were thus made was a question for the jury to determine from all the evidence.

It appears that Mrs. Giblin employed one Currier, an attorney at law, to draw up a bill of sale, and they went to the office of one Woods for that purpose. The defendant called Currier as a witness, and asked him this question: "Did you hear Mrs. Giblin say, when you went to the office of Squire Woods, on the night of August 29th, 1861, that she had no authority from plaintiff to transact the business for him, of which she has testified on this trial?" The plaintiff objected that it was a privileged communication made to the witness as an attorney, and therefore he could not disclose it; the Court sustained the objection, and this is assigned for error. Other questions were also put to this witness respecting the conversations between the vendor, Mrs. Giblin, and other persons present at the time of the transaction, relating to the object and design of the parties in making the bill of sale, which were excluded by the Court upon the same objection. It appears that Mrs. Giblin employed the attorney, and she was therefore his client so far as relates to this transaction. The rule is well settled, that the confidential counselor, solicitor, or attorney of the party cannot be compelled to disclose communications made to him in that capacity. (*Landsberger v. Gorham*, 5 Cal. 450). But this rule does not extend to any facts within his knowledge, or information acquired by him in any other way than by such confidential communications of the client. (*Hunter v. Watson*, 12 Cal. 377.) It follows that all state-

Contra Costa Railroad Co. v. Moss.

much, if not entirely, in the sound discretion of the Legislature; and when the political department of the Government has recognized the public character and necessity for public use of any particular proposed railroad, Courts will rarely, if ever, in a proceeding to condemn lands, investigate and determine this preliminary question.

Under the general Railroad Law, all railroads are compelled to act as common carriers for the conveyance of all passengers and property that may come to their road for that purpose.

The Courts are not authorized to condemn lands for railroad purposes, unless it is shown by evidence that the petitioners have endeavored to contract for the purchase of the same, but have been unable to do so.

The general Railroad Law has not given to any company organized under it, the right to condemn or use any lands owned or previously located and appropriated for railroad purposes by another railroad company, except where it may be necessary for one railroad to cross another. Land once located by a company, who are proceeding in good faith and with reasonable diligence in the construction of their road, cannot be taken from it and appropriated by another company.

APPEAL from the District Court, Fourth Judicial District, Contra Costa County.

The facts are stated in the opinion of the Court.

John B. Felton and J. W. Stephenson, for Defendants and Intervenors, Appellants.

Pratt & Clarke, for Respondents.

CROCKER, J. delivered the opinion of the Court — **CORN, O. J.** and **NORTON, J.** concurring.

This is a proceeding under the general Railroad Law of this State to condemn land for railroad purposes. The defendants appeared and filed a demurrer to the petition of the railroad company, setting up various grounds. The Court sustained the demurrer and allowed the plaintiffs to amend their petition; and the granting leave to amend is now assigned as error. The principal grounds of the demurrer were, that the petition did not state that the land sought to be acquired was necessary for the purposes of the company; and that it did not show that the company could not contract for the purchase of the land. It is insisted that these averments were essential to give the Court jurisdiction of the proceedings; that the Court had no power to allow the plaintiffs to amend their

petition; and that the Court could not acquire jurisdiction by the amended petition; and that it was the duty of the Court, upon sustaining the demurrer, to dismiss the proceeding. Sec. 23d of the general Railroad Law of 1861, under which these proceedings were prosecuted, contains this provision: "If such company cannot contract for the purchase of any real estate, or any right, title, or interest therein, necessary for any of the purposes aforesaid, from the person or persons owning the same, then such company may acquire the same, for the purposes in this section expressed, by means of the special proceedings prescribed in this act." Under a clause of the same character, though differently worded, it was held, by this Court, that the person applying for a condemnation must have first sought and failed to buy the land from the owner. (*Gilmer v. Lime Point*, 19 Cal. 47.) The Legislature of 1863 (Stat. 1863, 613) so amended Sec. 23 of the general Railroad Law as no longer to make this inability to contract a condition or ground of jurisdiction in proceedings to condemn land. The power of the Legislature to declare the terms and conditions upon which such proceedings might be instituted, was fully sustained in that case.

Sec. 33 of the general Railroad Law contains this provision: "The said Court or Judge may make all such orders as may be necessary or proper in the special proceedings provided for in this act, and shall cause the pleadings and proceeding to be amended whenever justice shall require it to be done, and shall direct the manner of the service of all orders and notices not herein specially provided for." It is clear that the Court had full power, under this provision, to grant leave to the plaintiffs to amend their petition. The mere fact that the matters to be amended related to the jurisdiction of the Court over the proceedings can make no difference. The power to cause amendments to be made is granted in general terms, unqualified by anything which would justify the Court in refusing leave to amend in the matters objected to in this case. This point is therefore overruled.

It is next objected that the corporation, plaintiffs in this case, are a private company, incorporated for the advancement of their own private enterprise of coal mining, and not as common carriers for

Calderwood v. Tevis.

of O'Connell, but it was refused by the Court. In August, 1862, Tevis recovered judgment in that action for the restitution of the premises, from which Calderwood caused an appeal to be taken to this Court, which was dismissed on the ground that the sureties in the undertaking, on appeal, had been excepted to, and had not justified according to law. (21 Cal. 512.) Before the judgment in *Tevis v. O'Connell* was rendered, and while that action was still pending in the District Court, Calderwood commenced the present action, having obtained the possession from O'Connell, alleging that he had the title to the premises, and was in possession; and that Tevis set up a false claim of title thereto. The case came on for trial in December, 1862, and Tevis recovered judgment, from which, and from an order denying a new trial, the plaintiff prosecutes this appeal.

One of the defendants, Marye, answered the complaint, denying the plaintiff's title, and averring that the legal title was vested in Tevis, and that he, Marye, was the owner of the equitable title to the one-half of the premises. To this answer, the plaintiff demurred, on the ground that it did not state facts sufficient to constitute a defense. It appears that the demurrer had not been submitted or disposed of when the case was tried. The plaintiff contends that it was an irregularity to try the case while this demurrer was pending, such as entitles him to have the judgment set aside and a new trial granted. He refers to the case of *Hestres v. Clements* (21 Cal. 425), in support of this point. In that case, the demurrer was to the complaint, and the decision was evidently founded upon Sec. 155 of the Practice Act, which provides that "when there are issues both of law and fact to the same complaint, the issues of law shall be first disposed of." The present case does not, however, come directly within the provisions of that section, as the demurrer was not to the complaint, but to one of the answers. The objection was not raised at the time of the trial; in fact, the plaintiff failed to appear or to prosecute his action at the time set for trial. At most, it was but an irregularity; and in this case we cannot see that the plaintiff has thereby been "prevented from having a fair trial," to bring his case within the first clause of Sec. 193 of the Practice Act. Nor has he suffered any injustice

from it, to justify a new trial on this ground. (*Sannicksen v. Brown*, 5 Cal. 57; *Johnson v. Sepulveda*, Id. 151; *Paige v. O'Neal*, 12 Id. 493; *Broadus v. Nelson*, 16 Id. 79.) This objection is therefore overruled.

It is objected that, as the judgment in *Tevis v. O'Connell* was not rendered until after the present action was commenced, therefore the Court erred in admitting it in evidence. The action in which that judgment was rendered was pending at the time this action was commenced; and the right and title of the defendant Tevis, established by it, were vested in the latter before this action was instituted. A notice of *lis pendens* having been duly filed, and the plaintiff having purchased from the defendant therein while that action was pending, and after the notice was filed, is bound and estopped by the judgment therein, when rendered, equally with the defendant O'Connell. The mere fact that that judgment was not rendered until after the commencement of this action, cannot affect its conclusiveness and binding effect. The pendency of that action was plead by the defendant Tevis, in abatement of this suit; and it was perfectly proper for him to show that that action had been finally adjudicated in his favor.

The next point is, that the premises were claimed as a homestead by O'Connell and his wife; that the plaintiff purchased this homestead right and interest, and obtained a conveyance thereof, executed by O'Connell and his wife; and that this homestead right is not barred or concluded by the judgment in *Tevis v. O'Connell*, because the wife was not made a party to that action. The mere possession and use of premises as a homestead does not of itself create any interest in the property, when the parties claiming the homestead, in fact, have no title or estate therein. They are but trespassers upon the property of another. And in such cases it is not necessary to make the wife a party to an action founded upon such trespass. The trespass is the act of the husband, and not of the wife, and therefore he is the proper party. It follows, that a judgment against him, in such action, is conclusive upon him, and all persons claiming under him. This point, therefore, is not well taken. The plaintiff raises several other questions, but as they are destitute of merits, and unimportant, it is not necessary to refer to them.

The judgment is affirmed.

Nelson v. Murray.

NELSON v. MURRAY.

WHERE the pleadings are verified, and the answer in response to a material allegation of the complaint denies the same upon information and belief, the denial is insufficient.

If the answer merely denies the conclusions of law resulting from the facts averred in the complaint, it is insufficient to raise an issue, and the facts are deemed admitted.

APPEAL from the District Court, Thirteenth Judicial District, Merced County.

The facts are stated in the opinion of the Court.

Coffroth & Spaulding, for Appellant.

H. H. Hartley, for Respondent.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action brought by an owner of a ferry to restrain the defendant from obstructing a public highway leading to it. The cause was submitted upon the complaint and answer, and a decree rendered granting a perpetual injunction. The appellant contends that all the material allegations of the complaint were denied by the answer, and therefore the Court erred in rendering judgment against him. An examination of the pleadings shows that the defendant, in answer to an averment in the complaint that the Board of Supervisors, on a certain day, made a certain order establishing a certain road, denies, upon information and belief, that the Court of Sessions established or opened a road, as averred in the complaint, which is clearly insufficient. Many of the denials follow the language of the complaint literally, in such a way as to render them insufficient to raise issues, where the pleadings are verified as in this case. The complaint also avers that the Board of Supervisors of the county, in October, 1855, made an order declaring the road in question a public highway; and the answer merely denies that the road became a public highway in the manner prescribed by law, which is clearly insufficient. The whole

Verzan v. McGregor.

answer is evasive, and the material facts to sustain the plaintiff's action are not specifically denied, and are therefore to be deemed admitted. The Court below did not err in treating the answer as insufficient to put the plaintiff upon his proof.

The judgment is affirmed.

VERZAN v. MCGREGOR *et al.*

THE general rule is, that it is for the Court to determine all questions relating to the admissibility of evidence; but when the question of its admissibility depends upon the decision of other questions of fact, such as the execution of a contract or agreement, and the testimony is conflicting as to whether the instrument was in fact executed or delivered, it is proper to submit this question to the jury, under proper instructions from the Court.

Where the party offering the instrument, makes out a *prima facie* case of its execution, the other party should not be allowed to introduce counter proof before the instrument is read to the jury.

Parol evidence is admissible when it relates to the execution or authenticity of a written instrument, or to its delivery, or whether the delivery was absolute or conditional.

Where a written agreement is signed and executed by the parties, and at the same time an addition is made in writing upon the same paper, beneath the signature, which additional writing is not signed by either of the parties independent of the signatures of the parties which precede it, parol evidence may be introduced to show whether the parties intended this addition to form a part of the contract.

Defendants entered into a contract with the Table Mountain Ditch Co. to perform certain labor on the ditch of the company. The contract contained many stipulations; one of which was, that if the work was not completed by a certain time, defendants should forfeit the contract, and also all moneys due on the same: *held*, that if this clause in the contract was inserted under a mistake as to the amount and difficulty of the labor to be performed, it was void; and that it did not deprive defendants of the benefit of the other clauses in the agreement.

If the pleadings are under oath, and the replications in response to a material averment of the answer undertake to deny, by saying "It is not true," etc., the replication is evasive and does not specifically deny the averment.

APPEAL from the District Court, Fifteenth Judicial District, Butte County.

The facts are stated in the opinion of the Court.

H. O. Beatty, for Appellant.

That the Court was the proper tribunal to determine the admissibility of the memorandum, I refer to the following authority: (1 Greenl. on Ev. Sec. 49.) In equity, time is seldom of the essence of a contract; in law, it generally is, unless waived. It is true, Courts always, to prevent injustice, seize on slight circumstances to determine that time is waived. And to prevent a party from sustaining a total loss — where he only fails in time — the Courts always allow an action in *assumpsit* (not on the contract) in the *quantum meruit*, or some other of the common counts, where the defendant has accepted the work, service, material, or other thing from the plaintiff, whereby he has actually been benefited; but then plaintiff can avail himself of no special provision of a written contract. (2 Parsons on Cont. 172.)

S. Rosenbaum, for Respondents.

CROOKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is an action to recover the possession of a ditch or canal used to convey water for mining purposes. The ditch was originally owned by the "Table Mountain Ditch Co.," and had been sold under a judgment and execution against the company, and purchased by one Rhodes, and by him conveyed to the plaintiff. The sale to Rhodes was made on the sixteenth day of April, 1860. On the twenty-ninth day of May, 1859, the defendants entered into contract with the company, by which they agreed to finish, widen, deepen, and repair the ditch; dig a tunnel, and erect several flumes connected with the ditch; and agreed to finish the work in November, 1859. The defendants are in possession of the property under this contract; claiming the right to retain the possession until they are paid for the labor done on the work. This claim of the defendants is founded upon the following writing, which is written under the contract, just below the signatures of the parties, but is not signed by either of them, independent of the signatures to the contract itself, which precedes it. It is as follows: "The

Versan v. McGregor.

Table Mountain Ditch Co. agree to give to the parties of the first part, the right of way for digging the ditch. And the parties of the second part, *agreeing to give the parties of the first part the ditch as security till the whole is paid.* Also agreeing to build two sufficient reservoirs to hold water from said ditch; one at the end of the long flume, also one on Table Mountain. Failing to build such reservoirs, to pay interest on all money due the parties of the first part."

One important question in the case is, whether or not this memorandum forms any part of the contract between the parties. On this point Nesbit and Saucier, the subscribing witnesses, whose names are subscribed to the main contract above the memorandum, were examined before the Court. Nesbit testified that he was present when the contract was signed, and was called to witness it. Several hours were spent in discussing it. Defendants wished security for their pay. Tyre (who acted for the company) said he was willing to give security for their pay, if the defendants would give security for finishing their work; and it was agreed that the defendants should give security for the performance of their contract to the amount of five hundred dollars. Tyre then wrote the memorandum as security for the payment on the contract, and the defendants left to get security before the memorandum was signed; that when he signed as a subscribing witness, McGregor was on one side of him and Tyre on the other. Witness asked why the memorandum was not signed. Tyre replied that the memorandum had nothing to do with the contract; and McGregor was standing by his side at the time, within three feet of him, and made no response. He supposes McGregor must have heard him ask the question. The memorandum was to be executed conditionally; and he is certain defendants so understood it. The defendants refused to take the contract unless security was given; and they said they would give security to the company, if the latter would give the memorandum. Nothing was said about the memorandum when the contract was delivered.

Saucier, the other attesting witness, testified that he was present when the memorandum was written. It was talked over for an hour or more. Tyre wrote the memorandum and read it, and both

Vernan v. McGregor.

parties then signed. The memorandum seemed to make the contract satisfactory; noticed that the paper was signed above the memorandum. The paper was ready for signing before the memorandum was written. It was read as a part of the contract. The witness thought it a part of the contract, and thinks all thought so. He did not hear any consultation about security. Several other witnesses, including McGregor, one of the defendants, were examined on this point, and some of them state that it was agreed that it was written as a mere memorandum until the defendants gave security in the amount of five hundred dollars, and then to be signed. It seems that the defendants never gave this five hundred dollars security. The Court below, after hearing all the evidence upon this point, held, that the memorandum formed no part of the contract, and excluded it from the jury; but afterwards, upon a statement of the defendants, that they claimed that the acts of the company were a fraud upon them if the memorandum was excluded, and that this fraud was for the jury to determine, the Court permitted it to be read to the jury in connection with the parol evidence. The jury found a general verdict for the defendants, and also a special verdict upon several questions; among others, "that the defendants had a lien and possession of the ditch as security for the payment of their demands for labor and materials furnished and used in said ditch, tunnels, and flumes," and that Rhodes and the plaintiff had notice of the lien.

The first question to determine is, whether the Court erred in submitting the contract and memorandum together to the jury. The general rule is, that it is for the Court to determine all questions relating to the admissibility of evidence; and when this question of admissibility depends upon the decision of other questions of fact, such as the execution of a contract or agreement, these preliminary facts are, in the first instance, to be tried by the Judge; but he may, at his discretion, take the opinion of the jury upon them. Often these preliminary questions are mixed questions of law and fact; or the evidence may be conflicting as to whether the instrument was in fact executed or delivered by the parties; in which case it is proper to submit the question to the jury under proper instructions from the Court. It is enough to authorize such

submission to the jury that there is some proof of the facts on which the right to admit the evidence is predicated. (1 Greenl. Ev. Sec. 49.) It is often the case that the main question in controversy is the execution and authenticity of the instrument. And the rule is, that if there be no evidence of authenticity, the instrument cannot be read to the jury; but if there be any fact or circumstances tending to prove the authenticity from which it might be presumed, then the instrument is to be read to the jury, and the question, like other matters of fact, is for their decision. (2 Phillips' Ev., C. H. & E.'s Notes, 503, Note.) And when a *prima facie* case of execution has once been made, the Court is not to allow the other party to adduce counter proof before the instrument is read, and thus assume to take the question from the jury. (Id.) Testing the present case by these rules, it is manifest that the Court erred — first, in permitting the plaintiff to introduce counter proof after the defendants had made a *prima facie* case of execution; second, in deciding that the memorandum formed no part of the contract between the parties after such *prima facie* proof had been made, thus taking the question from the jury; but these errors were corrected by afterwards permitting the instrument to be read, and leaving the question of its authenticity to the jury. So the action of the Court, taken as a whole, forms no ground for reversing the case.

The next question is, whether parol evidence was admissible to show that the memorandum formed part of the contract or agreement of the parties. As a general rule, parol evidence is not admissible when it relates to the *construction* to be given to a written contract; but such evidence is admissible when it relates to the execution or authenticity of the instrument, or to its delivery, or whether the delivery was absolute or conditional. In such cases the execution and acts of delivery being mostly a matter *in pais*, oral declarations of intentions connected with the execution and delivery may properly come in as part of the *res gestæ*. (2 Phillips' Ev., C. H. & E.'s Notes, 754.) On this point, the case of *Heywood v. Perrin* (10 Pick. 228) is very similar to the present. In that case a promissory note, payable on demand, had been signed by the defendant; but before its delivery the defendant objected to it

Versan v. McGregor.

because it was payable on demand, and thereupon the following memorandum was written at the bottom of the note, below the signature of the defendant and the attestation of a subscribing witness, to wit: "One-half to be paid in twelve months, the balance in twenty-four months;" and it was then delivered to the payee. The Court held, that it was competent for either party to prove by parol evidence the time when, the person by whom, and the circumstances under which the memorandum was affixed to the note. But evidence of the declarations of the promisee as to his intention in taking the contract in that form, and as to his understanding of the meaning and construction of its terms, could have no effect in giving a construction to the instrument, as the Court was bound to construe it according to its terms, and could not be aided by the declarations of the parties made at the time. The Court, therefore, held that the words "payable on demand," in the body of the note, were qualified and controlled by the memorandum at the bottom.

The evidence upon this point, in the present case, was somewhat conflicting, and it was a proper matter for the jury to determine after hearing all the testimony; and as their conclusion is sustained by the Court below in refusing a new trial, we should not be justified in disturbing the verdict on the ground that it is not sustained by the evidence. It seems that some of the testimony on this point was given to the Court in the absence of the jury, and was not restated by the witnesses to the jury. It was the fault of the plaintiff that the evidence was not restated to the jury after the Court decided to submit the whole matter to the jury. If he had reoffered such testimony, and the Court had excluded it, he would then have had some ground on which to predicate error.

The contract set up by the defendants contains this clause: "The parties of the first part also agree to finish the whole work on or before the fifteenth of November, 1859; and they expressly agree that if the tunnel, ditch, and flume are not finished within ten days of the time specified, they will forfeit the contract, as also all moneys due on the same." The work was not finished until long after the time specified; and the defendants set up as reasons for the delay, that the tunnel to be constructed was much longer than the company represented, and the rock in the tunnel was found to be

Vernan v. McGregor.

much harder than was anticipated, and harder than was represented by the company. The Court instructed the jury that the time was not of the essence of the contract, and a failure to complete within the time would not be a forfeiture of the amount due under the contract for labor and materials that were of actual value to the company; and if the parties were mutually mistaken in regard to the length of the tunnel, and the time fixed was based on such mistake, the stipulation as to time would be void, and the defendants would have a reasonable time in which to complete the work. Or if the company represented the tunnel to be shorter than it really was, and if the defendants believed such representation to be true, and acted thereon in fixing the time for completion, then the clause as to time and forfeiture would be void, and defendants would be entitled to a reasonable time. To these instructions the plaintiff excepted, and asked the Court to instruct them "that if the defendants had not completed their work within ten days after the fifteen of November, they could not claim any lien or other advantages under the contract, but could at most only recover the reasonable value of their work, without lien or other advantages from the contract," which the Court refused, and this is assigned as error.

Where an act is done or a contract is made under an injurious mistake or ignorance of a material fact, it is voidable; and this rule is not limited to cases where there has been a fraudulent concealment and suppression of facts, but extends also to cases of innocent misapprehension and mistake. (Story on Cont. Sec. 409; 1 Story's Eq. Sec. 140.) It is not necessary, in a case of this kind, where the mistake or misrepresentation only affects one out of many stipulations in a contract, to treat the whole agreement as void, but only that portion to which the mistake or misrepresentation properly applies. The rule in equity is, that if there has been any undue concealment or misrepresentation, the injured party will be placed in the same situation, and the other party will be compelled to do the same acts, as if all had been transacted with the utmost good faith. (1 Story's Eq. Sec. 439.) In this case, the evidence and instructions given on this point are intended merely to prevent a forfeiture claimed under a clause inserted under a mistake as to the facts, and a misrepresentation by the company's

Verzan v. McGregor.

agents of those facts, most material to this part of the contract. The fact that this evidence was used to defeat the claim of forfeiture will not deprive the defendants of the other valid clauses in the argument not affected thereby, and compel them to rely upon a mere implied contract to pay the value of the work done. In this view of the case, the Court did not err in giving the instructions objected to, or in refusing the instructions asked by the defendants.

The contract in controversy, in describing the parties, reads as follows: "This agreement, entered into this 29th day of May, 1859, between Robert McGregor and James Newton, parties of the first part, and David Tyre, C. A. Simmons, and Thomas Cairns, Directors of the Table Mountain Ditch Company, parties of the second part, witnesseth," etc. The agreement refers to the ditch, tunnels, and flumes "of the Table Mountain Ditch Company," as the subject matter of the contract. It is signed by Tyre, Simmons, and Cairns, without any official designation, or statement of the capacity in which they sign, attached thereto; but the memorandum commences thus: "The Table Mountain Ditch Company hereby agrees," etc. The contract seems to have been filed and kept with other papers of the company, by its Secretary. The plaintiff objected to the admission of the contract in evidence, on the ground that it was not the contract of the company, but only of Tyre, Simmons, and Cairns, who signed it. The defendants aver, in their answer, that the contract was entered into "with the Table Mountain Ditch Company." The company, who were made parties to the suit by the answer, which was in the nature of a cross complaint, in their answer merely deny that "it ever entered into any such contract as is set forth in the cross bill," etc. The plaintiffs, in their replication to the answer, say that "it is not true, as charged in said answer, that the Table Mountain Ditch Company agreed with the defendants to give to them," etc. The answer and replication are clearly evasive, and do not specifically deny that the company were the real parties to the contract, and bound thereby. If it had been the intention to raise that distinct issue, it should have been done by more direct specific denials or averments. As was said in *Rowe v. The Table Mountain Water Com-*

Draper v. Douglass.

pany (10 Cal. 444), where a similar point was raised: "We cannot see why the corporation, if it chose to do so, could not as well bind itself in this form as in any other." The averment in the complaint is admitted by the failure to specifically deny it. There is sufficient in the contract itself to show that the Company were the parties really interested; so that it is not impossible, in fact, for the contract thus executed to be the contract of the corporation, in which case the objection fails. It seems, too, that the corporation acted under it, by making payments thereon, and putting the defendants in possession of the ditch; and they receive the benefit of the defendants' work thereon. These are strong circumstances to show the liability of the company. (Angell & Ames on Corp. Sec. 296.) There was therefore no error in this action of the Court. We have thus examined all the material points raised by the appellant, and find no just ground for disturbing the verdict and judgment.

The judgment is therefore affirmed.

DRAPER v. DOUGLASS *et al.*

Instruments conveying mining claims need not be under seal.

Plaintiff located a quartz lode and commenced work, digging up the rock towards the lode, at a distance of fifty or one hundred feet from it: *held*, that his declarations made at the time, as to his object in commencing work at that point, were admissible in evidence.

APPEAL from the District Court, Eleventh Judicial District, El Dorado County.

Plaintiff recovered judgment in the Court below, and defendants appealed.

H. H. Hartley, for Appellants.

P. L. Edwards, for Respondent.

CROCKER, J. delivered the opinion of the Court — NORRIS, J. concurring.

This is an action to recover the possession of a certain quartz lode in the County of El Dorado. It seems that the lode was located by one Kisardo and three others, in October, 1861; and afterwards Kisardo bought out the others and took bills of sale from them, and the plaintiff claimed title under a conveyance from Kisardo. On the trial, the latter was examined as a witness, and testified that these bills of sale to him had been lost, and explained when and where. The defendants objected that these bills of sale were not under seal, and to proof of their contents, on the ground that the originals were not duly accounted for; and it is insisted that the Court erred in overruling the objection. This Court has repeatedly decided that instruments conveying mining claims need not be under seal, and the evidence fully establishes the loss of the originals. There was, therefore, no error in this action of the Court.

One of the witnesses testified that he saw the plaintiff at a certain time at work some fifty or a hundred feet below the tunnel which had been commenced by the original locators, digging up the rock towards the tunnel; and the plaintiff told him at the time that the object of the work was to drain the ravine to run a tunnel into the quartz lode. The statement of the plaintiff was objected to, and the action of the Court in admitting it is assigned as error. It was clearly admissible as part of the *res gestæ*. The plaintiff was engaged in work at a distance from the lode, and he explained the object of the work; that it was to enable him to mine the lode, thus showing the connection between the work and the mine.

It is often the case, that miners commence their operations in sinking shafts and running tunnels at a distance from the lode sought to be worked, and their statements while thus engaged in the work, as to the object they are seeking to accomplish by it, are properly admissible as part of the *res gestæ*; otherwise it might be claimed that they were doing no work on the mine, because of the distance from the lode. Verbal and written declarations are often said to be admissible, as constituting a part of the *res gestæ*. As such, they are most properly admissible when they accomplish some act—the nature, object, or motives of which are the subject of inquiry. (1 Phillips' Ev., C. H. & E.'s Notes, 185, and Note 89.) This point is therefore not well taken.

Pelberg v. Gorham.

The next objection is, that the judgment is contrary to the evidence. We are satisfied from an examination of the testimony that the evidence sustains the judgment.

The judgment is therefore affirmed.

PELBERG *et al.* v. GORHAM.

A COMPLAINT (where there is more than one plaintiff), in an action to recover damages for the alleged seizure of goods, which avers, that the defendant took and carried away "certain goods, chattels, and effects, of and belonging to the said plaintiffs," does not necessarily aver a joint ownership of the goods in the plaintiffs; but would be sustained by proof that the plaintiffs owned the property as partners, or as tenants in common, and that their respective interests therein were very unequal.

Defendant, Gorham, as Sheriff, levied on goods claimed by the plaintiffs. After suit had been brought, one of the attaching creditors procured a release from one of the plaintiffs, executed in the name of both, of all actions and causes of action, etc. : *held*, that if this release was obtained by fraud, it was void, and the Sheriff could derive no advantage from it, although he was not implicated in, and knew nothing of the fraud.

In an action against a Sheriff for damages for the wrongful seizure of goods, the true measure of damages is, the value of the goods at the time of the taking.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The facts will be found fully reported in 10 Cal. 120. The plaintiffs recovered judgment in the Court below, and defendant appealed. On the trial, plaintiffs introduced evidence tending to show that plaintiff Glazier, who executed the release, had an interest in the goods only to the amount of thirteen hundred and fifty dollars; and that Pelburg had an agreement with him, before the seizure of the goods by the Sheriff, that on payment of said amount to him, Pelberg should become the sole owner of the goods. Plaintiffs claimed that the release was a fraud on plaintiff Pelberg.

Dwinelle & Hepburn, for Appellants.

One coöwner has a right to transfer or release his interest in a joint property, whether it damages his coöwner or not. An inten-

Pelberg v. Gorham.

tion to injure or defraud has nothing to do with the power of disposition. The release by Glazier to Gorham may have been a fraud on Pelberg, but it nevertheless sundered the joint right by releasing or passing the interest of Glazier the plaintiff, to Gorham the defendant. If the right of property in the goods had been in Glazier alone, and he had released to Gorham, it is plain that he could not recover; for the cause of action would have been extinguished, or passed from the plaintiff to the defendant. The same thing, in legal effect, exists in this case. The cause of action is joint, and in two; and both join in the action which only both can support. After suit is brought, one of the two plaintiffs and joint owners releases and transfers his part of the joint ownership to the defendant. This sunderes the joint ownership, and makes the defendant a coöwner tenant, in common with the other plaintiffs; and in such a case, to permit a judgment to go against the defendant, for the value of the goods, is to permit a judgment to be recovered against him or a cause of action which he owns himself; and that is precisely what has happened here.

D. W. Perley, for Respondent.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action to recover damages for an alleged seizure of goods claimed by Pelberg and Glazier, by the defendant, as Sheriff of the County of San Francisco. The defendant set up as a defense, that since the commencement of the suit, one of the plaintiffs, Glazier, had released the cause of action. This release, the plaintiff Pelberg contends, was made for the purpose of defrauding him. The case has been previously before this Court, and will be found reported in 10 Cal. 120.

On the trial, after the return of the *remittitur*, the defendant asked the Court to give the following instruction to the jury: "That the complaint in this action alleges that the plaintiffs were the joint owners of the goods in controversy, and that neither of the plaintiffs can deny said joint ownership, as far as this action is concerned." The Court refused to give it, and this is assigned as

Pelberg v. Gorham.

error. The complaint alleges that the defendant took and carried away "certain goods, chattels, and effects, of and belonging to the said plaintiffs." Here is no direct averment of "joint ownership," as stated in the instruction. This averment would be sustained by proof that the plaintiffs owned the property as partners, part owners, or as tenants in common, and that their respective interests therein were very unequal. The evidence shows that the plaintiffs were tenants in common of the property, having very unequal interests therein; and therefore the release of Glazier could not affect the interests of Pelberg therein. The refusal of the Court to give this instruction was not erroneous, in view of the facts of the case.

The next error assigned is the refusal of the Court to give the following instruction asked for by the defendant: "Even if the jury should believe that the plaintiff Glazier, when he made the release, intended to defraud the plaintiff Pelberg, the release is nevertheless valid and sufficient to defeat this suit, provided the defendant, Gorham, was not a party to the fraud; in that event, the remedy of Pelberg would be a suit against Glazier." If this release was obtained by fraud, it is void, and could not be used for any purpose. But even if such was not the case, the defendant, Gorham, is not the real party interested in defending this action, as he acted in levying upon the goods for and on behalf of the attaching creditors, one of whom it appears procured the release from Glazier. The instruction, therefore, should have stated that those acting for and on behalf of Gorham, must be free of the fraud, as well as Gorham, to make it good, on the ground claimed by the appellant. Gorham could not claim any benefit from a paper procured by the fraud of another acting on his behalf. That a release, obtained by fraud under these circumstances, cannot operate as a bar to the action, is well settled. (*Eastman v. Wright*, 6 Pick. 323; *Loring v. Brackett*, 3 Id. 403.)

The last objection is, that the Court erred in charging the jury "that if they found for the plaintiff they would take the value of the goods to be the amount stated in the inventory." The evidence shows that the amount stated in the inventory referred to was the cost price of the goods; and it appears that the controversy between the parties on this point was, whether the value was to be taken at the inventory prices, or at the discount thereon at which they were

DeUprey v. DeUprey.

taken by plaintiffs. The plaintiffs were entitled to recover the full value of the goods, and they were not limited to the amount they paid for them. It is evident, therefore, that the defendant suffered no injury by this instruction, as it was, in effect, a proper determination of this controverted question. The amount at which the plaintiffs purchased the goods, was not the necessary criterion of their value, as is claimed by the defendant. The instruction seems to have been given in this form, to answer this point raised by the defendant at the trial, and it was not necessarily erroneous. The judgment is affirmed.

DEUPREY v. DEUPREY.

THE Statute of Limitations requires an action on a judgment to be brought within five years; but when judgment is rendered payable in installments, the time begins to run from the period fixed for the payment of each installment as it becomes due.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

John McHenry, for Appellant.

A. Campbell and *A. H. Loughborough*, for Respondent..

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action upon two judgments rendered in favor of the plaintiff against the defendant; one dated September 9th, 1852, for the payment of sixty dollars per month, for the support of the infant child of the parties, they having been husband and wife; the other, dated January 16th, 1855, for two hundred and nineteen dollars, with interest at ten per cent. per annum, and costs. This action was commenced July 11th, 1861. The defendant demurred to the complaint on various grounds; the Court overruled the demurrer, and the appellant contends that the Court erred in so

DeUprey v. DeUprey.

doing, claiming that the complaint showed that the cause of action was barred by the Statute of Limitations. This is not, specifically, mentioned as one of the grounds of the demurrer; and it is doubtful whether it should not be thus distinctly specified to authorize the Court to consider it. (*Mason v. Cronise*, 20 Cal. 211; *Smith v. Richmond*, 19 Id. 476; *Barringer v. Warden*, 12 Id. 311; *Sublette v. Finney*, 9 Id. 425.) In all these cases, this ground of demurrer was specifically stated, and the question was not, therefore, directly decided. It is not necessary to determine it here, because the Statute of Limitations was specifically set up as a defense in the answer, and a demurrer thereto was sustained, and the question is therefore properly presented in that way.

The Statute of Limitations requires that an action on a judgment be brought within five years. The second judgment sued on was rendered more than five years before the commencement of the action; and the action upon that judgment was barred by the statute. But it seems that the amount claimed under that judgment was not included in the judgment rendered in this action; so that the defendant has suffered no injury by the sustaining of the demurrer to his answer, so far as relates to this second judgment.

The first judgment is payable in monthly installments; and in such case the time begins to run from the expiration of the period fixed for the payment of each installment as it becomes due for the part then payable; and for the other installments, only from the day of the expiration of the respective times of payment. (*Angell on Limitations*, 105.) It follows, that all the installments which fell due prior to five years before the commencement of the suit, were barred by the statute; but for all the installments which fell due within the five years, the right of action was not barred. The Court below did not err, therefore, in sustaining the demurrer to the answer, so far as it applied to the first judgment. It seems that the judgment rendered, included only the installments which fell due within the five years; and it is therefore correct, so far as relates to this point.

It is objected, that no proof was offered to show that the child named in the judgment had been, or was, in the custody of the plaintiff, or that she had expended the necessary money and care

Flandreau v. Downey.

on her support and education. The complaint is duly verified, and these averments not being specifically denied by the answer, are to be deemed as admitted; and no proof to sustain them was therefore necessary. The right to bring an action upon a judgment or decree, is clear and undoubted; and the fact that the decree was for a divorce and for alimony, makes no difference in the rule. (*Howard v. Howard*, 15 Mass. 196.)

The judgment is affirmed.

FLANDREAU *et al* v. DOWNEY.

JUDGMENTS are evidence in actions concerning the same matters for or against the parties thereto, as well as their privies in estate.

A was the owner of certain houses and lots. B obtained a judgment against him; sold the property, and obtained a Sheriff's deed. After B's purchase, C commenced an action against A to foreclose a mechanic's lien on the property, which lien had been recorded before B's judgment had been docketed, but did not make B a party defendant. C obtained judgment of foreclosure, and had the property sold, and became the purchaser. A then purchased of B the title which he had acquired by his Sheriff's deed. In an action brought by C against A to recover possession: *Held*, that A was not estopped by C's judgment from asserting the new title he had acquired by the deed from B. An estoppel by deed or matter of record should be pleaded as such, where there is an opportunity to plead it. Where no opportunity to plead it occurs, it is conclusive as evidence.

If a record that he has not been pleaded is offered in evidence as an estoppel, and no objection is made at the time that the record has not been specially pleaded, the objection is deemed waived.

In a suit in equity to enjoin a Sheriff and the plaintiffs in an execution from selling real estate, on the ground that the sale would be a cloud upon plaintiff's title, a judgment denying the injunction and dismissing the complaint is not an estoppel, so as to prevent plaintiffs from showing the truth upon the subject, in a subsequent action to recover possession of the property.

APPEAL from the District Court, Seventeenth Judicial District, Sierra County.

The facts are stated in the opinion of the Court.

Vanclief & Bowers, for Appellant.

Flandreau v. Downey.

The admission of this evidence against our objection, was error, because Downey was not a party to the action of *Flandreau et al. v. White et al.*, in which case the judgment was against *Flandreau et al.* (1 Phillips' on Evidence, 326, 327; Cowen & Hill's Notes to same, Part 2d, 571, 574, 818, 819; *Byers v. Atwater*, 4 Day, 431-435; *Hurst v. McNiel*, 1 Wash. C. C. 79-83; 19 N. Y. 108, and cases there cited.)

In the two actions of *Flandreau v. Wm. M. Downey*, on which plaintiff's title in part depends, the parties were the same as in this case; and Wm. M. Downey, who was the defendant in those actions, is therefore conclusively bound by the judgments therein against him, and is estopped from disputing anything therein determined. (9 Cowen, 270; 2 Denio, 9; 15 Wend. 615; 4 Cow. 602; 2 Barb. 206; 1 Hilliard on Mortgages, 440; 1 Greenl. Ev., Sec. 522.) And as the record in the case of *Flandreau et al. v. White et al.* could be relevant for no other purpose than to impeach or invalidate what had been determined against Downey in those cases, it should have been excluded.

Taylor and Cowdery for Respondents.

CROOKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is an action to recover possession of two lots, with the buildings thereon, in the town of Downieville. The plaintiffs claim title under two judgments rendered in their favor against the defendants, dated October 2d, 1858, to enforce mechanics' liens on said property. These liens were duly recorded September 29th, 1857, and a credit had been given on the debt for one year from March 13th, 1857. The complaints, in the action to enforce these liens, were filed September 13th, 1858. The summonses issued thereon were dated the same day; but were not placed in the hands of the Sheriff until two days thereafter, having remained in the meantime in the hands of the Clerk. The plaintiffs purchased the property at the sales under their judgments, and their deeds bear date October 17th, 1859.

To rebut this evidence of title the defendant showed that How-

Flandreau v. Downey.

ard & Ladd recovered a judgment against him, which was docketed July 7th, 1858, under which the property was duly sold at Sheriff's sale, and purchased by Ladd; and that Ladd had conveyed the same to him since his purchase, by a deed bearing date October 8th, 1861. As the title obtained by the plaintiffs, under their judgments and sales thereon, relates back to the date of the recording of their mechanics' liens, and as that was prior to the docketing of the Howard & Ladd judgment, under which the defendant claims a new and subsequently-acquired title, it follows that under this evidence the plaintiffs had the prior and better title to the premises.

But the defendant introduced further proof. He offered in evidence the judgment roll, findings, and *remittitur* from the Supreme Court, in a case brought by the present plaintiffs against White, Howard & Ladd, to enjoin the latter from selling the premises under the judgment of *Howard & Ladd v. Downey*, on the ground that such sale and the title acquired under it would be a cloud upon their title acquired at the sale under their judgments. The judgment in that case was as follows: "It is hereby ordered, adjudged, and decreed that the injunction heretofore granted and issued in said cause be and the same is hereby forever dissolved, and the complaint of said plaintiffs be and the same is hereby dismissed. It is further ordered that said defendants have and recover judgment of, from, and against said plaintiffs for their costs in this behalf expended." That case was appealed to this Court, when the judgment was affirmed on the ground that the actions to enforce the mechanics' liens were not commenced, within the meaning of the statute, until the fifteenth day of September, as the summonses were not issued until that day, and therefore they were not commenced within six months after the credit had expired, as required by the statute. (The case will be found reported in 18 Cal. 639.)

To the introduction of this evidence the plaintiffs objected: first, that that action was not between the parties to this suit; second, that the defendant Downey was estopped by the judgment in the action on the mechanics' liens from contesting their validity, and that they were conclusive against him; third, that they were

Flandreau v. Downey.

irrelevant to the issue of this case. The Court overruled these objections and admitted the evidence, and this is the first error assigned.

The first objection is that the record and judgment in that action were inadmissible, because Downey was not a party in that action. In this case, however, the defendant Downey claims title under and derived from the defendants in that action, and he is therefore a privy in estate. As such the record in that case is clearly evidence for and against him. (2 Phil. Ev., C. H. & E.'s Notes, 14, 15, Note 260; 2 Smith's Leading Cases, 518.) This objection, therefore, is not well taken.

The second objection is that Downey, the defendant, is estopped by the judgments in the mechanics' lien suits from contesting their validity. If Downey claimed by no other title than that held by him at the date of these judgments, he would be concluded by them. But he claims by a new and subsequently-acquired title, derived from Ladd; and as the holder of that title he thereby acquired the same rights, as against those judgments, that his vendor had, and can claim the full benefit of that title, as against these plaintiffs, the same as his vendors could. As they were not concluded or estopped by those judgments, not having been parties in the actions in which they were rendered, so he, claiming under them by privity of estate, is not concluded or estopped by them. The objection, therefore, is untenable.

The third objection is that this evidence was irrelevant to the issues in this case. The defendant did not plead his judgment in his answer as an estoppel, or as showing that the same matter involved in the controversy in this case was adjudicated and determined in that. Whether it was necessary to thus set up this judgment as an estoppel, or as *res judicata*, in order to make it an issue in the case, or whether it was a matter which could properly be given in evidence, without being thus specially pleaded, is not very clearly settled. In *Hostler v. Hays* (3 Cal. 302) it was held, that only a technical estoppel, by deed or matter of record, was required to be specially pleaded, and that an estoppel *in pais* need not be. The estoppel claimed in that case was not by deed or matter of record; and it was not necessary, nor does the Court hold, that in

Flandreau v. Downey.

all cases where an estoppel is claimed by deed or matter of record it must be specially pleaded. This question is examined at some length in 2 Smith's Leading Cases, 519-522, and the result would seem to be that a record or deed is conclusive as a plea where there is an opportunity of pleading it, but where there is no such opportunity then it is conclusive as evidence. (Id. 521.) The averments of the complaint in this action, as is but too common in actions of this kind, are of the most general character. The answer, after denying the allegations of the complaint, sets forth the judgment of Howard & Ladd against him, the sale of the property under it to Ladd, and the sale by the latter to him; but contains no averment relating to the suit of the plaintiffs against White and others, or the judgment rendered in it. No objection was made to the introduction of this evidence, that the record had not been specially pleaded, and it is therefore to be deemed as waived. If that specific objection had been made at the time, the Court could have allowed the defendant to amend his answer by making the proper averments to authorize the admission of the proof and remove the ground of the objection.

But it is urged that it is irrelevant on another ground; that is, that this record shows no such adjudication of the matters in issue in this action as will estop or conclude the plaintiffs from showing the truth upon the subject. The case of *Fulton v. Hanlow* (20 Cal. 450) is very similar, in almost every point to the present. In that case the record claimed to be *res judicata*, was a suit in equity to enjoin proceedings under a Sheriff's sale, on the ground that they would make a cloud upon the plaintiff's title; and the judgment was that the complaint be dismissed, and that the purchaser at the Sheriff's sale was entitled to a conveyance from the Sheriff, in which latter respect it went further than the judgment offered in this case. It was held that the purchaser's title was not so adjudicated in the suit in equity, or established by the decree, as to become *res judicata*, but was still open to be controverted in a subsequent action for the possession between the parties or their privies. This is decisive of the present action, for the judgment of the Court below seems to have been founded entirely upon this prior adjudication, the very findings in which were copied, and

Sargent v. Sturm.

made part of the findings in the present action, on the ground of the conclusive effect thereof.

The judgment is reversed and the cause remanded.

SARGENT *et al.* v. STURM.

If the original possession of property is acquired by a tort, no demand previous to the institution of a suit is necessary.

If the tortfeasor has parted with the possession of the goods tortiously obtained, in payment of pre-existing debt; or, if they have been sold on an execution against him, and bid in by a creditor, no demand of the purchaser is necessary before the institution of a suit: nor can the purchaser, who has obtained them in such manner, hold them against the original vendor.

If a creditor of the fraudulent vendee levy on and sell the goods fraudulently obtained, on an execution against the fraudulent vendee, and become the purchaser at execution sale, he acquires no title: but a *bona fide* purchaser from the fraudulent vendee paying a valuable consideration without notice of the fraud, in the usual course of trade, would hold the goods against the vendor.

Where the purchaser has obtained the goods from the fraudulent vendee, in payment of a pre-existing debt, or as an execution creditor, it is not necessary, on the trial, to prove that he participated in the fraud of the fraudulent vendee.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

The facts are stated in the opinion of the Court.

John B. Hall, for Appellant.

P. L. Edwards, for Respondents.

CROCKER, J. delivered the opinion of the Court — COPE, C. J. and NORTON, J. concurring.

This is an action to recover the possession, or the value, if possession could not be had, of a quantity of lumber, valued at \$1,100. The complaint alleges that the plaintiffs are the lawful owners and entitled to the possession of the lumber; that the lumber is in the possession of and unlawfully detained by the defendant; and that he refuses to deliver the same to the plaintiffs, though such delivery has been duly demanded. It appears that the plaintiffs sold and delivered the lumber in question to one Smith; but they con-

tend that Smith obtained the same by fraud and fraudulent representations; and that, therefore, he never acquired any valid title thereto. The defendant claims the property, as purchaser, under a sale on an execution issued on a judgment in his favor against Smith. The plaintiffs recovered judgment in the Court below, from which the defendant appeals.

The first point raised by the appellant is that, as the complaint does not allege any tortious or unlawful taking of the property by the defendant, the plaintiffs were bound to aver and prove a special demand and refusal before commencing the action; and a motion for nonsuit was made on that ground and overruled. The case of *Paige v. O'Neal* (12 Cal. 483) is very similar in many of its features to the present one. In that case the Court say: "It was not essential to aver a demand of the defendant of the wheat in controversy in the complaint, or to prove a demand on the trial. If the property in fact belonged to the plaintiff — and it is upon this theory the suit is brought, and to this effect the evidence tended when the plaintiff rested — the seizure by the defendant was tortious; and it is a general rule that where the possession of property is originally acquired by a tort, no demand previous to the institution of suit for its recovery is necessary. It is only when the original possession is lawful, and the action relies upon the unlawful detention, that a demand is required." No objection was made by demurrer, that a special demand was not averred in the complaint; but the defendant took issue upon all the averments. The jury found by their verdict, that the property belonged to the plaintiff, and that it was in the defendant's possession. The defendant's claim was adverse to that of the plaintiff, and his possession was therefore unlawful from the beginning. He contested the plaintiff's claim or right to the property all through the action. If he had admitted in his answer the plaintiff's right to the property, and that he had always been ready to deliver up the property upon demand, but no demand had been made, it might have been a question, whether he could have been compelled to pay the costs of the action. But after contesting the title of the plaintiff, through a litigated suit in which he claimed the title, he cannot escape the effects of an adverse verdict, by an objection of this kind.

At the trial, the defendant offered in evidence the execution issued on the judgment of *Sturm v. Smith*, and other proof in connection therewith, that the property was duly sold by the Sheriff, under that execution, to the defendant; but the Court, on objection, excluded the evidence, and this is assigned for error. The answer of the defendant is simply a denial of the allegations of the complaint, and does not aver any title or right of possession in the defendant; in fact, it denies that the property was in his possession. Under these circumstances, it is doubtful whether the evidence was admissible under the pleadings. But the defendant has not been injured by the exclusion of the evidence. Even if it had been admitted, together with the judgment on which the execution issued — which, however was not offered — it could not have availed the defendant anything. The plaintiffs' right of action was founded upon the want of any title in Smith to the property on the ground of fraud; and this evidence did not in any way tend to disprove the facts on which the plaintiffs' claim rested. The plaintiffs' evidence established his title, as found by the verdict of the jury. The evidence offered and rejected would not have shown that the defendant stood in any better position than Smith, or that the plaintiffs' title was not as effectual against the defendant as against Smith. The defendant, by his alleged purchase at the sale on execution, acquired no better title to the property than Smith had; and the same evidence which established the fact that Smith had no title, equally established the same fact as against the defendant; and the force and effect of that evidence could not have been avoided or defeated in any way by the excluded testimony. He who receives goods from a fraudulent purchaser in payment or as security for a preëxisting debt against such fraudulent purchaser, cannot hold them against the vendor. (*Root v. French*, 13 Wend. 570; *Coddington v. Bay*, 20 Johns. 637.)

And the same principle applies to a purchase by a creditor at an execution sale of the property on an execution against the fraudulent vendee. (*Durell v. Haley*, 1 Paige, 492; *Buffington v. Gerish*, 15 Mass. 156.) But a *bona fide* purchaser from the fraudulent vendee, paying a valuable consideration without notice of the fraud, obtaining them in the usual course of trade, would hold the

Matter of Estate of Hidden.

goods against the vendor. (Hilliard on Sales, 332, Sec. 7.) The defendant in this case, holds a claim which accrued before the sale; and as he paid nothing on his purchase at the execution sale, he cannot claim the right of a *bona fide* purchaser in such cases. If the amount of his bid on the property was applied as a credit on the execution and judgment, he can have the same canceled at any time by applying to the Court and showing that he obtained no title to the property by his purchase. (Prac. Act, Sec. 237; *Piper v. Elwood*, 4 Denio, 165; *Adams v. Smith*, 5 Cowen, 280; *Nelson v. Rockwell*, 14 Ill. 375.) By that means, he will be placed in the same position he was in before his purchase, and will have lost nothing thereby. It was not necessary for the plaintiffs to prove that the defendant participated in the fraud of Smith. The evidence introduced by the plaintiffs, and which was objected to by the defendant, was admissible as tending to prove the fraud of Smith in the purchase of the property from the plaintiffs.

The judgment is affirmed.

IN THE MATTER OF THE ESTATE OF HIDDEN.

THE allowance of a claim against an estate by an executor or administrator, and the Probate Judge, has the force and effect of a judgment, to be paid in due course of administration; but it is doubtful whether this judgment would bind another creditor of the estate who is not a party to it.

When the account of a claimant is contested, and he applies for leave to amend, by filing a more full and particular account, the amendment should be allowed.

APPEAL from the Probate Court, Santa Clara County.

The facts are stated in the opinion of the Court.

C. T. Ryland, for Appellant.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

The appellant in this case was a creditor of the deceased, and duly filed his claim against the estate, which was allowed by the

Matter of Estate of Hadden.

administratrix and the Probate Judge, on the fifth day of January, 1861. Afterward, on the thirtieth day of October, 1861, while the final account of the administratrix and settlement thereof was pending in the Probate Court, one of the creditors of the estate filed objections to the final account; and among other things objected to the allowance of the appellant's claim, on the ground that a portion thereof was barred by the Statute of Limitations. No fraud, mistake, misrepresentation, or deceit on the part of appellant, or of the administratrix, are charged. On the hearing of the matter, the Probate Judge refused to permit the plaintiff to file a more full and particular statement of his account, or to give him an opportunity to prove that his claim was not barred by the statute, but rejected a large portion of his claim on that ground alone.

In construing the statute relating to the estates of deceased persons, this Court has held, that a claim duly allowed by the administrator and Probate Judge, fixes the obligation upon the estate as a judgment, and has the same force and effect as a judgment. (*Dick's Estate v. Gherke*, 6 Cal. 669; *Pico v. De la Guerra*, 18 Id. 430.) In *Beckett v. Selover* (7 Id. 228), while an allowed claim was held to have the force of a judgment, it was still considered to be of no force, except as between parties and privies, and therefore it was held not to bind the heir in a proceeding for the sale of real estate for the payment of debts. So, too, it is doubtful whether it would bind a creditor of the estate who is not a party to it. Upon the question of the Statute of Limitations, the one hundred and thirty-fifth section of the Probate Act is imperative, as it provides that "no claim shall be allowed by the executor or administrator, or by the Probate Judge, which is barred by the Statute of Limitations."

But the Court erred in not permitting the appellant to file a more full and particular account of his claim, and in refusing to give him an opportunity to prove that his claim was not barred by the statute.

The order of the Court rejecting the claim is therefore reversed, and the case is remanded for further proceedings.

Lewis v. Tyler.

LEWIS v. TYLER.

WHERE the law compels a person, such as an innkeeper or common carrier, to take the care and custody of goods, he has a lien on the property for his reasonable and just charges therefor; but one who merely provides food, and takes the care of an animal, as an agistor, or a livery stable keeper, has no lien on the property, unless there is a special agreement to that effect.

APPEAL for the District Court, Fifteenth Judicial District, Tehama County.

The plaintiff recovered judgment in the Court below, and the defendant appealed.

W. S. Long, for Appellant.

W. H. Rhodes, for Respondent.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action to recover the possession of certain cattle. The defendant claimed the right to their possession on the following grounds: First, that he seized them while trespassing upon his lands and has a right to hold them until paid the damages caused by the trespass; second, that the plaintiff contracted with the defendant to pasture his cattle for him, and that he has a lien on them therefore, and is entitled to the possession until the lien is paid. No point is made upon the first defense, and it is therefore unnecessary to notice it.

The general principle is, that where the law compels a person, such as an innkeeper, or common carrier, to take the care and custody of goods, he shall have a lien on the property for his reasonable and just charges therefore; and the same rule applies to a person who, by his labor and skill, has imparted an additional value to the goods. (*Grinnell v. Cook*, 3 Hill, 491.) But one who merely provides food and takes the care of an animal, as an agistor or livery stable keeper, has no lien on the property, unless there be a special agreement to that effect. (*Grinnell v. Cook*, 3 Hill, 491, 492, and cases cited.) An agistor of cattle is under no legal obli-

Dudley v. Thomas.

gation to take the charge of or keep any cattle that may be brought to him for that purpose. He may receive or refuse them, without violating any duty or obligation imposed on him by the law; and he is at perfect liberty, therefore, when he receives stock to keep, to impose such terms and conditions as he may deem proper. And he may require an agreement that he shall have a lien upon the animals for his reasonable charges, or for the agreed price, if he shall deem it necessary for his security. That class of bailees, however, who are required by law to take the charge and custody of, and to keep animals for others, have no right to impose conditions upon those who employ them; and the law, therefore, very properly gives them a lien upon the property for their security. That reason does not exist in the case of agistors of cattle, and therefore they have no lien, except where there is a special agreement. (Edwards on Bail, 279, 280.) It follows, that the claim set up by the defendant is no defense to the action.

The judgment is therefore affirmed.

DUDLEY v. THOMAS.

When matters in dispute are submitted to arbitration, with power for the arbitrators to appoint an umpire, the arbitrators have a right to select the umpire, either before or after the investigation of the matter has commenced, even though the articles of submission contain a clause providing for such selection in the event of a disagreement between the arbitrators.

Arbitrators have the power to award costs, though no mention be made of costs in the articles of submission.

After an award has been once made and delivered, the arbitrators cannot afterwards alter the same, even to correct mistakes, without the consent of the parties; but the making of a new and supplementary paper, and attaching the same to the award, after it has been delivered, does not vitiate the original award, and may be treated as surplusage.

If the arbitrators award that one of the parties shall pay to the other a sum certain, and also that the parties shall execute to each other mutual releases of all actions, etc., the tender of a release as provided by the award is not a condition precedent to the right to bring an action to recover the money.

The award of money is absolute and unconditional; but the award of releases is different, for they are concurrent acts, and neither party can compel the other to execute a release without the tender of a release by himself.

Dudley S. Thomas.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

The facts are stated in the opinion of the Court.

L. Archer, for Appellant.

The submission, in this case, was general as to all matters in difference between the parties to the date of the first submission, to wit: November 6th, 1861, and was special as to certain other specified matters. The award does not show that the special matters named in the submission were passed upon as is required, to make the award good. (See *Muldrow v. Morris*, 12 Cal. 339.) This defect, it is submitted to the Court, cannot be supplied by parol evidence, but renders the entire award null and void.

The agreement to submit provides for the selection of an umpire, in the event of a disagreement between the two arbitrators. The fact is, that the umpire was selected before the arbitrators commenced their session. We contend that this was a material and fatal variance from the agreement. This point has not, so far as we know, been decided by this Court, and we think it is worthy of full consideration. A person might well be willing to submit his rights to two named persons, and consent to have a third called in, in case of disagreement, and yet not be willing to submit to the three in the first instance for many reasons, which will occur to the minds of the Judges.

Thomas Bodley, for Respondent.

CROCKER, J. delivered the opinion of the Court — NOXTON, J. concurring.

This is an action to enforce an award. The case was tried by the Court, who found for the plaintiff, and a judgment was rendered accordingly, from which the defendant appeals. It is objected that the umpire was selected by the arbitrators before they commenced to hear the case, when the articles of submission provided for such selection in the event of a disagreement between the arbitrators. This objection is not tenable. The arbitrators in such case had the

Dudley v. Thomas.

right to appoint the umpire either before or after the investigation of the matter had commenced. Indeed, it is the better course that the umpire be first selected, so that he can hear the evidence direct from the witnesses. (Caldwell on Arbitration, 107; *Roe v. Doe*, 2 Dum. & East. 644; *Harding v. Watts*, 15 East. 556; *McKinstry v. Solomons*, 2 J. R. 57; *Van Cortland v. Underhill*, 17 Id. 405.)

It seems that on the thirty-first day of October, 1860, the parties agreed to submit all matters in controversy between them to arbitration — the award to be made on or before November 6th. No award was made under this submission; and on the second day of April, 1861, they agreed that the same matters should be resubmitted to the same arbitrators, and that the arbitrators should also take into consideration and render their award upon any damage that the defendant may have been entitled to by reason of any striking given to him by said plaintiff, and the detaining by him from said defendant of certain trucks and chains. The award was rendered May 4th, 1861, that Thomas should pay to Dudley eight hundred and fifty dollars, on or before May 14th, 1861, in full payment, discharge, and satisfaction of all moneys, debts, and demands due from him to Dudley; and that the said parties should, within ten days next ensuing the date of the award, seal and execute to each other mutual and general releases of all actions, causes of actions, suits, controversies, claims, and demands for or by reason of any matter or thing from the beginning of the world down to the date of the said submission. It is objected that the award covers matters not submitted to the arbitrators; but this is not sustained by the record. The award evidently includes no matter not submitted; nor do we think the award respecting the release goes beyond the matters submitted. It includes all matters up to the date of the submission but none since; and it is thus authorized by the submission.

It appears that after the award had been made, the arbitrators, on the sixth day of May, 1861, attached the following certificate, signed by them, to a bill of costs in the case amounting to one hundred and eighteen dollars and twenty cents, viz.: "We, the undersigned, certify the foregoing to be the correct bill of costs in the

Dudley v. Thomas.

above matter of difference, and award the said Stillman Thomas to pay the same as costs of said suit." Neither in the agreement of submission, nor in the award made on the fourth day of May, was there any stipulation or reference to the subject of costs. The arbitrators have power to award costs, though no mention be made of costs in the submission, as it is a matter within the terms of a general reference. (Cald. on Arb. 198.) And it has been held that in the absence of any specific directions about costs, they must follow the award. (*McIntosh v. Blyth*, 1 Br. & Bing. 269.) But it is contended that the execution of this certificate by the arbitrators to the bill of costs, was an alteration or amendment of the award as published, and therefore vitiates the award. The rule seems to be well settled, that after an award has been once made and delivered the arbitrators cannot afterwards alter the same, even to correct mistakes. If such alteration is attempted it will be considered as mere surplusage, and it will not vitiate the award, which will stand good in its original terms. (Cald. on Arb. 177; *Henfree v. Bromley*, 6 East. 309; *Irvine v. Elmore*, 8 Id. 53; *Brooke v. Mitchell*, 6 M. & W. 473.)

In the case of *Porter v. Scott*, (7 Cal. 312) it was held, that any alteration of the award by the arbitrators after it has been made and published, without the consent of the parties, would vitiate it; but that was an alteration of the original award, and not, as in this case, the making of a new, separate, and supplementary paper. We are satisfied that the execution of this subsequent instrument did not vitiate the original award, which remained unaltered by the arbitrators. Whether it should be treated as mere surplusage, or as an effective instrument, is not a question before us; for the judgment only included the amount of the original award, and the plaintiff does not complain because the amount of costs in this supplementary paper was not included in it.

It appears that the plaintiff executed a receipt, which included the two sums of eight hundred and fifty dollars and one hundred and eighteen dollars and twenty cents, with a release of all actions, etc., as required by the award, which he offered to deliver upon the payment of said sums and the execution of a similar release by the defendant. It is contended that it was necessary for the

Dudley v. Thomas.

plaintiff, in order to maintain the action, to prove a performance of, or an offer to perform, the award on his part; and that this was not good as an offer of a release, because he required the payment of both sums, when, as defendant claims, he was not entitled to the sum of one hundred and eighteen dollars and twenty cents.

The first inquiry is, whether it was necessary for the plaintiff to aver and prove an offer of a release to enable him to maintain the action. The arbitrators first award that the defendant shall pay to the plaintiff eight hundred and fifty dollars, on or before the fourteenth day of May, 1861; and they further award, that both parties shall, within ten days after the date of the award, execute to each other mutual releases. The award is dated May 4th, so that the time for the execution of the releases was the same day as that fixed for the payment of the money.

In a case very similar to the present, where the award required the defendants to pay the plaintiffs a certain sum without fixing any time for the payment, and there was a further award that the plaintiffs should, on demand, assign certain claims to the plaintiff, it was held, that no demand of the money before suit brought was necessary, as by the award the defendants were directed to pay a certain sum without any condition or qualification whatever. And it was further held, that it was not necessary that the plaintiffs should aver a tender or offer of performance on their part. (*Nichols v. Rensselaer County Mut. Ins. Co.*, 22 Wend. 125; see, also, *Crosby v. Watkins*, 12 Cal. 85.)

It would seem, from the principles laid down in the case from Wendell, that an offer to perform was not necessary, to enable the plaintiff to maintain an action in a case like this. The award of the payment of the money, in the present case, was absolute, unqualified, and unconditional. The award of mutual releases was, however, different; for they were clearly concurrent acts, and neither party could compel the other to execute a release without showing either an offer of a release by him, or a readiness and willingness on his part to execute it. The action is merely to recover the money awarded; and the tender of a release, as provided by the award, was not a condition precedent to the right to recover the money. The right to recover the money is not defeated

Amyx v. Taber.

by the mere fact that the plaintiff demanded more than he was entitled to, because his right of action was good without any demand at all; and even where a demand is necessary, the mere fact that a greater sum is demanded than the party is entitled to, will not defeat the action, unless the defendant shows that, upon such demand, he offered to pay the sum the plaintiff was really entitled to, and that it was refused. This objection of the plaintiff is not, therefore, well taken.

The judgment is affirmed.

AMYX v. TABER.

THE Common Council of the City of Stockton, under the charter of 1862, have power to make ordinances to prevent cattle and hogs from running at large over the streets and public places within the corporate limits of the City.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

M. G. Cobb, for Appellant.

Terry & Baine, for Respondent.

The facts are stated in the opinion of the Court.

CROOKER, J. delivered the opinion of the Court — NORRIS, J. concurring.

This is an action to recover the possession of certain cattle and hogs. The defendant in his answer, set up as a defense the charter of the City of Stockton, and the by-laws of the city made under that charter relating to animals running at large in the city; that he was Chief of the Police of said city, and as such took up the animals in question under the authority conferred on him by the laws of the State and the ordinances of the city, and held them as such at the commencement of the action. The plaintiff demurred to the answer; the Court sustained the demurrer and rendered final judgment for the plaintiff, from which the defendant appeals.

Amyx v. Taber.

Sec. 1 of the Act of 1862, reincorporating the City of Stockton (Stat. 1862, 314), provides that the City of Stockton shall be a body corporate, and that said body corporate "may make by-laws not repugnant to the Constitution and laws of this State." Sec. 6 of Art. 3 provides that "the Common Council shall have power within the city, to pass all by-laws, ordinances, and resolutions not repugnant to the Constitution of this State, necessary to be passed for the municipal government and management of the affairs of the City of Stockton, and for the execution of the powers vested in the said body corporate, or in any office thereof;" and Sec. 7 provides that "the Common Council shall have power within the city, by ordinance * * * to prevent, remove, and abate nuisances, and at the expense of the parties causing or committing the same, to prevent and regulate the running at large of all hogs, pigs, goats, sheep, horses, mules, jackasses, or horned cattle * * * ; to impose and appropriate fines, forfeitures, and penalties, for the breach of any ordinance." Sec. 1 of Art. 5 provides for a Police Court, and that "said Police Court shall have exclusive jurisdiction of all violations of any city ordinance, and may hold to bail, etc." Under these statutory provisions, the Common Council of the City of Stockton passed an ordinance making it unlawful for persons owning such animals to permit them to run at large within the corporate limits of the city, and authorized the Chief of Police, whenever he should find such animals within said limits, to cause them to be taken in charge and placed in the city pound, and after giving ten days' public notice in some newspaper published in the city, to expose them for sale at auction to the highest bidder, and apply the proceeds, first to the payment of a fine of five dollars for each animal, and the costs of sale and keeping, and the residue, if any, to be deposited with the City Treasurer for the benefit of the owner.

The answer avers that the animals in controversy were running at large within the corporate limits of the City of Stockton; and, as Chief of Police, acting under said laws and ordinances, he took them in charge, placed them in the city pound, and caused a notice thereof to be published in a newspaper in said city; and that they were thus lawfully in his possession, and lawfully detained by him

Amyx v. Taber.

at the time the suit was commenced. It seems to have been objected that, as the city charter gives the Police Court "exclusive jurisdiction of all violations of a city ordinance," the Common Council had no authority to confer upon the Chief of Police the powers vested in him by this ordinance. This objection is not tenable. The proper construction of this statute is that the Police Court is to have exclusive jurisdiction of *all actions prosecuted* for the violation of a city ordinance. The Police Court is a judicial tribunal, and cannot perform the duties appropriate to a Chief of Police, in the removal of nuisances, or the taking up of estrays, or animals found trespassing upon the public grounds and streets.

The power and authority of the Common Council of Stockton, under their charter, to make a proper ordinance to prevent animals of the kind named from roaming at large over the city, and its streets and public places, is clear and undoubted. Such laws and ordinances are adopted in all well-governed cities and towns, and are clearly demanded by the public interests. Individuals have no right to use the streets and public grounds of a city as a place in which to keep such animals; and ordinances prohibiting them from so doing, and providing the proper means to prevent it, do not violate any constitutional or vested right or privilege. Ordinances of such a character have been fully sustained by the Courts. (*Helber v. Noe*, 3 Ire. 493; *Whitfield v. Longest*, 6 Id. 268; *Commonwealth v. Dow*, 10 Met. 382; *Commonwealth v. Chase*, 6 Cush. 248.) We do not deem it necessary to enter into a detailed examination of the provisions of the ordinance in question in this case, as the respondent has not seen fit to file any brief pointing out the specific objections to it. The answer contained sufficient facts to show a good defense to the action, and that the defendant lawfully possessed and detained the property.

The judgment is therefore reversed and the cause remanded.

Hamm v. Arnold.

HAMM v. ARNOLD.

ARNOLD commenced a suit in equity against Hamm, Gallup & Gwin, averring that he was in possession of a tract of land, and Gallup had executed a deed of the land to Gwin in 1856, in trust for Hamm, and that neither Gallup nor Gwin had any title to the land; and asking that this adverse claim be adjudged null and void. Hamm answered, denying that he claimed any interest in the land under the deed. On the trial the complaint was dismissed as to Hamm, and judgment rendered against the other defendants. Arnold, in 1857, purchased the land at a sale on an execution issued on a judgment against Packard Hamm, grantor. Hamm afterwards brought an action against Arnold to recover possession of the land: *held*, that Arnold was not estopped by the judgment in the equity suit dismissing his complaint as to Hamm, from proving title under his Sheriff's deed.

APPEAL from the District Court, Thirteenth Judicial District, Stanislaus County.

Albert Packard was seized in fee of the demanded premises on the twelfth day of March, 1856, and continued so seized till he conveyed it to plaintiff Hamm, on the third day of January, 1857. It was under this deed from Packard that Hamm claimed title in the present action. The suit brought by Arnold against Hamm, Gallup, and Gwin was commenced December 30th, 1858, and judgment was rendered in it February 17th, 1860. The present action was commenced October 7th, 1861. The other facts appear in the opinion of the Court.

J. J. Stoddard, for Appellant.

A. Shell, for Respondent.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action to recover the possession of a tract of land in Stanislaus County. The case was sent to a referee for trial. After the plaintiff had proved his claim of title, he gave in evidence a record in another action, which was a suit in equity brought by the defendant, Arnold, against the present plaintiff, Hamm, and one Gwin. The defendant then offered evidence to prove that on the

Hamm v. Arnold.

tenth day of February, 1857, he purchased the premises in question at a Sheriff's sale under an execution issued upon a judgment against one Packard, the plaintiff's grantor, which was a subsisting lien upon the premises at the date of the deed from Packard to the plaintiff, and at the time of the purchase by the defendant. The plaintiff objected to this evidence as irrelevant, on the ground, that the defendant was estopped by the decree in the equity suit. The referee sustained the objection, and the defendant's evidence of title was excluded, which is now assigned as error.

The complaint in the suit in equity, brought by Arnold against Hamm and Gwin, under which the estoppel is claimed, alleged that he (Arnold) was the owner, and was and had for a long time been in the peaceable possession of the premises in controversy; and that the "defendants claim an estate or interest in said lands adverse to the right and title of the plaintiff thereto; and by their own act, or by their procurement, a deed of said land bearing date December 13th, 1856, executed in due form of law to the said defendant Gwin, by S. M. Gallup, has been, or was, on the twentieth day of December, 1856, duly filed for record in the office of the County Recorder of said County of San Joaquin, after having been acknowledged in due form before a Notary Public." It then avers that at the date of the deed, Gallup had no interest in the land; and Gwin has no interest therein, and the deed was made to cast a cloud upon the plaintiff's title; that Hamm has the beneficial interest in this claim of Gwin's and Gallup and Gwin held and hold the same in trust for Hamm. There are several other averments not necessary to mention. The complaint prays that said adverse claim may be adjudged null and void; and that Gwin may be decreed to convey the land to the plaintiff; and that in the meantime he may be restrained from conveying or incumbering it.

The answer of Hamm in that suit denies that the deed to Gwin was procured by him, or that he ever had or has any beneficial interest or title in the claim of title under the deed to Gwin, or that the latter holds any interest therein in trust for him; and prays that the complaint be dismissed as to him. The decree in that suit adjudged the deed to Gwin to be void; and the latter was ordered to execute and deliver a conveyance of his claim of title

Watson v. Whitney.

to the premises derived under the deed, to the plaintiff; and that "the complaint be dismissed as against the defendant, Hamm."

It is evident that this title of the present defendant, Arnold, was not adjudicated; or if involved in the controversy in that suit, that the adjudication was not adverse to his title, but on the contrary was sustained by the decree. The mere dismissal of the complaint, as against Hamm, was not an adjudication against the title of Arnold, or in favor of any title claimed by Hamm. On the contrary, Hamm set up no title in that action, but denied all the material allegations of the complaint against him. Taking the averments of his answer to be true, then he was improperly made a party to this suit; and the presumption is, that the Court found them to be true, and granted his prayer by dismissing the suit as to him. But the answer of Gwin raised issues to be tried, and showed that he was the real party defendant; and as to him, the issues, involving Arnold's title and right of possession, were found in favor of Arnold, and the decree was rendered accordingly. There is no valid ground for the claim that the judgment in this suit in equity estopped Arnold from proving his title in the present action. A question very similar in principle was so decided in the cases of *Fulton v. Hanlow* (20 Cal. 450) and *Flandreau v. Downey* (23 Cal. 354.) (See, also, *McDonald v. The Bear River and Auburn Water & M. Co.*, 15 Id. 145; *Kidd v. Laird*, Id. 162.) The referee therefore erred in excluding the defendant's evidence.

The judgment is reversed and the cause remanded.

WATSON v. WHITNEY.

One who, with armed men, enters upon land inclosed with a fence and in the possession of another, and commences the erection of a house, and refuses to deliver up peaceable possession on demand, but makes a show of force to retain it, is guilty of forcible entry and detainer.

In an action of forcible entry and detainer, all matters of legal excuse, justification, or avoidance, can be given in evidence by the defendant under a general denial of the allegations of the complaint.

Watson v. Whitney.

The granting or refusing of a change of venue by reason of the bias and prejudice of the citizens of the county, is discretionary with the Court, subject to revision only in cases of abuse.

Where the complaint in an action of forcible entry and detainer, prays for treble damages, the Court has the power to treble the damages, although the complaint does not specially refer to the statute authorizing it.

In impanneling a jury each party has a right to put questions to a juror to show not only that there exist proper grounds for a challenge for cause, but to elicit facts to enable him to decide whether he will make a peremptory challenge.

APPEAL from the County Court of Napa County.

The facts are stated in the opinion of the Court.

Moore and Laine, for Appellant.

Wallace & Rayle and Edgerton, for Respondent.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON J. concurring.

This is an action for forcible entry and detainer. The facts are substantially as follows: The tract of land in controversy was inclosed at the time of the forcible entry, which took place December 31st, 1862, and had been in the quiet and peaceable possession of the plaintiff or his tenants ever since 1856. On that day, Watson, the plaintiff, and several persons with him, went to the place where the defendant, with six or seven others, was engaged in constructing a small house. The plaintiff asked whose house is that, to which the defendant replied that it was his; and the plaintiff then demanded peaceable possession, to which the defendant answered that he could not have it. Whitney and those with him were armed; and the plaintiff then said, "I see you are all armed, and that is enough." One of the persons who went there with the plaintiff struck the house with an ax; and one of the defendant's party presented a pistol at him, and told him that if he struck again he would shoot him. He did not strike again, but replied that he would throw the ax at him if he did not drop the pistol. These facts, which are not controverted, clearly show a forcible entry and detainer within the provisions of the statute, and within the rules laid down by this Court on that subject. There was an un-

Watson v. Whitney.

sual assemblage of armed men with the defendant, and the plaintiff had just grounds to apprehend violence if he had attempted to retain possession, or remove the defendant from his land. Actual threats were also used of violence to the plaintiff or those who accompanied him. The jury that tried the case returned a verdict in favor of the plaintiff, on which judgment was rendered for restitution of the premises with treble damages, from which the defendant appeals.

The defendant filed an answer while the case was pending before the Justice of the Peace, in which, after denying generally the allegations of the complaint, he averred that he entered peaceably, on the day named, upon a certain quarter section of land described by the public surveys, which includes about ten acres of the tract described in the plaintiff's complaint; that he had a right to enter thereon under the preëmption laws of the United States; that it was public land; had been surveyed by the United States Surveyors as such, and was subject to the preëmption laws. The Justice, on motion, struck out all of this answer, except that part denying the allegations of the complaint. When the case came up in the County Court on appeal, the defendant moved the Court to reverse this order of the Justice, and to send the case back to the Justice with an order requiring him to certify it to the District Court for trial, which motion was denied by the Court, and this is assigned for error. It is unnecessary to determine, in this case, whether title can be put in issue in actions of this kind, and thus require the case to be sent to the District Court for trial. The affirmative allegations in the answer show no *title* in the defendant, but merely an attempt on his part to comply with the preëmption laws of the United States, as a means of procuring a title at some future time. There was, therefore, no error in refusing to send the case to the District Court for trial. Nor was there any error in refusing to reverse the order of the Justice. If the defendant desired to amend his answer by adding that part stricken out by the Justice, he should have made a motion to that effect in the County Court. He has not been prejudiced in any way by this action of the Justice, as the twentieth section of the Forcible Entry Act allows all matters of excuse, justification, or avoidance, to be given

Watson v. Whitney.

in evidence under a general denial of allegations of the complaint. This assignment of error is therefore overruled.

The defendant filed an affidavit, and moved the County Court thereon to change the place of trial to some other county, which was denied, and this is assigned for error. The affidavit sets forth that he believes he cannot have a fair and impartial trial in the County of Napa, by reason of the bias and prejudice of the citizens of that county against the defendant, and the class of persons to which he belongs; that there has been great excitement in the county, and much feeling and prejudice existed, growing out of the rejection of the grant of the "Suscol Rancho," and that this suit has grown out of these troubles, and numerous suits of a similar character had been commenced, and the questions involved therein have been largely and generally discussed by the citizens of the county; that there is a large league of landholders of the Suscol Rancho who are bitterly opposed to the defendant, who have contributed money to prosecute the defendant and others. The granting of a change of venue on this ground is discretionary with the Courts, subject to revision only in cases of abuse. (*Sloan v. Smith*, 3 Cal. 410; *People v. Fisher*, 6 Id. 155.) The fact that no difficulty occurred in selecting a jury, which was accepted by the defendant to try the case, shows that there was no just foundation for the application, and that there was no abuse of this discretion vested in the Court. This objection is therefore untenable.

It is also contended that the Court erred in trebling the damages found by the jury, because the complaint does not specially refer to the statute, in the prayer for damages. The plaintiff prays, in his complaint, for treble damages; though it does not refer to the statute which allows the damages to be trebled. Parties are not held to any great strictness in their pleadings in Justices' Courts, and this Court has held that an omission of this kind will not prevent the Court from trebling the damages. (*O'Callaghan v. Booth*, 6 Cal. 63; *Hart v. Moon*, Id. 161.) The next point raised is, that the verdict is against law and evidence. This, as we have already shown, is not well taken. The evidence fully sustains the verdict.

In impaneling the jury, the defendant propounded the follow-

Merrill v. Forbes.

ing questions to each juror, which were objected to by the plaintiff and excluded by the Court, and this is assigned as error: "1st. Have you heard much conversation among the people in regard to the rights of the parties on the Suscol Rancho; and if so, have you formed or expressed an opinion in regard to those rights? 2d. Have you any bias or prejudice against that class of citizens on the Suscol Rancho commonly called squatters, of which class the defendant is one? 3d. Have you ever sat on any of these Suscol cases, similar to this case, as a trial juror?" It is not necessary to determine whether affirmative answers to these questions, or any one of them, would have formed a proper ground for a challenge for cause. Each party has a right to put questions to a juror, to show, not only that there exists proper grounds for a challenge for cause, but to elicit facts to enable the party to decide whether or not he will make a peremptory challenge; and the defendant had a right to put these questions, if they were pertinent for either purpose. He was entitled to an answer to these questions, to enable him to decide whether he would make a peremptory challenge; and the Court erred in refusing them.

The judgment is therefore reversed, and the cause remanded for a new trial.

MERRILL v. FORBES *et al.*

The rules of law respecting the acts necessary to constitute a forcible entry, or a forcible entry and unlawful detainer, require something more than a mere trespass upon the property.

One who enters upon land, for the purpose of cutting and taking away grass or crops growing thereon, without any intention of taking possession of the land, and without residing thereon, is not guilty of a forcible entry and detainer.

APPEAL from the County Court of Solano County.

The facts are stated in the opinion of the Court.

Whitman and Wells, for Appellants.

Merrill v. Forbes.

Our first point in the case is, that the complaint, and the proofs under it, establish that, if any unlawful act was committed, it was merely a trespass, and that plaintiff was not entitled to recover in this form of action. (*Commonwealth v. Shattuck*, 4 Cush. 143; *Frasier v. Hanlon*, 5 Cal. 156; 1 Bishop on Cr. Law, Sec. 399; 2 Id. Sec. 416; *State v. Fort and Gause*, 4 Dev. & Bat. 192, cited in 2 Archbold's Crim. Prac. 354, 12; *People v. Smith*, 24 Barb. 16; *Willard v. Warren*, 17 Wend. 257; *People v. Gibbs*, 24 Id. 200.)

M. A. Wheaton, for Respondent.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action founded on an alleged unlawful entry and forcible detainer of a tract of land in Solano County, originally commenced before a Justice of the Peace, and appealed to the County Court, where it was tried before a jury, who rendered a verdict in favor of the plaintiff for damages in the sum of two hundred and sixty-seven dollars and fifty cents, which was trebled in the judgment.

It appears that the plaintiff was in possession of the premises in controversy, as tenant of the owner, under an agreement to give one-third of the grain that he might raise thereon, delivered in sacks. Whether there was any agreement about the crop of grass does not appear; but it seems that the plaintiff, shortly before the acts complained of, offered to purchase the grass of him, or his interest therein, but they failed to come to an agreement, and the defendant Forbes purchased the grass crop of the owner of the land. When Forbes went on the premises with his workmen and mowing machine to cut the grass, the plaintiff was not at home, but his employé went and told them they must not cut the hay. They refused to stop work. Afterward, the plaintiff returned home, and went and forbade them; but the workmen told him they were going to stay there until Forbes told them to quit. Forbes was afterwards told he must not cut the grass; to which he replied, it did not make any difference about Merrill's forbidding him—he was going to cut it.

Mitchell v. Davis.

The rules of law respecting the acts necessary to sustain an action for a forcible entry, or a forcible and unlawful detainer, require something more than a mere trespass upon the property. The entry of the defendants was evidently not for the purpose of taking possession of the land, but merely to cut and take away the grass growing thereon; and when this was completed, the defendants quit the premises entirely. Indeed, they do not appear to have resided on the land, even while they were at work. There is no conflict of evidence upon these points, and it is clear that the facts are entirely insufficient to maintain this kind of action.

The judgment is reversed and the cause remanded.

MITCHELL v. DAVIS.

On the trial of an action of forcible entry and detainer, the plaintiff offered in evidence a judgment against defendant awarding possession of the land; and the writ of restitution issuing on the same; and the Sheriff's return thereon: *held*, to be competent evidence, for the purpose only of showing the extent of plaintiff's possession, and that defendant was estopped from contesting the same.

The Supreme Court, in reversing a judgment, passed upon a point of law, as resulting from the facts then before it: *held*, that the rule that the law, thus laid down, becomes the law of the case in all its stages, only applies so long as the evidence develops the same state of facts; and that, if on the new trial, the evidence shows a different state of facts from that shown on the first trial, the law of the case will be that resulting from this new state of facts.

When irrelevant testimony is offered by one party, in the course of a trial, and objected to by the other, and is admitted by the Court, under the objection, and afterwards, before the close of the trial, the party introducing the evidence asks leave to withdraw it, and the other party objects, and the Court under the objection, refuses leave: *held*, that this last objection was a waiver of the first, and cured the error.

If the party guilty of a forcible entry, has any title or right of possession, his title or right of possession cannot be tried in an action of forcible entry and detainer. He must first deliver up the possession, forcibly acquired; and then, he may litigate his title or right to possession in a proper action.

APPEAL from the County Court, Stanislaus County.

The facts are stated in the opinion of the Court.

Mitchell v. Davis.

L. Quint and Coffroth & Spalding, for Appellant, cited: (*Table Mountain Co. v. Stranahan*, 21 Cal. 548; *Davidson v. Dallas*, 15 Id. 82; *Higginbotham v. Higginbotham*, 10 B. Monroe, 371; *Baxter v. Beaumont*, 16 East. 33).

George Cadwalader, for Respondent, cited: (*Dutton v. Warschauer*, 21 Cal. 625; *Rice v. Bancroft*, 11 Pick. 468).

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action of forcible entry and detainer. The case has been previously before this Court, and will be found reported in 20 Cal. 45. It was there held that the evidence showed that the plaintiff was in possession of the premises at the time of the alleged entry of the defendant, as the agent of one Storer, and therefore the action should have been in the name of Storer, and not the plaintiff. It seems that Storer had recovered judgment, in an action for the possession of the premises, against Davis; and the return of the Sheriff to the writ of restitution was, that he had "put Storer, by his representative, James Mitchell, in peaceable possession of the within described premises;" and as there was no other proof respecting the character of the possession of the plaintiff, it was held that his possession was merely as against Storer.

At the trial, had after the return of the *remittitur*, the plaintiff proved that he held possession at the time of the defendant's entry, not as agent, but as the mortgagee of Storer, by his consent; and under instructions from the Court upon this subject, the jury found a verdict in favor of the plaintiff, from which the defendant appeals.

The plaintiff introduced in evidence at the trial, the judgment, execution, and return of the Sheriff thereon in the case of *Storer v. Davis*, and this is alleged to be in error. This evidence was admissible to prove the right and extent of the possession of the plaintiff, and that the defendant was estopped from contesting the same. The return of the Sheriff that Mitchell was the "representative" of Storer, was open to explanation by proof showing in what way he was his representative, and in what character he took the possession. This objection is therefore overruled.

Mitchell v. Davis.

It is urged that the proof showed that the possession was delivered to Storer and not to Mitchell, and that there was no proof of actual possession by Mitchell at the time of the alleged entry; and the previous decision of this Court in the case is referred to in support of this position. The evidence in the case as now presented is very different upon this point from what it was on the previous appeal. It now appears that one Hunter was the attorney of Storer, and as such directed the Sheriff to put Mitchell in possession under the writ; that Mitchell had a mortgage upon the premises, and though he may have been put in possession as agent of Storer, yet the proof is that he held at the time of the defendant's entry as mortgagee, and not as agent. This evidence shows that the actual possession was in Mitchell, and not in Storer. The possession of a mortgagee is not in fact the possession of the mortgagor. As was said in the opinion on the former appeal: "The fact of possession, and not the title to the premises or the right of possession, can alone be inquired into." It is urged that the previous decision upon this point has become the law of the case, and conclusive upon the parties; and numerous decisions of this Court are referred to. An examination of those cases will show, however, that they apply only to principles of law announced in a case; and not to mere questions of fact, which may have been passed upon. For instance, it was held in this case on the previous appeal, as a question of fact, that the evidence showed that the possession of the plaintiff was as the agent of Storer, and not by any right in himself; and it was further held as a principle of law, founded upon this fact, that the possession of the agent was the possession of his principal for the purpose of this action, and therefore the action should have been in the name of the principal. The determination of this principle has become the law of the case; but the question of fact, whether or not the plaintiff was the agent of Storer, is liable to be changed by further evidence showing the true and a different state of facts; and the action of this Court upon this question of fact does not operate as a bar or estoppel upon the plaintiff from showing the true facts of the case. If no further evidence had been introduced by the plaintiff on the second trial upon this point, there might have been some grounds

Mitchell v. Davis.

for saying that the question had been put at rest by the former adjudication. The judgment of this Court was, that the case be remanded for a new trial; at which new trial the plaintiff had a clear right to introduce any evidence relevant to the issues to be tried. The Court instructed the jury that if they "found from the evidence that Mitchell was the agent of Storer, and as such was put into the possession of the premises, then his possession was that of Storer, and not his own, and they should find for the defendant." This was following out and adhering to the law of the case as it had been laid down by this Court. The jury, however, found that he was not the agent of Storer, in finding for the plaintiff, and that finding is sustained by the evidence before them. This objection is therefore overruled.

The plaintiff offered in evidence a location of a military land warrant by Storer upon the premises, and the Court overruled an objection of the defendant to its admission, and this is assigned for error. It seems that immediately afterwards the plaintiff asked leave of the Court to withdraw this evidence from the jury; but the defendant opposed it, and the Court therefore refused leave to withdraw it. This action of the defendant waived this objection, and cured the error. The paper was irrelevant, and should not have been admitted, and the Court should have permitted it to be withdrawn; but, under the circumstances, the defendant is precluded from assigning it as error. The defendant offered in evidence an opinion of the U. S. Land Commissioner, respecting the validity of the location of this land warrant, which the Court excluded, upon objection being made by the plaintiff. The opinion, even if it were admissible in evidence under any circumstances, was clearly irrelevant to the issues in this case, and the Court therefore did not err in excluding it. If the defendant has any title or right of possession to the land, it must be tried in some action proper for trying such questions; but the present is not an action of that kind. He was not justified in attempting to enforce any such right by taking forcible possession of the land in dispute. He must first deliver up the possession thus forcibly acquired, and then he may be in a situation to litigate, in a proper action, any valid right or title he may have to the land. One great object of the Forcible

Herriter v. Porter.

Entry Act, is to prevent even rightful owners from taking the law into their own hands and attempting to recover, by violence, what the remedial process of a Court would give them in a peaceful mode.

The judgment is affirmed.

HERRITER v. PORTER—HIHN, INTERVENOR.

A CAUSE of action arising out of contract, or based upon a single or continuous tortious act, cannot be divided up into several demands, and made the subject of separate actions.

If an action be brought to recover possession of a lot of personal property, wrongfully taken and detained, and if the wrongful taking was one continuous and tortious act, a verdict and judgment, in that action, will be a bar to a subsequent suit for the remainder of the property.

The Supreme Court will not presume error, or that facts exist which would show error. If the Court below commits error in its finding or judgment, that error, or the facts necessary to establish it, must be shown affirmatively by the appellant.

APPEAL from the District Court, Third Judicial District, Santa Cruz County.

The facts are stated in the opinion of the Court.

R. F. Peckham, for Appellants.

There are many decisions against splitting up causes of action, founded in public policy; but they are all in trespass, trover, and actions, *ex contractu*.

No case is to be found in which it has been held, that a suit to recover a specific chattel was a bar to another suit to recover another specific chattel, which happened to be in the possession of the defendant at the time.

If such is the law, then if defendant has in his possession different kinds of goods, at the same time — though of the most opposite character — and in distant and different places, a recovery of one — for instance, a horse in Sacramento — would preclude his afterwards suing for a cow in the County of Santa Cruz.

Herriter v. Porter.

The chattels, in this case, being all of the same kind, can make no difference in principle.

J. C. Wilson and W. W. Stow, for Respondent.

CROCKER, J. delivered the opinion of the Court — NORRIS, J. concurring.

This is an action to recover the possession, or the value, if possession could not be had, of 7,770 redwood posts, in Santa Cruz County, brought by the plaintiff against Porter, Sheriff of that county, and Hihn intervened in the action, claiming to be the owner adverse to the plaintiff. The facts as agreed to are substantially as follows: Prior to July 6th, 1860, the intervenor, Hihn, and others were the owners of a tract of land in said county, known as the "Soquel Augmentation;" and before that date the plaintiff went on the land, cut and took timber thereon, and made the same into posts, to the amount of 12,000 to 14,000 — the posts in controversy being a part of them. On that day, the plaintiff had 7,000 of the posts at the warehouse of Hihn & Lynch, 4,000 on the bank of the Soquel Creek, and the remainder on the "Soquel Augmentation." The intervenor, Hihn, and the owners of the tract of land, on that day, commenced an action in the District Court, against Herriter, the plaintiff to this action, to recover the possession of 3,500 of the posts at the warehouse of Hihn & Lynch, and 5,000 on the "Soquel Augmentation;" and the defendant, Porter, as Sheriff, took from the possession of Herriter, under the affidavit, order, and undertaking in that action, the said 13,777 posts. The plaintiffs in that action recovered a verdict and judgment, against Herriter, for 3,500 posts at the warehouse, and 2,300 of those on the "Augmentation." Herriter having failed to file a bond or undertaking, in the former action, as required by the statute, to enable him to retain possession of the posts, the Sheriff delivered them to Hihn, one of the plaintiffs in that action, who afterwards sold them. Herriter, after the judgment, demanded the posts sued for in this action of the Sheriff, who failed to deliver them. Upon these facts the Court below found for the plaintiff, and rendered judgment accordingly, from which the defendants appeal.

Herriter v. Porter.

It is urged by the appellants, that the timber out of which the posts were made was cut on the land of Hihn and others—therefore, the posts were their property under the rule laid down in the case of *Halleck v. Mixer* (16 Cal. 578). That is true, unless they were cut under some contract or agreement with the owners of the land, or with their consent—a fact which does not appear in the statements of facts agreed on.

It is further contended that the 4,000 posts on the bank of the Soquel Creek were not included in the action brought by Hihn and others against Herriter; that the judgment in that action is not a bar to the claim of the intervenor, Hihn, set up in this action. From the agreed statement it would appear that they were not thus included; but the statement shows that the Sheriff, in that action, took possession of those posts with all the others, and delivered them to the plaintiffs in that action, under the order, affidavit, and undertaking therein. This act of the Sheriff does not, however, necessarily show that the right to those particular posts were litigated and determined in that action; but it shows that the intervenor, Hihn, obtained the possession of those 4,000 posts under and by virtue of the proceedings in that action.

If the claim of Hihn and others to all the posts cut by Herriter was founded upon one entire contract respecting them, or upon one single or continuous tortious act on the part of Herriter, then that claim could not be divided up into distinct demands, and made the subject of separate actions. And if it was attempted, a judgment in one action would be a conclusive bar to any other action, upon the principle, that if a plaintiff bring an action for a part only of an entire and indivisible demand, the verdict and judgment in that action will be a conclusive bar to any subsequent suit for another part of the same demand. (*Phillips v. Benik*, 16 Johns. 136; *Farrington v. Payne*, 15 J. R. 432; *Cunningham v. Harris*, 5 Cal. 81.) Whether the former action between these parties was founded upon a contract, or a tort, we are unable to determine from the statement of facts before us. So, too, we are equally unable to determine whether the claim sued for in this action, and that sued for in the former action, formed parts of one entire contract, or are founded upon one single or continuous tortious act. In the absence

Abrams v. Howard.

of the necessary evidence to determine these points, we cannot presume they are of such a character as would require us to reverse the judgment of the Court below. If that Court has committed error in its finding or judgment, that error, or the facts necessary to establish it, must be shown affirmatively by the appellant. We cannot presume error, or presume facts to exist which would show error.

The judgment is therefore affirmed.

ABRAMS v. HOWARD, ADMINISTRATOR, ETC.

THE declaration of a married woman as sole trader, which states that the business she intends to carry on will be the business of buying and selling goods, wares, and merchandise, describes the business to be carried on with sufficient particularity.

The affidavit of publication of the declaration of a sole trader, which states that the publication was made "once a week for three weeks, viz.: from April 26th, to May 20th, 1861," is sufficient to show that the publication was made for three successive weeks.

A and B, married women, as sole traders, each had suits pending against C, a Sheriff, for seising on execution their personal property. A's suit was tried first, and it was stipulated that B's suit should abide the event of A's. On the trial of A's suit, she offered as a witness, the husband of B: *held*, that the legal interest of the witness was adverse to the party calling him, and that he was a competent witness.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

John R. Jarboe, for Appellant, cited *Adams v. Knowlton* (22 Cal.), on the deficiency of the declaration; also, cited 1 Phillips on Ev. 90, and 1 Greenl. on Ev. 341.

Pratt & Clarke, for Respondent.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

The respondent moves to dismiss the appeals in these cases, on

Abrams v. Howard.

the following grounds: 1st, because the transcript contains no assignment of errors; 2d, because there is no statement on appeal; 3d, because it does not show that the appellant filed an undertaking on appeal, within five days after the notice of appeal was filed. The appellant has filed his assignments of error in this Court, which is all that is requisite. There is a statement on motion for new trial which answers the purpose of a statement on appeal. But if it did not, the absence of a statement on appeal is no ground for dismissing the appeal. The appellant has filed a certified copy of the undertaking on appeal, which shows that it was filed two days after filing the notice of appeal. The motion to dismiss the appeal is therefore denied.

These actions were brought by the plaintiffs, married women, claiming to be sole traders, to recover the possession of certain personal property, against the defendant's intestate, former Sheriff of San Francisco, who had levied an execution thereon, as the property of the plaintiffs' husbands, who had formerly been engaged in business, under the style of "Abrams & Bro." At the trial, the plaintiff offered in evidence her declaration as sole trader, to which the defendant objected that it was insufficient, not being made in compliance with the Sole Trader Act. The declaration states as follows: that it is "my intention to carry on and transact business on my own account and in my own name as sole trader, in pursuance of an act of the Legislature of the State of California, entitled 'An Act to authorize Married Women to transact Business in their own Name, as Sole Traders,' approved April 12th, 1852. And I further declare that the said business will be the buying and selling of goods, wares, and merchandise," etc. The objection is, that the description of the business to be carried on is not sufficiently specific. This objection is not well taken. The business of a general merchant, is described with sufficient particularity.

The affidavit of the publication of the declaration as sole trader was also objected to, because it did not state that the publication was made for three *successive* weeks, in the terms of the statute. The affidavit states that the publication was made "once a week for three weeks, viz.: from April 26th to May 20th, 1861." The affidavit is sufficient on this point. If the first publication was on

Treasurer v. Commercial Mining Co.

the twenty-sixth of April, the first week's publication ended May third; the second week, May 10th; and the third week, May 17th, which shows that they must have been successive weeks.

When the case of Henrietta Abrams was called for trial, the parties in the case of Helena Abrams agreed that the latter cause should abide the event of the former. In the trial of the former case, the plaintiff called as a witness Moses Abrams, the husband of the plaintiff in the latter suit, and the defendant objected that he was incompetent, on the ground that his testimony would inure directly to the benefit of his own wife under the stipulation. The Court overruled the objection, and this is assigned for error. The witness was not a party to either suit. His legal interest was adverse to the party calling him; because if she failed to maintain her action, the property would be applied in payment of his debt on the execution, and he was interested to have it so applied. The record of the judgment in this action would not be legal evidence for or against *the witness*, in the other action, for he was not a party to that action. The fact that his wife, a sole trader, was a party thereto, does not bring the case within the rule in Sec. 393 of the Practice Act. This assignment of error, therefore, is not well taken.

The judgment is affirmed.

TREASURER v. THE COMMERCIAL COAL MINING CO.

THE general rule, that a Court of Equity would not enforce a specific performance of an agreement for the transfer of stock, applied particularly to public stocks, such as are commonly bought and sold in the market, and where exact compensation in damages could be awarded by a Court of Law.

Where stock is of a peculiar and uncertain value, and where compensation in damages will not afford a party a full and adequate remedy, a Court of Equity will decree a specific performance.

In this State, Courts of Equity will decree a specific performance of contracts for the transfer of mining stocks, owing to their fluctuating and uncertain value in market, and the difficulty of substantiating by competent evidence what would be a proper measure of damages.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

The facts are stated in the opinion of the Court.

M. G. Cobb, for Appellant.

The true rule in equity is, that specific performance of an agreement relating to chattels, ought to be decreed, where equity and conscience require it, and where the remedy by action at law for damages would be inadequate, and no competent or just relief could be otherwise afforded. (2 Kent's Com. 9th Ed. 661; Mitford's Ch. Pl. 6th Am. Ed. 140, note *g*.) The bill in this case, however, may well be sustained on the ground of trust. (*Mech. Bank of Alexandria v. Seton*, 1 Peters, 203.)

Hall & Scaniker, for Respondents.

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is an action in the nature of a suit in equity, to compel the defendants, a corporation, to issue to the plaintiff a certificate of forty-six shares of the capital stock of the company. The defendants demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The Court sustained the demurrer, and rendered a final judgment for the defendants, from which the plaintiff appeals.

The complaint avers, that the plaintiff, with others, located and took up a coal mining claim; that his colocators, with others, formed the corporation defendants, for the purpose of mining for coal, with 2,500 shares of capital stock; that plaintiff and his colocators, delivered the possession of their claim to the corporation, who took possession, and have ever since held possession; that in consideration thereof, the defendants agreed to issue to the plaintiff the one-sixth of the capital stock, after deducting his share of the debts then existing against the original locators, and the expenses of organizing the corporation; that one hundred and sixty-two and two-thirds shares were used to pay his share of said debts;

that they have delivered to him two hundred and eight shares, leaving forty-six still due to him; that he demanded the stock, and they have refused to issue it. An amendment to the complaint sets forth the names of the trustees of the corporation, and prays that they be compelled to issue the stock, and for general relief.

The general rule is, that a specific performance will not be enforced of an agreement for the transfer of stock, on the principle that damages are a sufficient satisfaction. (Fry on Spec. Per. Sec. 24.) This rule applies more particularly to public stocks, such as are commonly bought and sold in the market; and it has been held not to apply to railway shares and investments of that description, where the shares are limited in number and cannot always be had in the market. (*Duncuft v. Albrecht*, 12 Simons, 189.) In which case it was also held that a parol agreement for the sale of such shares was binding, and that the contract was not within the Statute of Frauds. (*Humble v. Mitchell*, 2 Rail. Cases, 70.) So a bill to compel a specific delivery of certificates of shares of stock has been sustained. (*Doloret v. Rothchild*, 1 Sim. & Stuart, 590; *Chater v. San Francisco S. R. Co.*, 19 Cal. 219.) So of a bill to compel a transfer of York Buildings stock. (*Colt v. Nettewill*, 2 P. Wm. 304.) Justice Story, in his work on Equity Jurisprudence (Vol. 2, Sec. 717), speaks thus upon this subject: "And the true reason why a contract for stock is not now specifically decreed, is, that it is ordinarily capable of an exact compensation. But cases of a peculiar stock may easily be supposed, where Courts of Equity might still feel themselves bound to decree a specific performance, upon the ground that from its nature it has a peculiar value, and is incapable of compensation by damages. Indeed, it has been thought, that on contracts for stock a bill ought now to be maintainable generally in equity for a specific delivery thereof, upon the ground that a Court of Law cannot give the property, but can only give a remedy in damages, the beneficial effect of which must depend upon the personal responsibility of the party." And it seems to be well settled, that where compensation in damages will not afford the party a full, complete, and adequate remedy, a specific performance will be decreed. (*Clark v. Flint*, 22 Pick. 231; *The Mech. Bank v. Seton*, 1 Peters, 299; *Lady Arundell v.*

McDonald v. Badger.

Phipps, 10 Vesey, 148; *Buxton v. Lister*, 3 Atkins, 383; *Cowles v. Whitman*, 10 Conn. 121.) Courts of Equity have never hesitated to compel a transfer of stock held by a person in trust for another. (*The Mech. Bank v. Seton*, 1 Peters, 299; *Cowles v. Whitman*, 10 Conn. 121.) In the peculiar condition of business and mining operations in this State, where numerous mining and other corporations are in existence, whose stock is often of fluctuating and uncertain value, and where certain kinds of stocks have a peculiar value to those acquainted with their affairs, where the market value of stocks, if any they have, is often difficult to substantiate by competent evidence, and where the risk of the personal responsibility of individuals and corporations is so great, Courts should be liberal in extending the full, adequate, and complete relief afforded by a decree of specific performance. In the view we have thus taken of the principles which should govern cases of this kind, the action of the Court below was erroneous.

The judgment is therefore reversed, and the defendant is directed to answer the complaint within ten days after notice of the filing of the *remittitur* in the Court below.

McDONALD *et al.* v. WILLIAM G. BADGER—HARRIET J. BADGER, INTERVENOR.

THE declaration of homestead may include more than one lot of land in the homestead claim, if they are contiguous, and their value in the aggregate does not exceed \$5,000.

Where the homestead claim, as described in the declaration, includes several lots of land; and the lot on which the homestead residence is situated equals or exceeds \$5,000 in value, the homestead claim is void as to all the lots included therein, over and above the one thus occupied as the homestead residence.

Where the declaration of homestead claimed and described two lots of land, and the one on which the homestead residence was situated was worth \$5,000 or more, and both lots were sold on an execution, issued on a judgment against the husband: *Held*, that the purchaser at the execution sale acquired a valid title to the lot on which the homestead residence was not situated, and could maintain ejectment therefor.

A deed to the wife, of real estate, which is upon its face a deed of purchase, and recites a consideration paid, is presumptive evidence that the property thereby conveyed belongs to the community, and is liable as such for the debts of the

McDonald v. Badger.

husband; but this presumption may be overcome by clear and conclusive proof that the property was purchased with separate funds of the wife. The execution defendant cannot defeat the recovery, in ejectment, of the purchaser at the execution sale, by setting up title in a third person.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

At the Marshal's sale referred to in the opinion, the land was sold in three parcels; the lot, thirty feet front, on which the residence was, in one parcel; the strip, four feet nine inches wide, in a second parcel; and the lot, thirty-four feet front, in a third parcel.

D. P. & A. Barstow, for Appellants.

The referee who tried the case, as well as the Judge who passed upon the motion for a new trial, held that this property was liable for Badger's debts. The only objection to our right of recovery was, that at the time of the levy and Marshal's sale, there was a segregating of this lot from the other, or setting apart of the other portion of the whole tract from this for a homestead; and the case of *Gary v. Estabrook et al.* (6 Cal. 457), was relied on as an authority in point. But the case at bar differs entirely from that case, as the Court will see by a reference to it. At the Marshal's sale, three lots were sold: the homestead lot, the strip four feet and nine inches wide (between the two lots), and the thirty-four feet front. We do not claim that the homestead lot passed at the sale, but we do contend that the remainder of the land did. There was no call for an appraisalment of the premises, and a setting apart of the homestead, in this case.

J. B. Crockett, for Respondent.

The whole property being covered by the homestead claim, it was not liable to forced sale on execution; and the purchasers at such sale cannot recover, in ejectment, the excess over \$5,000. Ejectment is not the proper remedy; nor a sale under execution, against the husband, the appropriate method of reaching the excess. (*Cook v. McChristian*, 4 Cal. 23; *Gary v. Estabrook*, 6 Id. 457; *Ackley v. Chamberlain*, 16 Id. 181; *Bowman v. Norton*, Id. 403; *Williams v. Young*, 17 Id. 408.) The plaintiff in this

McDonald v. Badger.

suit, therefore, acquired no title by the Marshal's deed, which can avail him in this action.

If there was any title in Badger to the strip covered by the conservatory, reserved in the sale to Scott, or to any other part of the premises, it passed by the proceedings in insolvency to his assignee; and there was, therefore, no interest remaining in him to be sold on execution. (*Taffts v. Manlove*, 14 Cal. 47; *Lambert v. Glade*, 4 Id. 337; *Bank of Tenn. v. Horn*, 17 How. 157.)

Appellants, in reply.

We have always regarded the question of homestead, as the real point in the case. Conceding the claim to be good, as to the original thirty-foot lot, we have contended that the after-acquired property could not be invested with the character of homestead property, because the benefits conferred by the Homestead Act were not intended to extend so far. The design of the act is to secure to every family a homestead worth, at most, \$5,000. That Badger's family had on the thirteenth of June, 1855. But they claim more. They claim, by virtue of that act, as homestead property, land subsequently acquired, worth, at least, \$10,000; and this Court is asked to assent to the proposition, that where a party who has "selected" his homestead worth \$5,000, and upwards, afterwards acquired other land in the neighborhood of his homestead, this land also becomes invested with homestead rights. It was settled long ago, that a defendant, in ejectment, situated as Badger is, in this case, cannot set up an outstanding title in a third person. And the reason of the rule is, that by the act of sale and purchase, the judgment debtor becomes the tenant of the purchaser, and cannot deny his landlord's title. (*Jackson v. Graham*, 3 Cairns, 188; *Jackson v. Bush*, 10 John. 223.)

CROOKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is an action to recover the possession of a lot in the City of San Francisco, sixty-eight feet nine inches front on Second Street, and one hundred and twenty-five feet in depth. The plaintiff claims title to the premises under and by virtue of a deed executed

McDonald v. Badger.

by the United States Marshal, dated October, 1860, under and in pursuance of a Marshal's sale on execution on the thirty-first day of January, 1860, issued upon a judgment recovered by the plaintiffs in the United States Circuit Court for the Northern District of California against the defendant on the nineteenth day of November, 1858. Mrs. Badger, the wife of the defendant, intervened, claiming the premises as a homestead, and as her separate property.

The principal questions which arise in this case depend upon these claims to the property set up by the wife: the first of which we propose to examine is that relating to the homestead. It appears that in 1855 Badger executed, acknowledged, and recorded an instrument purporting to be a declaration of homestead on thirty feet of these premises, which was all he owned at that time. This paper can have no force or effect — as the law in force at that time did not authorize the execution or recording of such instruments. He was, however, residing upon this lot of thirty feet with his family, and it constituted and was his homestead under the laws then in force. Afterwards, on the third day of May, 1861, Mrs. Badger duly executed, and acknowledged, and procured to be recorded, a declaration of homestead, which includes not only the thirty feet occupied as a homestead in 1855, but the adjoining lot, which had been purchased since 1855, of thirty-eight feet nine inches front by one hundred and twenty-five feet in depth. This declaration of homestead includes the premises now in controversy.

The referee finds that the lot, thirty feet wide, with the house, is of the value of \$7,500, and the thirty-eight feet nine inches front is of the value of \$4,800. The appellants contend that as the value of these lots exceed the \$5,000, the value of the homestead allowed by law, and as they are separate lots, acquired by different titles, therefore the homestead claim should at least be limited to the lot thirty feet front on which the dwelling-house stands, and that the lot thirty-eight feet nine inches front should be held and deemed free and clear of the claim of homestead. There can be no valid objection to including more than one of several contiguous lots in the homestead claim, provided their value does not exceed in the aggregate \$5,000, the sum allowed by the homestead law. But a person cannot thus include more than one lot in the home-

McDonald v. Badger.

stead declaration where the value of such lot, with the dwelling thereon, equals or exceeds \$5,000. And if it is attempted, the homestead claim will be held void as to all separate lots included therein, over and above the one thus occupied as a residence. The homestead claim cannot, therefore, in this case be held to extend beyond the lot of thirty feet front. The appellant in his brief does not claim that this lot passed by the sale to the plaintiffs, so that it is unnecessary to examine either the title set up to it by Mrs. Badger as her separate property, or any questions which might have been raised owing to the fact that its value exceeds \$5,000.

The next questions to examine relate to the other lot thirty-eight feet nine inches front. It appears that on the eighteenth day of December, 1855, the defendant, Badger, purchased this lot and took a deed therefor from one Slade; that afterwards Badger sold and conveyed the southern portion, to wit: thirty-four feet front on Second Street by one hundred and twenty-five feet deep, to one Scott, thus leaving the title to the northern portion, four feet nine inches wide by one hundred and twenty-five feet deep still in Badger. On the twenty-fourth day of April, 1857, Scott conveyed this south thirty-four feet by deed of bargain and sale to Mrs. Badger for the sum of \$3,000, of which \$1,000 was paid in cash and the remaining \$2,000 was secured by a mortgage on the premises executed by Badger and his wife jointly, and they also gave their joint promissory note for the amount, which note and mortgage still remain unpaid.

The intervenor claims that she made this purchase of Scott for her own sole, and exclusive use, and benefit, as her own separate estate; and that the purchase money paid thereon was her own separate property. This deed is not copied into the transcript, and we are unable to determine from the record whether the property was conveyed to her sole, separate, and exclusive use, or not. The referee who tried the cause found, that the cash payment of one thousand dollars was made as follows, to wit: That one Phinney, who resides in the City of Boston, had before then left with said Wm. G. Badger, for collection, a promissory note of another person, with authority to loan out the money, when collected, on Phinney's account; that the note was paid to Badger shortly before

McDonald v. Badger.

the conveyance from Scott to Mrs. Badger; that, to enable Mrs. Badger to make the cash payment to Scott, Badger loaned to his wife the one thousand dollars collected for Phinney; that, subsequently, a portion of the one thousand dollars was refunded to Phinney by the sale of a piano, which was the separate property of Mrs. Badger, being between three hundred and fifty and four hundred dollars. The referee also found, that the intervenor was not entitled to maintain her intervention, and a judgment was rendered accordingly, from which she has not appealed. The referee also found, that the plaintiffs were not entitled to recover, and they appeal from the judgment rendered thereon. The decision of the referee was adverse to the claim of title set up by Mrs. Badger; and as she has not appealed from that decision, it is conclusive against her, so far as relates to her claim to it as her separate property.

The law is well settled by the decisions of this Court, that a deed of purchase to the wife is presumptive evidence that the property thereby conveyed belongs to the community, and is liable as such to the debts of the husband, and can be disposed of by him like any other community property. But this presumption may be overcome by clear and satisfactory proof that it was acquired by the separate funds or property of either the husband or wife; and the burden of proof to rebut the presumption lies upon the party claiming it as separate. The fact that such a deed is made to the wife, instead of the husband, creates no presumption that the property is her separate estate. The conveyance being by deed of purchase, excludes all presumption that this property was acquired by gift, bequest, devise, or descent. (*Meyer v. Kinser*, 12 Cal. 247; *Smith v. Smith*, Id. 216; *Pisley v. Higgins*, 15 Id. 127.) The proof in this case does not clearly and satisfactorily show that this lot was purchased with the separate funds or property of the wife. It cannot, therefore, be held or deemed her separate estate; but it was community property, and liable to the debts of the husband, and subject to his control and disposition.

It further appears, that, on the third day of June, 1857, the defendant, Badger, filed his petition in a proper Court, to obtain a

discharge from his debts under the Insolvent Law; that the proper proceedings were had, and, in due time, the Sheriff was duly appointed his assignee; and thereupon, Badger made, executed, and delivered to the assignee a general assignment, in writing, of all his estate, in general terms, without specifying any particular property. After proper proceedings, he obtained a decree discharging him from his debts. The respondent contends, that the assignee in this case took, by operation of law, all the estate of the debtor, whether named in his schedule or not; that the title to this lot was thereby vested in the assignee, who held the same for the benefit of the creditors generally, in accordance with the insolvent law; and therefore the plaintiffs acquired no right, title, or estate in the property by their subsequent purchase under the judgment. It is unnecessary to determine these questions, because it is a rule of law that the execution defendant cannot defeat the purchaser's recovery of his possession, by setting up a title in some third person. This rule is founded in good sense and sound policy. (*Jackson v. Graham*, 8 Caines, 188; *Jackson v. Bush*, 10 J. R. 223; *Jackson v. Davis*, 18 Id. 7.) It follows that this outstanding title in the assignee is no defense to the action.

The respondents contend, that the action is barred by the Statute of Limitations, on the ground that the defendant has not been in the possession of the thirty-four foot lot since the deed from him to Scott, dated in January, 1856, and this action was commenced December 21st, 1860. This, however, was within five years, the time limited for actions of this kind. But, even if it had not been, the defendant, Badger, has been in possession of this lot ever since the deed from Scott to his wife. The deed, as has been shown, conveyed a community, and not a separate, estate; the possession followed the estate, and the husband is therefore to be deemed as having been in possession under it, and not the wife. This defense is therefore untenable. It follows, from the view we have taken of this case, that the referee erred in finding that the plaintiffs were not entitled to the possession of the lot, described as fronting thirty-eight feet nine inches on Second Street, and running back one hundred and twenty-five feet.

The judgment is therefore reversed, and the cause remanded for a new trial.

On petition for rehearing, CROCKER, J. delivered the following opinion — NORTON, J. concurring:

A rehearing is urged on the ground that one point presented by the appellant in his brief was not passed upon in the former opinion. It is contended that as the homestead declaration covers the *whole* property, including both lots, therefore, even though the value exceeds \$5,000, the excess cannot be recovered in ejectment: that it was not liable to forced sale on execution. Several decisions of this Court are cited which sustain the principle that a judgment is no lien upon the homestead, and that the same cannot be sold on execution. (4 Cal. 23; 16 Id. 181-213; 17 Id. 403.) In another case cited, that of *Gary v. Estabrook* (6 Cal. 457), it was held, that where the homestead claimed by the defendant in execution had been ascertained by appraisement to exceed \$5,000, a sale thereof should not be made by the Sheriff under execution until an exact appraisement of the value of the premises is obtained, so that he could sell and convey a definite undivided interest therein. That is, to illustrate, if the homestead should be found, upon appraisement, to be worth \$10,000, then as the undivided one-half only would be exempt under the Homestead Law, he could then proceed to sell and convey the other undivided half not exempt. This rule properly applies to a case of a single lot or tract of land on which the dwelling of the debtor stands, but it is not necessary to take that course where the homestead covers two or more lots, on only one of which is the dwelling of the debtor. As stated in the former opinion, the debtor may include several contiguous lots in his homestead claim, provided they do not exceed in value \$5,000; but if the lot on which the dwelling stands equals or exceeds in value the \$5,000, the attempt to include any other lot or lots will fail. If inserted in the declaration filed, they will not in such case form any part of the homestead, any more than as though they had not been inserted therein. The law requires that the debtor act in good faith, and not under cover of a law made for his special benefit, attempt to embarrass his creditors, or hinder, or delay them in collecting their just debts. It is better for the debtor to treat the lot or lots not occupied by the dwelling as free

Bowley v. Howard.

from the homestead, and therefore liable to levy and sale on execution, like any other property not exempt from execution, than subject the debtor to the risk of the loss of the whole homestead property, on the ground that he had included an excessive quantity of value in his declaration for the purpose of hindering, delaying, and defrauding creditors. As to the objection that the value of the separate pieces of property, as reported by the referee, was taken at a date subsequent to the filing of the declaration of homestead, and that the property may have greatly improved in value in the meantime, we think it is entitled to no weight, for the reason that there was no proof or finding as to the value at the time of the filing of the declaration; in which case the presumption would be that the value would be the same, as there properly could be no presumption of either an increase or diminution of the value in the intermediate time. We do not wish to be understood, however, as holding that the value at that date is to fix the extent or quantity of land exempt as a homestead for all future time, regardless of the subsequent increase of value caused by the construction of improvements or otherwise. That is a question to be determined when it is properly before the Court.

The rehearing is denied.

ROWLEY, EXECUTOR, ETC., v. HOWARD *et al.*

The return of a Deputy Sheriff, on a process served, is a nullity, unless made in the name of the Sheriff.

The jurisdiction of Justices' Courts is special and limited, and the law presumes nothing in favor of their jurisdiction. A party who asserts a right under a judgment rendered in a Justice's Court, must show affirmatively every fact necessary to give the Court jurisdiction to render such judgment.

The acts in relation to the collection of delinquent taxes, which compel the defendant to verify his answer, do not change the rule in the forty-sixth section of the Practice Act, "that where the complaint is not verified, a general denial of its allegation in the answer will put in issue all its material allegations."

A summons was served by a Deputy Sheriff, and returned with the following signature to the return: "Elijah T. Cole, D. S." Judgment was rendered by default: *held*, that the judgment was null and void, for want of jurisdiction.

Rowley v. Howard.

The general rule applicable to all judgments is, that they cannot be impeached in a collateral action, for errors or irregularities, but may be for want of jurisdiction.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

The plaintiff recovered judgment in the Court below, and the defendants appealed. The other facts are stated in the opinion of the Court.

A. P. Catlin, for Appellants.

The judgment before the Justice was void, for want of jurisdiction of the person of the defendant.

Winans & Hyer and *W. S. Wood*, for Respondent.

A judgment by default, where summons has been served on defendant, cannot be attacked collaterally, for a mere irregularity of service, or for a defective return. (*Dorente v. Sullivan*, 7 Cal. 279; *Crane v. Brannan*, 3 Id. 193; *Webb v. Harrison*, Id. 65.) The service of summons was sufficient.

The rule laid down in *Joyce v. Joyce* (5 Cal. 449), on which appellants relied to show that the service on Young was defective, is overruled in *Touchard v. Crow* (20 Cal. 150); in which case it is decided that a Deputy County Clerk may take acknowledgments — holding a deputy to possess the same powers as the principal. The statutes in reference to County Clerks and their deputies, and Sheriffs and their deputies being similar, the same rule will obtain as to the powers possessed by each.

OROCKER, J. delivered the opinion of the Court — NORRIS, J. concurring.

This is an action to recover the possession of a lot in the town of Folsom. The plaintiff claims title under a tax deed, executed by the Sheriff, in pursuance of a sale under an execution issued out of the District Court, upon a judgment for taxes, rendered in a Justice's Court by default. The judgment was rendered, and the

Bowley v. Howard.

proceedings had, under and in pursuance of a statute of this State, entitled "An Act to provide for the collection of Delinquent Taxes in the City and County of Sacramento," approved April 3d, 1860. (Stat. 1860, 189.) The return of the service of the summons issued in the action for taxes is signed "Elijah T. Cole, D. S.;" and it is objected that this return is insufficient to give the Court jurisdiction, or to authorize him to enter a judgment by default. This objection is well taken. In *Joyce v. Joyce* (5 Cal. 449) it was held, that such a return was insufficient to prove service; and that the act and return of a deputy is a nullity, unless done in the name and by the authority of the Sheriff. And a similar principle was laid down in *Lewis v. Thompson* (8 Cal. 266). The jurisdiction of Justices' Courts being special and limited, the law presumes nothing in favor of their jurisdiction; and a party who asserts a right under a judgment rendered in such Court, must show affirmatively every fact necessary to confer such jurisdiction. (*Swain v. Chase*, 12 Cal. 283; *Whitwell v. Barbier*, 7 Id. 64; *Lowe v. Alexander*, 15 Id. 296.)

The respondent, in reply to this point, contends that as the complaint alleges that "said judgment was duly and lawfully recovered in manner and form prescribed by law," and as this averment is not specifically denied in the answer, therefore it is admitted. The complaint is not verified, and the answer denies generally the allegations of the complaint. This averment cannot, therefore, be held as admitted. It is true, that the act in question requires the answer to be verified; but this does not change the rule established by Sec. 46 of the Practice Act. The statute also provides that "any deed derived from a sale of real property, under this act, shall be conclusive evidence of title, except as against actual frauds, or prepayment of the taxes, and shall entitle the holder thereof to a writ of assistance, from the District Court, to obtain possession of such property." The respondent contends that this statute precludes the appellant from making the objection. In the case of *Mills v. Tukey* (22 Cal. 373), this clause of the statute was considered on an appeal from an order granting a writ of assistance; but in that case the Court founded its decision upon the fact that "the sale was made on a judgment regularly obtained," and therefore is not authority upon the question now before us, where the judgment is null and void for want of jurisdiction. The

Hicks v. Whiteside.

plaintiff introduced the papers in evidence, showing the proceedings before the Justice, in support of his title, and they show the invalidity of the judgment. The plaintiff, therefore, proved the invalidity of his own claim of title; and the statute does not preclude the defendant from taking the benefit of an objection thus shown.

It is further urged, by the respondent, that the judgment of the Justice cannot be impeached in this collateral action — citing numerous cases in support of the position. But that rule applies more particularly to the judgments of the superior Courts of general original jurisdiction, and not to inferior Courts of special and limited jurisdiction, like that of a Justice of the Peace. In the former, all presumptions are in favor of their jurisdiction; and their want of jurisdiction must be proved. In the latter, the presumption is against their jurisdiction; and therefore it must be affirmatively shown. (*Alderson v. Bell*, 9 Cal. 315; *Dorente v. Sullivan*, 7 Id. 279.) The general rule applicable to all judgments, is that they cannot be impeached in a collateral action for errors or irregularities, but may for want of jurisdiction. (*The Chemung Canal Bank v. Judson*, 4 Selden, 254; 2 Phillips' Ev.; C. H. & E.'s Notes, 109, 65, 188.) This objection is fatal to the plaintiff's claim of title; and the Court below erred in overruling it.

The judgment is reversed, and the cause remanded.

HICKS v. WHITESIDE.

A DECLARATION of location, under the Possessory Act of this State, described the tract of land as being in Township 21; and also gave the names of the land-claims adjoining it on its different sides. The tract was in Township 22: *held*, that this mistake did not vitiate the declaration, and that it was admissible in evidence.

A, a witness for plaintiff, when cross-examined, was asked questions by defendant, which, on plaintiff's objection, were erroneously ruled out by the Court. Defendant afterwards called the same witness, and asked the same questions, which were answered without objection: *held*, that the judgment would not be reversed by reason of the error committed by the Court, as defendant had suffered no injury thereby.

In an action to recover possession of a tract of land, claimed by plaintiff under

Hicks v. Whiteside.

the Possessory Act of this State, evidence tending to show, that at the time plaintiff filed his declaration, he knew that the land in controversy or any portion of it was claimed by defendant, is relevant.

The two hundred dollars of improvements, pertaining to the realty, required by the fourth section of the Possessory Act, must be made on the land claimed, before an action can be commenced to recover possession of the same.

APPEAL from the District Court, Fifteenth Judicial District, Butte County.

The land in dispute in this action, was the north half of the south-east quarter section eight, containing eighty acres. Plaintiff, in his declaration of location, claimed the whole of the south-east quarter. Defendant had resided on the north-east quarter of the same section for several years prior to the making and recording of plaintiff's declaration; and an inclosed field of defendant's extended on, to, and included, about fifteen acres of the said north half. Plaintiff recovered judgment in the Court below, and the defendant appealed. The other facts are stated in the opinion of the Court.

J. E. W. Lewis, for Appellant.

The Court erred in permitting plaintiff to introduce the declaration of location. The declaration describes the land as being in Township 21, while the land in action is in Township 22. Certainly, that is a variance that is material and decisive on the case. A declaration under the act, when the provisions of the law have been complied with, is the title paper of the claimant, as much so as a patent or deed; and a person might with as much propriety recover land described in them as being in one township, when the land in action is in a different township. The Court ought to have given the first instruction asked by defendant. Plaintiff, in his pleadings, predicated his bill upon the Possessory Act. When a person pleads a particular title, he must prove it as laid. (*Egan v. Delaney*, 16 Cal. 87.) To recover, under the Possessory Act, he must show a full, complete compliance with the provisions of the act—particularly, Secs. 2, 3, and 4—before suit was commenced. (*Wright v. Whitesides*, 15 Cal. 47.)

H. O. & W. H. Beatty, for Respondent.

The description was perfect without the township. We could reject that as a call repugnant to and inconsistent with the other calls; and rely upon the other portions of the description. That you may reject one repugnant call of a deed, when the others furnish a perfect description of the land, is beyond question, both on principles of reason and authority. (1 A. K. Marshall, 17; *Ferris v. Coover*, 10 Cal. 589.) The instruction asked by defendant, was improper for this reason: plaintiff filed his claim December 17th, 1860, and filed his complaint February 20th, 1861. Suppose plaintiff was living on the place the twentieth of February, and putting up improvements at that time; but that they were not far enough advanced to amount to two hundred dollars. He brings suit on that day, and goes on with his improvements. Before the seventeenth day of March — when the ninety days would expire — he has over two hundred dollars of improvements. Now, on the trial, he proves that he complied with all the requirements of the statute, within the time prescribed. Could the trespasser say: "You sued too soon; you should have allowed me to trespass a month longer before you sued?" This point is fully settled in the case of *Stark v. Barnes* (4 Cal. 412).

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is an action to recover the possession of a tract of land in Butte County. The tract really in controversy is the north half of the south-east quarter of Section 8, in Township 22 north, of Range 1 east. The plaintiff claimed under the Possessory Act of this State. He offered in evidence his declaration of location, filed in the Recorder's office; and the defendant objected to its introduction on the ground that it described the tract as being in "Township 21," instead of Township 22, and contends that the Court erred in overruling the objection. The premises are particularly described by the surrounding claims, which clearly show that the tract lay in Township 22, and that the figures 21 were inserted by mistake, instead of 22. The Court therefore properly overruled the objection.

It seems that Herring, the County-Surveyor, testified as a witness for the plaintiff, that he made the survey of the tract of land described

Hicks v. Whitesides.

in the plaintiff's declaration; that he wrote the declaration; and that the tract embraced one hundred and sixty acres. On cross-examination, the defendant asked him when this survey was made, and whether he made the survey prior to or at the time he wrote the certificate; to which the plaintiff objected, that the questions were not proper on cross-examination. The Court sustained the objection; and this is also assigned for error. The questions were clearly proper ones on cross-examination; but it is evident that the defendant was not injured by this ruling of the Court. The objection only went to the putting of the questions at that particular *time*; and did not preclude him from putting the same questions, upon making him a witness for himself, had he so desired. If, when the defendant recalled the witness as his own, the Court had then overruled the questions, he might perhaps have claimed that he had been injured thereby; but it seems that he then asked the question without objection. The questions do not seem to have been of so important or material a character as to justify us in reversing the judgment because they were excluded at that particular stage of the trial.

It appears that the defendant had been in the possession, prior to the filing of the possessory claim by the plaintiff, of an old field, a part of which, including about fifteen acres, lay upon the north side of the eighty-acre tract in controversy. It seems that the remainder of the eighty acres was inclosed by a fence in the spring of 1860, built by the defendant and other parties. One of these persons, Garner, was called as a witness, and the defendant asked him what he knew or understood about the fences thus built including any part of the Whitesides tract, and whether it included any portion of the tract upon which Whitesides resided. The possessory claim filed by the plaintiff, bounded the tract on the north by the "Whitesides claim," as well as described it as the south-east quarter of Sec. 8. The Court, on the ground of irrelevancy, excluded these questions, and also a question put to another witness respecting the knowledge of the plaintiff, that the defendant claimed the tract in controversy at the time of a certain conversation between the parties respecting the building of fences. We think all of these questions were relevant to the matters in contro-

Hicks v. Whiteside.

versy between the parties, and that the Court erred in excluding them. They tend to show the knowledge of the parties of the location of the lines of their respective claims, which was important, taken in connection with other evidence respecting the building of fences on their claims by these parties and their neighbors.

The defendant asked the Court to give the jury the following instruction, which was refused: "If the jury do not find that there was two hundred dollars worth of improvements on the land claimed by plaintiff at the time of the pretended location, or prior to the institution of this suit, pertaining to the realty, the plaintiff cannot claim under the act; in this event, unless plaintiff had an actual possession thereof prior to defendant, they will find for the defendant." This is also assigned for error. The plaintiff's declaration was filed in the Recorder's office December 17th, 1860, and this action was commenced February 20th, 1861. The fourth section of the Possessory Act requires that, unless improvements to the value of two hundred dollars shall have been made prior to the recording, they must be put on within ninety days after the date of the record. Sec. 2 of the same act provides that "no person shall be entitled to maintain any such action for possession of or injury to any claim unless he or she occupy the same, and shall have complied with the provisions of the third and fourth sections of this act." The instruction is based upon the principle that these improvements must be made *before* the action is commenced—while the respondent contends that he had a right to show that they were put on or completed *after* that time, if done within the ninety days. We think the respondent is mistaken in his construction of the statute. The general rule is well settled, that the plaintiff must show a right to maintain the action at the commencement of the suit. He cannot commence his action while his right or title is imperfect or inchoate, and trust to completing or perfecting it before the trial takes place. The right of action in this case is founded upon the statute, and that imperatively requires that he "shall have complied" with this provision of section four before he shall be entitled to maintain the action. (*Wright v. Whitesides*, 15 Cal. 47; *Sweetland v. Froe*, 6 Id. 147.)

The judgment is reversed, and the cause remanded for a new trial.

Haynes v. Calderwood.

HAYNES v. CALDERWOOD *et al.*

WHERE an action has been commenced to quiet title to a tract of land and to remove a cloud therefrom caused by certain deeds on record, and a *lis pendens* has been filed, one who purchases from the defendant during the pendency of the action, and after the *lis pendens* is filed, is bound by the judgment rendered therein.

Gregory v. Haynes (18 Cal. 592 and Id. 21, 448) Affirmed.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court. (In connection with this case, see *Calderwood v. Tevis*, 23 Cal. 335.)

David Calderwood, for Appellants.

R. C. & D. Rogers, for Respondent.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action brought by the plaintiff, who is in the possession of the property in question, claiming to be the owner in fee, against the defendants, who are claiming an adverse title thereto, to quiet his title, and to remove the cloud therefrom caused by certain deeds on record, under which the defendants claim adversely. It appears that one Wenborn, whose title has since been conveyed to the plaintiff, on the thirteenth day of May, 1854, commenced an action in the District Court against one Boston and others, to quiet his title to the premises. On the same day, he filed and had recorded in the Recorder's office a notice of the pendency of the action, in accordance with the provisions of Sec. 27 of the Practice Act. The plaintiff in that suit recovered judgment, which is unreversed.

It seems that during the pendency of that action, on the third day of June, 1854, the defendants therein executed and delivered to one D. Calderwood their quitclaim deed of the premises, and various subsequent deeds were made by D. Calderwood and those claiming under him, which are the deeds sought to be canceled by this action, as being a cloud upon the plaintiff's title. The main question therefore is, whether or not the defendants had actual or

In Matter of Estate of Reed.

constructive notice of the former suit of *Wenborn v. Boston et al.*, for it is clear that if they had, they are bound by the judgment rendered therein; the title thus derived from the Bostons cannot be set up against the title of the plaintiff, and the plaintiff is entitled to relief, by having the deeds under the Bostons canceled for the purpose of removing the cloud upon his title created by them.

The validity, force, and effect of the decree in the suit of *Wenborn v. Boston*, and of the *lis pendens* filed in that action, were fully sustained by this Court in the cases of *Gregory v. Haynes* (13 Cal. 592 and 21 Id. 443), and we see no good reason for overruling the points decided in those cases. The same questions are brought before us by the appellants in this case. It is sufficient to say that we affirm the judgments in those cases on these points. The defendants cannot attack that judgment or attempt to retry the issues therein determined in this collateral action. This disposes of all the material points assigned as error by the appellants.

The judgment is affirmed.

 IN THE MATTER OF THE ESTATE OF S. L. REED.

R WAS the owner of a tract of land, and residing on the same. On the twenty-third of April, 1861, he married; and on the thirtieth day of March, 1862, died, leaving issue of the marriage, one child. He continued to reside on the land, with his family, up to the time of his death. No declaration of homestead had been filed prior to January 1st, 1862: *held*, that the failure to file a declaration of homestead, was a waiver of the homestead right as against the general creditors of deceased.

APPEAL from the Probate Court, Solano County.

The widow in this case did not claim the homestead as against the incumbrances on the land, but only as against the claim of the general creditors of the estate. The widow was married to the intestate on the twenty-third day of April, 1861; and the child was born February 6th, 1862. The other facts appear in the opinion of the Court.

John G. Hyer, for Appellant.

In Matter of Estate of Reed.

Sec. 2281 Wood's Digest, page 403, provides: "If there be no law in force exempting property from execution, the following shall be set aside for the use of the widow, or minor children, and shall not be subject to administration: The homestead, consisting of any quantity of land, not exceeding twenty acres, and the dwelling house thereon, with its appurtenances, not being included in any incorporated town, or city; or instead thereof, a quantity of land, not exceeding one lot, in any incorporated town or city, and the dwelling-house thereon, and its appurtenances, to be selected by the widow; or if there be no widow, to be designated by the Probate Judge; and not to exceed, in any case, more than \$5,000 in value." Now, I claim, that this section means to set apart absolutely for the support and maintenance of a family, whether the same consist merely of a widow, or widow and minor child, or children, or minor child, in case he be an orphan, the estate described therein, and that nothing can defeat such claim or right. The Constitution, Art. 11, Sec. 15, also provides, that the Legislature shall protect, by law, from forced sale, a certain portion of the homestead and other property of all heads of families.

It is useless to argue, that the acts of the Legislature, defining how a homestead may be acquired, militate against this theory. It is not so. If the section of the statute cited, read, "property may be exempted," a contingency resting in the volition, and sometimes, nay, almost always, in the discretion or caprice of the husband, instead of reading as it does, "if there be no law in force exempting property, it shall be set aside," etc., *i. e.*, above all contingency to preserve sacred to the widow and minor children, then a question might possibly arise under the Homestead Act, as at present in force.

H. H. Hartley, for Respondent.

CROCKER, J. delivered the opinion of the Court — CORE, C. J. and NORTON, J. concurring.

S. L. Reed died on the thirtieth of March, 1862, leaving his widow Mary Ann Reed, and one child, surviving him. J. L. Reed was appointed administrator of the estate, with the consent of the

widow. The widow filed her petition in the Probate Court, setting forth the fact of their marriage; that they had lived together after their marriage, and until his death, on a certain tract of land, which is described, as their family residence; and praying that twenty acres of the land with the dwelling-house thereon, in which they resided, be set apart to her as a homestead. The creditors appeared and filed their written objections to the allowance of this claim to a homestead, on the ground: 1st, that no homestead had been selected, according to law, at the death of deceased, or at any time; 2d, that the homestead claim, if any there was, had been abandoned by the act of the parties in mortgaging the property; 3d, that the marriage of the petitioner and deceased, was subsequent to the twenty-eighth day of April, 1860, and to the contracting of the debts allowed against the estate; 4th, that the real estate was acquired by the deceased prior to the marriage, and was his separate property, and not subject to a homestead claim. On the first day of June, 1863, the Probate Court denied the application to set apart the homestead, from which the widow takes this appeal.

The amendments to the Homestead Law, passed in 1862 (Stat. of 1862, 521), extended the time for filing declarations of homestead to the first day of June, 1862, and provided as follows: "But from and after the said last mentioned day, no property shall be deemed a homestead, or be exempt from forced sale, under execution or other legal process, unless the declaration provided for in said act be made and filed for record according to law; *provided*, that the making or filing for record of such declaration shall not, in any case, or in any manner, affect or impair any alienation, sale, mortgage, or other contract, or lien, lawfully executed, or obtained prior to the time of the filing for record of such declaration." We find nothing in the record, showing that any declaration of homestead had been filed as required by this law within the time fixed by this statute. We find, copied into the transcript, a declaration of homestead, made by the petitioner, and filed, and recorded, on the sixteenth day of June, 1863, after the order appealed from was made. It cannot, therefore, avail the petitioner in this case. It is clear, that by the failure and neglect to file the declaration of

Hussey v. McDermott.

homestead within the time fixed by this statute, the property could not be deemed or held as a homestead. The Court, therefore, did not err in denying the application to set apart the property.

The order is therefore affirmed.

HUSSEY v. McDERMOTT.

SEVERAL persons were owners of separate tracts of land within an outside fence, which formed a common inclosure; but the division lines of the separate tracts within the common inclosure were well known and defined, and each person cultivated his own tract, and that the general outside fence constituted as full and complete an actual possession in the owner of each separate tract, as though it had been inclosed by a lawful fence.

A and B, two of these owners, disposed of their tract to C. Soon after this, D, who was the owner of another tract within the inclosure, went on the tract sold to C and commenced plowing it. C went to D, took hold of his horses, and commenced turning them from the tract, when D drew a pistol, and aiming it at him threatened to hurt him if he did not leave. D continued plowing on the land: *held*, that the acts committed by D, clearly amounted to a forcible entry and detainer.

APPEAL from the County Court of the County of San Joaquin.

The land within the inclosure mentioned in the opinion was public land, and had been inclosed at the common expense of the parties claiming it for their mutual protection. The other facts appear in the opinion of the Court.

George W. Tyler, for Appellant.

Brown and Graves, for Respondent.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action of forcible entry and detainer. The facts relating to the matter in controversy do not seem to be disputed, and the main question is whether they show that the plaintiff is entitled to maintain the action. It appears that the parties are the owners of separate tracts of land within an outside fence, which forms a

common inclosure for several farms; but the division lines of the tract of each claimant are well known and defined, and each person cultivates his own tract within such boundary lines. The tract in controversy contains about thirty acres, and lies immediately north of the tract owned by the defendant; and the division line between this thirty-acre tract and the defendant's land is marked by a small ditch and embankment, about three feet high from the bottom of the ditch to the top of the bank. This thirty acres had been owned and cultivated by two brothers named Sperry, from 1857 to the Fall of 1861, when they exchanged with the plaintiff for other land owned by him. This exchange was made and the possession of the thirty acres delivered by the Sperrys to the plaintiff about two months before the commencement of this suit. About a month before this exchange was made with the plaintiff, the defendant applied to the Sperrys to purchase this thirty acres, or make an exchange for cattle; but they failed to come to any agreement.

A few days before the commencement of the suit, the plaintiff, and several others with him, went on this thirty-acre tract and found the defendant plowing there, and the plaintiff told the defendant that he was trespassing upon his land and wanted him to leave it. The defendant replied, that he should do no such thing; that he had a better right to it than the plaintiff. The plaintiff then took the horses by the bits, and commenced turning their heads in the direction of the defendant's house, and said to the defendant: "Let me show you how to plow a furrow off my land." As soon as the plaintiff did this, the defendant pulled out a six-shooter pistol, raised it up, pointed it at the plaintiff, and told him to let go those horses' bits or he would get hurt. They were then about twelve feet apart. The plaintiff then went off and left the defendant, who went on plowing the land. It seems that about six weeks after this occurrence, and while the suit was pending, the plaintiff attempted to plow the land, when the defendant came with a double-barreled shotgun, and drove him off; but after the defendant went away, the plaintiff commenced plowing again.

The respondent contends, that the plaintiff had not the actual possession of the land, at the time of the entry of the defendant; because the thirty acres were not inclosed by a separate fence, and

In Matter of Estate of James.

the plaintiff had never cultivated the land. His possession was clearly sufficient to support this action. The evidence shows, that a separate fence was not necessary; that the general outside inclosure was sufficient for the protection of the crops. The land had been cultivated by the Sperrys, and that constituted as full and complete an actual possession as though it had been inclosed by a lawful fence. They had put the plaintiff in possession; and his possession was as full and ample as theirs. He went to cultivate the land as soon as the proper season had arrived, and was forcibly driven off by the defendant. This objection, therefore, has no force.

The acts of the defendant clearly constitute a forcible entry and detainer, within the statute on that subject, and entitled the plaintiff to bring and maintain this action. This is not a case where the evidence is conflicting, for the principal facts are not controverted. It is unnecessary to investigate the instructions given and refused by the Court, to which the plaintiff excepted, and to point out the errors committed by the Court therein. The verdict of the jury, and the judgment of the Court thereon, are clearly against the law and the evidence; and the Court erred in refusing the plaintiff a new trial.

The judgment is reversed and the cause remanded for a new trial.

IN THE MATTER OF THE ESTATE OF JAMES.

By the amendment to the Homestead Act of 1860, it seems to have been the intention of the Legislature, that the homestead, upon the death of either husband or wife, should descend to and vest absolutely in the survivor. But whether the act should receive this construction, or whether the homestead, upon the death of either husband or wife, descends to the survivor and the children, heirs of the deceased, and should be partitioned between them, are questions which the Probate Court has no jurisdiction to determine. The District Court of the county where the homestead is situated, is the only proper tribunal to hear and determine these questions.

APPEAL from the Probate Court of Santa Clara County.

The respondents, Sarah E. D. James and George H. C. James,

were children of the intestate, by a former marriage, and were his only children. The homestead had been acquired after the marriage of the intestate with appellant, Mary M. James. The other facts appear in the opinion of the Court.

W. W. Crane, Jr., for Appellant.

The declaration of homestead, created a joint tenancy between Jeremiah C. James and appellant, and consequently, when he died she became vested, as survivor, with the whole fee. (Stat. 1860, 811, Sec. 1.) But if, on the contrary, appellant did not take the whole by right of survivorship, under the amendatory Act of 1860, she certainly is entitled to one-half of all the property, by virtue of her community rights; and one-third of the remainder, by virtue of the Statute of Descents and Distributions. It follows, that the Probate Court of Santa Clara County clearly committed error in awarding one-half of all the property to the petitioners, Geo. H. C. and Sarah E. D. James. (Wood's Dig. 423, Sec. 1; *Id.* 424. Sec. 10; *Knox v. Beard*, 5 Cal. 252; *Estate of Buchanan*, 8 Id. 507; *Scott v. Ward*, 13 Id. 468; *Payne v. Payne*, 18 Id. 291.)

James & Lane, for Respondents.

On the death of the intestate, the property, both real and personal, immediately descends to the heir, subject only to the lien of the administrator, for the payment of debts. (7 Cal. 215.)

Four months after the appointment of administrator, the heir has the right to apply to the Probate Court for a distribution of his interest in the estate. (Stat. 1861, 648, Sec. 85.) A partition is the necessary incident to the distribution, and is provided for by law. (Stat. 1861, 648, Sec. 89.) Unless there is some special statutory provision to prevent, it will not be denied but that the property in dispute, both real and personal, descends in equal proportions to the appellant.

It is claimed, on the part of the appellant, that by filing the declaration of homestead, the law of descent became entirely changed, and the right of inheritance by the children of the deceased became entirely obliterated; and the title of the property became, and now is absolutely vested in the appellant. The law of 1860 was

not intended to, nor did it, in any manner, change the law of descent.

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

Jeremiah C. James, husband of the appellant, and father of the respondents, died intestate, February 2d, 1862. Previous to, and at the time of his death, his children, the respondents, resided in the State of New York. The premises in controversy were the common property of the intestate and his wife, and occupied by them as a homestead. During the lifetime of the intestate, in April, 1860, his wife, the appellant, filed a declaration of homestead, in accordance with the statute then in force. Soon after the death of the intestate, the appellant was appointed administratrix of the estate, and on the ninth of July, 1862, upon her application, the Probate Court set apart to her use, as the family of the intestate, the homestead and certain personal property. Afterwards, the respondents filed their petition in the Probate Court, praying for a partition of the property thus set apart to the widow, they claiming the undivided one-half, or one-quarter to each, as the descendants and heirs of the intestate. The application was opposed by the appellant; but the Probate Court granted the prayer of the respondents, from which decree she takes this appeal.

The property was set apart to the use of the family of the deceased, in accordance with the provisions of Sec. 34, of the Act of 1861, amending Sec. 121 of the Probate Practice Act, which reads as follows: "Upon the return of the inventory, or at any subsequent time, during the administration, the Court, or Probate Judge, may, of his own motion or on application, set apart for the use of the family of the deceased, all personal property which is by law exempt from execution, and the homestead, as designated by the general Homestead Law, or by Sec. 124 of this Act." (Stat. 1861, 636.) Sec. 124 (Wood's Dig. 403), defines what personal property and homestead shall be thus set apart. Sec. 125 provides to whom such property, thus set apart, shall belong. But since the date of this law, the Legislature, in 1860, amended the Homestead Law, and among other things provided that "from and after the filing for

Spencer v. Doane.

record of said declaration, the husband and wife shall be deemed to hold said homestead as joint tenants; and all homesteads heretofore appropriated and acquired by husband and wife, shall be deemed to be held by such husband and wife in joint tenancy." (Stat. 1860, 311.) The distinguishing incident of a title by joint tenancy is, that the entire tenancy, or estate, upon the death of one of the joint tenants, goes to the survivor, and vests in him, absolutely. (4 Kent's Com. 398.) It would seem from this statute, that it was the intention of the Legislature that the homestead should vest in the surviving husband or wife, absolutely, and not descend to the heirs of either.

But the appellant contends, that the Probate Court has no jurisdiction of this proceeding, instituted by the respondents. It was held by this Court, *In the Matter of Tompkins' Estate* (12 Cal. 114), that the homestead does not constitute any part of the assets of the estate of the deceased husband or wife; that upon the death of the head of the family it is made the duty of the Probate Court to set apart the homestead for the benefit of the family of the deceased; and after this is done, the Court has no further control over it. It was further held, that what the rights of the surviving wife were, in and to the homestead, was a question to which the jurisdiction of the Probate Court did not extend. We think the Probate Court is not the proper tribunal to litigate questions, or afford the relief asked, in this case; that a proper action should have been brought in the District Court, of the proper county, where the homestead is situated, which has full power and authority to hear and determine the questions involved, and to afford such relief (if any) as the parties may be entitled to.

The order and decree of the Probate Court is therefore reversed, and the petition of the respondents is dismissed.

SPENCER v. DOANE *et al.*

In a civil action, a party cannot raise the objection for the first time in the Supreme Court, that the jury before which the cause was tried in the Court below, was not duly selected and summoned as required by law. To enable a party to avail himself of such objection, it must be made in the Court below.

Spencer v. Doane.

Newly-discovered evidence, which is merely cumulative, affords no ground for a new trial.

It is not error for the Court to exclude affidavits, filed on a motion for a new trial, which are written in a foreign language.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

On the twenty-third day of August, 1861, a decree was rendered in the Fourth District Court, on the petition of Alta Gracia Carlos, divorcing her from her husband, Fernando Carlos. The decree further adjudged two-thirds of the community property to the plaintiff, and one-third to the defendant, and provided for other proceedings touching its distribution, among which was the appointment of Spencer, the plaintiff in this action, receiver.

On the twenty-second day of April, 1861, Pierce, one of defendants, commenced an action against Fernando Carlos, in the Fourth District Court, on a note of one thousand dollars, and procured an attachment to issue, by virtue of which defendant Doane, as Sheriff, levied on the personal property of said Fernando.

This action was brought by Spencer, as receiver, to recover the value of the property attached. The plaintiff claimed that the note was given by Fernando Carlos to Pierce, without consideration, and for the purpose of defrauding the wife.

Wm. W. Chipman, for Appellant.

Cook & Hittell and *Charles McC. Delany*, for Respondents.

CROOKER, J. delivered the opinion of the Court—NORRON, J. concurring.

This is an action brought by the plaintiff, as receiver in the divorce case of *Carlos v. Carlos*, to recover the value of certain personal property alleged to have been taken and converted by the defendants. The latter justify the taking under an attachment issued in an action brought by the defendant Pierce, against the husband in the divorce suit.

The first error assigned is, that the jury were not duly selected and summoned as required by law. It is a sufficient answer to say that no objection of this kind was made by the appellant at the

time of the trial. The record states that the "jury were duly impaneled, accepted, and sworn." It is further contended that the jury made a mistake in their verdict. The verdict is a general one in favor of the defendant. We are unable to understand, from the brief of the counsel or from the record, wherein this alleged mistake consists, unless it be that they were mistaken in finding for the defendant instead of the plaintiff. Another assignment of error is accident or surprise, caused by an alleged mistake made by some of the defendants' witnesses. We do not see anything in the record which would justify us in setting aside the verdict and judgment on these grounds. (*Taylor v. California Stage Company*, 6 Cal. 228; *Patterson v. Ely*, 19 Id. 29.)

Another ground for a new trial urged by appellant, is newly-discovered evidence. This new evidence is all cumulative, and upon the same points to which the witnesses of the plaintiff testified on the trial. In such case it affords, as a general rule, no ground for a new trial—as has been repeatedly decided by this Court. It is contended that the evidence is insufficient to justify the verdict. There is much evidence to sustain the verdict, and the Court below, who heard it all, deemed it sufficient; and this Court will not, therefore, disturb the verdict on that ground.

The next point is, that the Court erred in refusing certain instructions asked by the plaintiff. These instructions are predicated upon the idea that the alleged antedating of the note given by Carlos to Pierce, was a fraud upon the plaintiff, or Carlos' wife, which vitiated the note and formed sufficient ground for a verdict for the plaintiff. The Court gave several of the instructions asked by the plaintiff, which embraced all the points the plaintiff was entitled to in those refused; and it is evident, therefore, that the plaintiff suffered no injury by this action of the Court. So, too, in regard to the action of this Court in excluding affidavits on the motion for a new trial, written in a foreign language. If they had been admitted, they would have been of no benefit to the plaintiff on his motion; and he has therefore suffered no injury by their exclusion. After a careful examination of the points raised by the appellant, we see no grounds for reversing the judgment or granting a new trial.

The judgment is therefore affirmed.

Moss v. Mayo.

MOSS v. MAYO.

WHERE property has been assessed to an unknown owner and sold for the tax, and a deed executed to the purchaser, the fact that the agent of the owner of the lot paid the tax on the wrong lot by mistake, is not such a mistake as a Court of Equity will relieve against.

Under the Act of April 3d, 1860, "Providing for the collection of Delinquent Taxes in the City and County of Sacramento," where several lots are assessed to unknown owners by fictitious names, and suits are instituted for the collection of the several taxes, there is no valid objection to having one affidavit for, and one order of publication of summons, apply to the several cases. In such case, the publication of one summons gives the Court jurisdiction in each case.

In such case a judgment rendered becomes a lien only on the property of the persons against whom it is rendered; and where no judgment is rendered either against the real owner by name or the fictitious person representing such real owner, a Court of Equity will enjoin the purchaser from dispossessing the real owner by a writ of assistance obtained under the tax deed.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

The facts are stated in the opinion of the Court.

Winans & Hyer, for Appellant.

D. W. Welty, for Respondent.

On petition for rehearing, which was denied, respondent's counsel filed the following argument:

The view taken by the Court appears to have been, that to authorize the sale of property for delinquent taxes against unknown owners, they must not only be represented on the record by a fictitious name, but also that formal judgment must be rendered against them under said fictitious name; and following out that theory, the Court held, that because the plaintiff in this case, the real claimant of the property, was not bound by a formal judgment, the sale was a nullity, as far as her rights in the premises were concerned.

We think an examination of the entire statute will show that such was not the intention of the Legislature in framing the act, and that it in terms does not require a formal judgment to bind the property, but merely that all parties known should be before

the Court by real names, and all unknown by a fictitious name; and then, after proper notice given, that a decree against the property should be made. The statute will be found in Statutes of 1860, 139-141. In the first section it legalizes certain assessments and renders them binding, both in law and equity, against the persons and property assessed.

Here, it will be observed, a special lien is created upon the property, regardless of the ownership thereof, and it is bound for the payment of the taxes.

The second section prescribes the form of complaint to be filed, and the defense permitted.

The third section provides that certified copies of entries of the assessment rolls, showing unpaid taxes against any person or property, shall be evidence, etc.; thus again recognizing most clearly the difference between a personal assessment and one against the property merely.

The fourth section enacts that judgments rendered in such cases shall become liens (from Justices' Courts) in like manner as judgments rendered in the District Court under that act; that is, become liens upon all property of the defendants liable to taxation, and may be enforced against the same.

Now the Court in reviewing this section seems to have held, that the only effect of a payment rendered under this act was to give a lien on the property of the defendants in the suit, and that only from the time of docketing the judgment — and that before that time, *i. e.*, the rendition of the judgment, there was no lien.

Now we understand the statute differently. We contend that the statute make the tax a lien on the real estate, and that this section only enlarged the lien — that is, gave a judgment which operated not only as a lien upon the specific real estate bound for the tax, but also upon all the other property of the defaulting taxpayer. If this be so, then the only penalty attached to the want of taking a formal judgment against either the real or fictitious defendants would be, that the plaintiff would fail to obtain a general lien on all his other property; but we contend that if the record shows a decree, judgment, or other judicial determination of the amount of delinquency, fact of nonpayment, and the proper parties were

Moss v. Mayo.

before the Court—it was competent for the Court to order the property sold; and a sale of it passed the title to the purchaser thereat.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

The defendant was a purchaser of a certain lot in the City of Sacramento owned by the plaintiff, at a Sheriff's sale, under a judgment rendered for taxes against certain persons, not including the plaintiff (the lot being assessed to "unknown owners"). He obtained a Sheriff's deed under his purchase, and also a writ of assistance to be put in possession of the property. The plaintiff then brought this suit to enjoin him from enforcing the writ of assistance, averring that she resided in the City of San Francisco, and her agent at Sacramento had by mistake paid taxes on another lot that she did not own, instead of this one which she did own; that she had no notice of the tax suit or the proceedings under it, and that no summons had been served according to law in that suit to give the Justice of the Peace who rendered the judgment jurisdiction of the action. She avers readiness to pay to the plaintiff all expense that he has incurred, upon his releasing the claim. The Court denied the injunction; sustained a demurrer to the complaint, and rendered a judgment for the defendant, from which order and judgment the plaintiff appeals.

The suit before the Justice for the delinquent taxes was brought in the name of "The People of the State of California v. John Doe 232, M. A. Parker *et al.*," and was commenced June 22d, 1861. An affidavit was made and filed by D. C. Thomas, who styled himself one of the attorneys for the plaintiff, in which several suits for taxes are described, including the one under consideration; in which it is stated that the property described in the several suits was assessed to unknown owners; that neither the plaintiff nor their attorneys knew the true owners of any of the several tracts, or their places of residence, and therefore the fictitious name of John Doe had been used as an *alias* for the true owner; and that he had been informed and believed that those whose true names are mentioned in the several actions were the true owners, or had an

Moss v. Mayo.

interest in the property named in the suits in which they were made parties. The Justice thereupon entered a general order in his docket in the form of a summons directed to the persons therein-after named, and to all owners and claimants, known and unknown, of any of the lands thereafter described; and after reciting that Cornelius Cole, District Attorney of the County, had filed divers complaints in his Court to recover the taxes levied upon property in the City of Sacramento and assessed to unknown owners, and asking for a decree and order to sell the premises described in said complaints to satisfy said tax lien; referring to the original complaints on file, there followed a description referring to the several suits, that relating to the one under consideration being as follows: "For \$29.44 against John Doe 232, Mary A. Parker, Catherine M. Hardenbergh, and the north seventeen feet of lot No. 6, between N and O, and Front and Second streets." The order then recites the affidavit made by Thomas, and states that by virtue and in pursuance of the provisions of the sixth section of an act passed April 3d, 1860, for the collection of delinquent taxes, the defendants named in the several suits, and all owners and claimants, known and unknown, and each of said tracts of land, were thereby summoned to appear before the Justice at a certain day therein named, to answer to the plaintiff, who sues to recover from them the sums mentioned in connection with their names, and for a decree and sale of their interest in the property to satisfy the lien for taxes; and that if they failed to appear and answer, the plaintiff would take a judgment against them as prayed for in the complaints on file in his office. The Justice further ordered and directed that summons in said causes be served by publishing the whole of this order one time per week for three months in the *Daily Bee*, a newspaper published in said county. This whole order was published in the *Bee* as provided for, which was all the service of summons in the case, and judgment was rendered thereon in favor of the plaintiff, on the day named, under which judgment the defendant purchased.

The sixth section of the act under which this tax suit was brought provides, that if the name of the owner of the property be unknown, or it has been assessed to an unknown owner, the person liable to pay the taxes may be sued by a fictitious name, and the

Moss v. Mayo.

summons be served in such manner as the Court may direct, and that the deed derived from the sale of such property shall be equally conclusive against the true owner as if the action had been prosecuted against him by his real name. And Sec. 5 provides that "any deed derived from a sale of real property under this act shall be conclusive evidence of title, except as against actual frauds, or prepayment of the taxes, and shall entitle the holder thereof to a writ of assistance from the District Court to obtain possession of such property."

In this case it is not alleged that there was any fraud, or that the taxes had ever been paid — but it is urged that the plaintiff's agent acted under a mistake in paying the taxes upon the wrong lot, and that she is therefore entitled to relief in equity. It is clear, however, that this is not such a mistake as a Court of Equity will relieve against. It is further urged that the judgment under which the sale was made was void, on the ground that the summons was not served by publication or otherwise, as required by the Practice Act, and that the affidavit of Thomas is not sufficient under the same act. It is true, that the statute under which the judgment was rendered provides that the Civil Practice Act, "so far as the same is not inconsistent with the provisions of this act, is hereby made applicable to proceedings under this act;" and it is also true, that the affidavit is not such, nor was the summons served, as is required by the Practice Act. But this was not necessary, as this matter of the service of summons in cases like the present, where the property was assessed to unknown owners, was provided for in the sixth section of the act, which governed and controlled the action of the Court upon this subject. We see no valid objection to the manner in which one affidavit and one general order of service of summons was made to apply to several cases. The statute does not require that a special order upon this subject should be made in each case. No person was injured by making one order apply to numerous cases; and the order referred to stated all the material facts relative to each separate action that were necessary to identify the action, its subject matter, and the names of the parties and the relief prayed for. The order was clearly in accordance with the provisions of the sixth section of the

Moss v. Mayo.

act in question. The time allowed for publication of summons was sufficiently liberal, and was in all respects reasonable.

The statute under which these proceedings were had provides that the judgment for delinquent taxes, when properly docketed in the Clerk's office, shall "*become liens upon all property of the defendants liable to taxation,*" and the lien is not limited to the particular property on which the taxes accrued. It is made a lien upon the property of the defendants against whom the judgment is rendered, but no others. The judgment in this case is, that the "plaintiffs do have and recover from defendants, Mary A. Parker and Catherine M. Hardenbergh, the sum of \$37.01, together with \$19.80 costs, and that if the same is not paid, all the right, title, and interest of each of said defendants, and of John Doe 232, representing all other owners or claimants of, in, and to the property described in the complaint, to wit: the north seventeen feet of lot No. 6, between N and O, and Front and Second streets, in the City of Sacramento, to be sold to pay the same and discharge the liens plaintiff held for the taxes levied thereon and sued for." It will be seen that there is no personal judgment against any person except Mary A. Parker and Catherine M. Hardenbergh, and the docketing of the judgment only made the same a lien upon their property. A deed made in pursuance of a sale under this judgment would only convey such interest as they may have had in the premises at the date of the docketing of the judgment. The title of the plaintiff in this action, or her possession, or right of possession, cannot be affected by such deed, because she is not one of the defendants to the action by her own proper name, and there is no judgment for the recovery of the taxes sued for against "John Doe 232," the fictitious name used to represent her as the real owner. The defendant has the right, under his writ of assistance, only to dispossess the persons against whom the judgment for the taxes was rendered, and not the plaintiff. It appears that he was about to dispossess the plaintiff by virtue of the writ, which he had no right to do, and she was entitled to an injunction to restrain him from dispossessing her. It follows that the Court erred in refusing the writ and dismissing the action.

The judgment of the Court below is therefore reversed and the cause remanded.

Griggs v. Clark.

GRIGGS, ADMINISTRATOR OF THE ESTATE OF CLARK, v. CLARK
et al.

THE jurisdiction of the Probate Courts over the estates of deceased persons, does not divest the District Courts of their general jurisdiction as Courts of Chancery, over actions for a settlement of the affairs of a partnership.

In the absence of any special agreement between partners upon the subject, the rule of law is, that partners are to share equally both profits and losses; and the mere fact that partners have put unequal amounts of capital into the common stock, or that one has put in all the capital, and the others only their skill and industry, will make no difference in the rule.

As a general rule, it is the duty of each partner, during the partnership, to devote himself to the interests of the concern without compensation, unless there is an express agreement that he receive compensation. But when the partnership is dissolved by death, and the survivor expends his time and labor in the care and management of the partnership property, by which its value is enhanced, he should receive compensation for the same, to be deducted out of the profits realised from the enhanced value of the property. A surviving partner, however, is not entitled to pay for services rendered, for merely winding up the affairs of the concern.

When a bill is filed to settle the affairs of a partnership, the partnership transactions of each and all the partners should be taken into account; and the decree should include all these, so as to leave nothing open for future litigation.

APPEAL from the District Court, Seventh Judicial District, Sonoma County.

The facts are stated in the opinion of the Court.

Shattuck, Spencer, & Reichert, for Appellants.

The complaint does not contain facts which constitute a cause of action; and the demurrer should have been sustained. It shows defendants surviving partners by law; they alone could settle the partnership. (Wood's Dig. 411, Art. 2317, Sec. 198.) And they could only be sued when they had abused their trust; but the complaint charges no facts showing abuse. (Story on Part. Secs. 344-346; Collyer on Part. Sec. 129; 3 Kent's Com. 37; *Evans v. Evans*, 9 Paige, 178.) And having commenced in the Probate Court, he should have continued there. (*Blanton v. King*, 2 How., Miss., 861; *Carmeischel v. Brawder*, 3 Id. 252; *Kimball v. Kimball*, 19 Ver. 579.)

Griggs v. Clark.

Wm. Ross and R. Robinson, for Respondent.

BALDWIN, J. delivered the opinion of the Court—COPE, J. concurring.

It seems to us that the report of the referee, and the consequent judgment of the Court, is erroneous in this: That it decrees that the defendants, as surviving partners, are liable for the full amount found to be due of assets collected, or in the hands of these survivors, without regard to the indebtedness of some \$7,500 found to be due in Missouri, on account of the firm operations. We understand that the partnership was formed in Missouri, and comprehended, as well transactions in that State, as in this; and a full settlement should involve and conclude as well transactions there as here. The administrator of the deceased partner, therefore, is not entitled to a decree, irrespective of the firm debts there; and the survivors would seem to be entitled to retain in their own hands, money, or assets, sufficient to pay this indebtedness, whether due in Missouri, or on contracts made there or here. But if we are mistaken in this, it is obvious that the report of the referee, which seems to be the whole predicate of the decree of the District Court, does not furnish any ground for such decree; for the referee says that it is impossible for him to ascertain the true state of the accounts, or make a full settlement in this respect, in the absence of information as to the amount of the Missouri debts, or by whom they were paid.

Judgment reversed, and cause remanded.

A rehearing was granted, and after reargument, CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action in the nature of a suit in equity, brought by the administrator of William T. Clark, deceased, who in his lifetime was in partnership with the defendants, in the purchase of cattle in the State of Missouri, and their sale in this State, for a settlement of the affairs of the partnership. The case was sent to a referee for trial, upon whose report a judgment was duly entered, from which the defendants appeal.

Griggs v. Clark.

The defendants demurred to the complaint; the Court below overruled the same, and this is assigned for error. It is contended, that the Probate Court, in which the proceedings for the settlement of the estate were pending, had acquired jurisdiction of the subject matter of the present action; and therefore the demurrer should have been sustained. The jurisdiction vested in the Probate Court does not divest the District Courts of their general jurisdiction as Courts of Chancery over actions of this character, as has been held by this Court. (*Wilson v. Roach*, 4 Cal. 362; *Clark v. Perry*, 5 Id. 58.)

It seems, that the amount of capital invested by each of the partners in the partnership business, was very unequal. The defendants claimed that each partner was entitled to an interest in the partnership property, and the profits of the business, in proportion to the amount of capital put in, and not in equal proportions; and when called upon by the administrator before the commencement of the action to settle and account for the partnership property and profits, they expressed themselves willing to settle and account upon that basis; but not upon the basis of an equal division. The administrator, on the other hand, claimed that the division should be in equal proportions; and as they refused to settle in that manner, he brought this action. The referee found, upon this point, in favor of the plaintiff; and this is sufficient to show that the defendants were in default, and that the plaintiff had a right to commence and maintain the action.

But the defendants contend that the referee erred in finding that the parties were to share the profits equally. In the absence of any special agreement between the partners upon the subject, the rule of law is, that the partners are to share equally of both profits and losses; and the mere fact that the partners have put an unequal amount of capital into the common stock, or that one has put in all the capital, and the others only their skill and industry, will make no difference in the rule. (Story on Part. Sec. 24; 3 Kent, 28.) The evidence as to whether there was any special agreement between the partners in this case, which would take the case out of this general rule, was conflicting; and under the circumstances, we are not disposed to disturb the finding of the referee upon this point.

•

Griggs v. Clark.

It appears that the time of the decease of the plaintiff's intestate was not the most advantageous period for the sale of the partnership stock of cattle then on hand, and the defendants did not sell the same until about a year afterward, during which time they increased in value about \$6,000; and the referee found that the services of the partner who had charge of the stock during that time were worth the sum of \$1,400. The referee held that the plaintiff was entitled to the share of his intestate in this increase, without any deduction therefrom of any sum for the services thus rendered by the surviving partner; and this is assigned as error. As a general rule, during the existence of the partnership, it is the duty of each partner to devote himself to the interests of the concern, and promote by his labor and skill the common benefit of the partnership, without any reward or compensation, unless there is an express stipulation to that effect. (Coll. on Part. Sec. 183; Story on Part. Sec. 182.) But when the partnership has been carried on for some time after a dissolution by death, and such continuance has proved beneficial to the parties, it is but just and proper that the surviving partner should receive a reasonable allowance for his skill and industry in conducting the business, for during that time the business has not received the care and labor of the deceased partner, as an equivalent for such services. While all the parties are living, each is under obligation to devote his time and services to the partnership business, and there is therefore good reason for holding that neither should receive a compensation for such services. But when, in consequence of the death of one partner, this equality no longer exists, it is but equitable that the surviving partner should be compensated for such services as he may have rendered in the business after the death of the deceased partner, to be deducted out of the profits realized by the continuance of the business; and the overplus of such profits, after deducting such compensation, to be divided between the partners. (Story on Part. Sec. 343 and notes; Coll. on Part. Sec. 328; Gow. Part. 354.) We do not wish to be understood, however, as holding that the surviving partner is entitled to compensation merely for services rendered in winding up the affairs of the firm (*Beatty v. Wray*, 19 Penn. 516), but to confine it to a case like the present, where the partnership busi-

Kilé v. Tubbs.

ness has been continued for a considerable period of time in order that the affairs of the partnership may be advantageously wound up. In the present case, the referee should have deducted the value of these services of the surviving partner, as found by him, so that the interest or share of plaintiff's intestate should bear its proportion thereof in the settlement of the business.

The deceased partner resided in California, and a large portion of the partnership business, especially that relating to the keeping and sale of the stock in this State, was conducted by him during his lifetime, during which he received and expended more or less money in and about the partnership business. In making up the account, the referee seems to have omitted these transactions of the deceased partner, and this is also assigned for error. It is clear that these transactions formed a material part of the account to be taken. The referee had no right to confine his account to the transactions of two only of the three partners. The whole of the subject matter in controversy between the parties, which included all the partnership transactions of each and all the partners, is the subject of the adjudication, and the account and decree must include all these matters and leave nothing open for future litigation or controversy. Equity will not adjudicate causes by piecemeal.

The judgment is therefore reversed and the cause remanded.

KILÉ & THOMPSON v. TUBBS.

The general rule is, that where a party enters, in good faith, upon a tract of land with color of title, under a deed purporting to convey the tract with specific boundaries, no person being in the adverse possession at the time, and he takes and holds actual possession of a part, *bona fide*, claiming title and possession of the whole tract described in the deed; he is deemed to have possession of the whole tract within the boundaries of the deed. This rule, however, cannot be held to apply to a case where a person in possession of a small tract, makes a conveyance of a large tract greatly exceeding his actual possession, when he has no color of title beyond his possession.

The State of California has no right to sell lands within her limits, to which she has no present or prospective title, by grant from the United States.

Kille v. Tubbs.

Whether this State has an inchoate title to lands, within her limits, called Swamp lands, depends entirely upon the question, whether they are Swamp lands, within the meaning of the Act of Congress of September 28th, 1850. The State of California does not acquire a legal title to the swamp lands within her limits, until they have been certified to the State by the General Land Office, and a patent issued to the State therefor by the United States.

If this State sells lands as swamp and overflowed, before the United States has issued its patent to the State therefor, the patent from the State has no other legal force except as a quitclaim from the State to the grantee of whatever interest or title the State may have to the lands therein described.

If the grantee, in a patent issued by this State, for land sold as swamp and overflowed, before the United States has issued to the State a patent therefor, bring an action to recover possession of the land, by virtue of his patent; and the defendant brings himself, in privity, with the source of paramount title, to wit: the United States, either as a preëmptioner under the laws of the United States, or otherwise, he has a right to show in evidence on the trial, that the land described in the patent is not swamp and overflowed, within the meaning of the Act of Congress; and if such shall appear to be the fact, plaintiff cannot recover.

The decision in the case of *Dell v. Meador* (16 Cal. 285) does not apply to lands sold and patented by the State as swamp and overflowed lands.

A had a house, corral, garden, and orchard on a tract of eighty acres of land, and claimed possession of the entire tract; but his actual possession did not extend beyond his improvements. B afterwards inclosed the entire tract with a fence, and put another house thereon. A then brought an action against B, to recover possession of the entire tract, and the defendant recovered judgment: *Held*, that the judgment was erroneous in this, that A was entitled to judgment for the house, corral, garden, and orchard, of which he had the prior actual possession.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

The facts are stated in the opinion of the Court.

H. O. Beatty, for Appellant.

It is a well-settled doctrine, that when an entry is made by one, under color of title, by a deed, his possession is deemed to extend to the bounds of that deed — though his actual settlement and improvements were on a small parcel of the tract. In such a case, where there is no adverse possession, the law construes the entry to be coextensive with the grant to the party, on the ground, "that it is his clear intention to assert such possession." (*Elliott v. Pearl*, 10 Peters, 443; *Barr v. Gratz*, 4 Wheat. 222, 223; *Fox v. Hus-*

Kille v. Tubbs.

ton, 4 Bibb. 559; *Thomas v. Harran*, Id. 563; and other authorities quoted in *Elliott v. Pearl*.) In *Prescott et al. v. Nevers et al.* (4 Mason, 330), Judge Story says: "I take the principle of law to be clear, that when a person enters into land, under a claim of title thereto, by a recorded deed, his entry and possession are referred to such title; and he is deemed to have a seizure of the land coextensive with the boundaries stated in his deed, when there is no adverse possession."

The plaintiffs had a patent from the State of California, for the land sued for. Defendant was a mere naked trespasser, having neither title nor pretense of title, unless the quitclaim deed from DeVries is so called. He was in no condition to contest the patent from the State to plaintiffs. This point is fully decided by this Court in the case of *Doll v. Meador* (16 Cal. 330, 331).

Budd and Carr, for Respondent.

The introduction of evidence, by defendant, as to the condition and character of the land, was not error. Such evidence does not attack the patent either directly or collaterally.

The patent is valid, and conveys to the plaintiff whatever right the State may have had in the land, and no more; and if the State had none, it conveyed none, and did not profess to convey any. The Statute of April 21st, 1858, 200, Sec. 7, expressly declares, that a patent issued for swamp lands shall not have any other legal effect or force than a quit claim of all right, title, and interest on the part of the State.

The case of *Doll v. Meador* (16 Cal. 295) was in relation to a patent issued under the act of the Legislature, for the disposal of the 500,000 acres granted by Congress to this State. There are between that case and this, the following important distinctions:

1st. The patent in that case conveyed the title in fee simple. (Act of 1859, Sec. 4, Chap. 313.) In this, it is but a quitclaim of the title of the State, if any she had. (Stat. 1859, 200, Sec. 7.)

2d. In that case, the land had been granted to the State, and was to be selected by the State, under State laws. (Act of Congress, Sept. 4th, 1841.) In this, swamp and overflowed lands had been granted to the State, to be segregated under the direction

of the Secretary of the Interior, a United States officer. (Act of Congress, Sept. 28th, 1850.)

3d. In that case, the land had been selected for the State of California, by State officials, and the selection had been approved by the register and receiver of the United States land office. (Stat. 1859, Chap. 313.) In this, the selection of the land as swamp and overflowed, was made by the purchaser, and not by any State or United States official. (Stat. 1858, Chap. 235.)

4th. In that, a tribunal decided before the issuing of the patent on notice to all claimants, that the plaintiff was entitled to the patent. (Stat. 1859, Sec. 3, Chap. 313.) In this, no officer of the government, State or National, decided, judicially or otherwise, that the land was swamp and overflowed land. The acts of the State officials were merely ministerial, and even the discretion given to the Governor by the Act of 1858, Sec. 7, was taken away by the proviso of the Act of 1861, 252.

“If the land be not swamp and overflowed land, then the United States neither conveyed nor attempted to convey the same to the State. Respondent does not attack the patent, nor the action of the officers in issuing it. The patent is regular and regularly issued; but unless the land is swamp and overflowed land, the patent conveyed nothing; the State had nothing to convey. (*Summers v. Dickenson*, 9 Cal. 555; *Patterson v. Winn*, 11 Wheat. 380.)

The case of *Doll v. Meador* (16 Cal.) decides that a person having a mere naked possession, cannot attack directly or collaterally a conveyance, or attempted conveyance of land, made or attempted to be made by the sovereignty possessing the eminent domain. But, in this case, the United States, the sovereignty possessing the eminent domain, neither granted, nor attempted to grant, the land in controversy, unless it were swamp and overflowed land; neither did the State attempt to convey any greater interest than the State may have had. The ancient doctrine, as to the effect of a patent from the sovereign, does not apply to the patent under consideration. (*Summers v. Dickenson*, 9 Cal. 555.)

Plaintiffs do not claim that the State held the land in controversy, by right of eminent domain, but by grant from the United States; and it is difficult to see how the State could have had any

Kile v. Tubba.

greater rights under the grant than any other grantee would have had.

The jury decided, not that no grant to the State had been made, but that the land was not within the calls of the grant. If the State took no greater rights, under the grant from the United States, than a private person would have done, then a segregation or survey made by the State, gave the State no rights. (*Smith v. United States*, 10 Peters, 335.)

Had the State brought suit for the land, the respondent could have shown that the land was not within the calls of the grant from the United States. And how can a grantee from the State by patent, conveying merely a quitclaim of the right of the State to the land, acquire by such patent, any greater rights than the State itself possessed?

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action to recover the possession of eighty acres of land. The evidence shows that in 1859, one Stayton had a house, corral, orchard, and garden, on the tract in dispute, and resided in the house with his family, claiming a large tract of three hundred and twenty acres, which included the eighty acres in controversy. On the fourth day of April, 1859, while thus in possession, he with his wife executed and delivered a deed to one John Thompson, conveying to him the whole three hundred and twenty acres, and delivered the possession to the latter; and the present plaintiffs claim under Thompson, as also under a patent issued to them under the statutes of the State relating to swamp lands. On the first day of March, 1861, Kile, one of the plaintiffs, leased the premises to one Gilmore, who occupied the house and grounds under the lease, until a short time before the commencement of this suit. It seems that the plaintiffs, and those under whom they claim, inclosed all of the three hundred and twenty-acre tract, except the eighty acres in controversy, and all the actual possession they had of that was the house, corral, orchard, and garden. But they claim to have had the constructive possession of the whole under the deed from Stayton, and under the swamp land certificate and patent. They claim to own the title in fee under the patent.

It seems that one Devries claimed some interest in the tract, under an unlocated Mexican grant; and he and the plaintiff Kile entered into an arrangement by which it was agreed, that he was to have the land if it should be included in the final survey of the grant; if not, Kile was to have it under his swamp land claim. Under this arrangement, Devries claimed to be in possession. The final survey of the grant, made in 1859, did not, however, include the land. Devries built a fence around the eighty acres in controversy, and furnished lumber to put another small house on it. He made several attempts to get possession of the old house and improvements, but failed. He conveyed his claim to the premises, to the defendant, November 2d, 1861; and one Medlin, also, made a conveyance to the latter, dated November 15th, 1861; and he went into the new house — built, it seems, by Medlin — with the lumber furnished by Devries. Defendant claimed also to hold the land as a preëmptioner, under the United States law.

At the trial, the plaintiff asked the Court to give the following instruction: "That a party entering upon land, under a deed describing it by metes and bounds — although he actually inclose or occupy only a small portion — is, in contemplation of law, in possession of the whole tract described in the deed; and if the jury believe that John Thompson entered upon the tract of land described in the complaint, under a deed from Stayton — intending to take possession of the whole tract — he was in possession of the whole, though he actually occupied but a portion; and if Thompson transferred his right and possession to plaintiffs, they, entering under such transfer, were in possession of the whole tract transferred, whether the transfer was by proper deed, or an assignment of a certificate of purchase." The Court refused to give the instruction, and this is assigned as error. The general rule seems to be, that where a party enters, in good faith, upon land, with color of title, under a deed purporting to convey the land with specific boundaries — no person being in the adverse possession at the time — and he takes and holds actual possession of a part, *bona fide*, claiming title and possession of the whole tract described in the deed, he is to be deemed to have the possession of the whole tract within the boundaries of the deed. In other words: in such case,

his possession is held to be coextensive with his deed. (*Rose v. Davis*, 11 Cal. 133; *Baldwin v. Simpson*, 12 Id. 500; *McCracken v. San Francisco*, 16 Id. 591; *Elliott v. Pearl*, 10 Pet. 443; *Barr v. Gratz*, 4 Wheat. 222; *Prescott v. Nevers*, 4 Mason, 330; *Keam v. Cannovan*, 21 Cal. 299.) This rule, however, cannot be held to apply to a case where a person in the possession of a small tract—the usual size of a farm—makes a conveyance of a large tract, greatly exceeding his actual possession, when he has no color of title beyond his possession. The right of possession cannot be extended by any such means. The instruction asked by the plaintiff does not state the rule upon this subject with that clearness and accuracy requisite in cases of this kind; and we would not, therefore, be justified in reversing the judgment because it was refused.

At the trial the plaintiffs introduced in evidence the patent from the State, issued under the statutes relating to swamp and overflowed lands. The defendant proved that nearly all of the tract in controversy was dry, arable land, well fitted for cultivation. The Court gave the following instruction asked for by the defendant: "If the land is not swamp and overflowed land, within the meaning of said act, then the plaintiffs acquired no right to the land by virtue of the patent from the State." There was no evidence that the land had ever been certified to the State, or any patent issued therefor from the United States, or from the General Land Office, as swamp land or otherwise. The plaintiff contends that the Court erred in giving this instruction, in admitting the evidence, and in overruling the motion for a new trial, on the ground that the verdict was against law and evidence. He contends that the decision of this Court in the case of *Doll v. Meador* (16 Cal. 295) fully determines this point in his favor.

The patent in that case was issued under the statutes of this State relating to the 500,000 acres of land granted to each State by the eighth section of the Act of Congress of Sept. 4th, 1841. (Wood's Dig. 744). It was issued under the provisions of the Act of 1859 (Stat. of 1859, 838), the fourth section of which provides, that "such patent shall vest in the grantee therein named a good and valid title, in fee simple, to the lands therein described." The act requires that the holder of the land warrant desiring a patent shall

Kille v. Tubbs.

give public notice of his application for the patent, and prove fully to the Register of the State Land Office the location of the warrant according to law; the survey of the land by the United States; that the location has been made or filed in the United States District Land Office, and has been made with the consent of the Register and Receiver of such Land Office; and all persons holding adversely are entitled to appear before the Register of the State Land Office, and contest the application for the patent. But the provisions of the statutes relating to swamp lands are entirely different.

The source of the title of the State to the swamp lands depends upon the Act of Congress of September 28th, 1850 (Wood's Dig. 745), the first section of which grants to the State of Arkansas the whole of the swamp and overflowed lands "made unfit thereby for cultivation." Sec. 2 makes it the duty of the Secretary of the Interior to make out an accurate list and plats of such lands and transmit the same to the Governor of the State, "and, at the request of said Governor, cause a patent to be issued to the State therefor; and on that patent the fee simple to the said lands shall vest in the said State of Arkansas, subject to the disposal of the Legislature thereof." Sec. 3 provides "that in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is 'wet and unfit for cultivation,' shall be included in said list and plats; but when the greater part of a subdivision is not of that character the whole of it shall be excluded therefrom." Sec. 4 extends the provisions and benefits of the act to each of the other States of the Union.

The State of California has, by its legislation, attempted to sell and convey these lands in advance of any segregation thereof, or the issuing of certified lists or patents by the National Government; attempting, by *ex parte* proceedings, and often without any, or very insufficient proof, to determine, without any concert of action with the National Government, what lands she is entitled to under the Act of Congress. The Act of 1855 (Wood's Dig. 517) authorized the sale and patenting of such lands, without requiring any evidence whatever, not even the affidavit of the purchaser, showing that the tract sought to be purchased was of the character described in the Act of Congress. And the Act of 1858 (Stat. of

1858, 198) is of the same character. By the amendments of 1859 (Stat. of 1859, 340), the purchaser was required to state, in the affidavit made by himself, "that every forty-acre lot, or its equivalent subdivision, of the land sought to be purchased, is the greater part swamp or swampy, or subject to inundation at the planting, growing, or harvesting seasons, so as to endanger, injure, or destroy the crops, taking the average season for a reasonable number of years prior to the year 1850 as a rule of determination." This is making the interested party the only witness on his own behalf. The amendment to Sec. 10 also provides how "a contest for the certificate of purchase, or other evidence of title to the same tract of land," shall be tried. It is doubtful, however, whether, under this section, a person in possession as a preëemptor under the laws of the United States, and claiming that the land is not swamp land under the Act of Congress, can appear and contest the claim of the purchaser under the State. It is, apparently, confined to "a contest for the certificate of purchase or other evidence of title." If such is the proper construction (and we believe the Surveyor-General and Land Register of the State have so construed it), it follows that there is no provision of law by which the essential fact whether the land is swamp land, and whether the State has or ever will have any title to it, can be tried between conflicting and adverse claimants, or can be investigated or determined prior to the issuing of the patent; and if the patent, under such circumstances, is held conclusive upon adverse claimants, it follows that any man may be deprived of his land and improvements by any person who will take the oath prescribed, without any opportunity of having his rights tried in a Court of Justice. A more plain and direct deprivation of property, "without due process of law," could hardly be found or imagined.

In 1861 (Stat. of 1861, 355) the Legislature passed a law appointing a Board of Commissioners, one of the provisions of which is that the County Surveyors of each county shall proceed to segregate the swamp and overflowed lands within their respective counties from the high lands, and make maps of the same, and transmit duplicates of such maps to the Surveyor-General; and also making it their duty to take such testimony as they may be able to,

Kille v. Tubbs.

procure, that such lands are swamp and overflowed lands, and transmit the same to the Surveyor-General; and the Governor is required to transmit these maps and testimony to the United States Land Office at Washington. Sec. 26 of this act provides, that after such segregation, the purchaser, in making his affidavit, may omit the statement that the land is swamp land, as required by the Act of 1859. All these proceedings on the part of the County Surveyors are entirely *ex parte*; adverse claimants have no notice thereof, and have no right to appear and contest the same any more than before.

It seems that the Legislature became aware, that, under these *ex parte* proceedings, lands might be sold and conveyed that were not, in fact, swamp lands, within the Act of Congress, and which might not belong to the State—as several provisions are made, in different statutes, that in such case the holders of the certificates of purchase or patent might select other swamp lands in exchange therefor. (Stat. 1859, 180; Id. 1861, 6; Id. 1862, 476; Id. 1863, 597.) The Legislature have been equally careful that these *ex parte* proceedings shall not bind or conclude adverse claimants. Sec. 7, of the Act of 1859, 200, after providing for issuing a patent, adds this clause: “*Provided*, that neither the patent provided for in this section, nor the certificate provided for in the sixth section of this act, shall have any legal effect or force, than as a quitclaim of all right, title, and interest, on the part of the State.” So, too, all certificates of purchase or of location, issued under the laws of this State, are only made “*prima facie* evidence of legal title.” (Stat. 1859, 227.) And only the same force and effect is given to certificates of purchase issued by the Register of the State Land Office, by the Statutes of 1863, 597, Sec. 17.

Taking into view the whole system of State legislation, regulating the sale of swamp lands, and all the provisions of the different statutes upon the subject, it is evident that the intention of the Legislature was, that certificates of purchase, and patents issued for swamp land, should not have a binding or conclusive effect upon adverse claimants, but should be only *prima facie* evidence of title, liable to be defeated upon proof that the land was not in fact swamp land within the Act of Congress. The statutes relating to the sale,

Kille v. Tubbs.

and patenting of the 500,000 acres of land, under which the decision in the case of *Doll v. Meador* was made, differ so widely from the statutes relating to swamp lands, that that decision forms no proper guide in the present case.

The Act of Congress of September 28th, 1850, provides that the patent from the United States to the State, shall vest the fee simple to said lands in the State; and it may, perhaps, be doubtful whether any title vests in the State until such patent is issued. However this may be, as to lands that are unquestionably swamp lands, within the Act of Congress, it is evident that no right, title, or interest, can properly be deemed to have vested in the State, as to any but those lands undoubtedly swamp, until at least they have been segregated by the consent or action of the proper officers of the United States; and until that is done, as to lands not clearly swamp, *bona fide* claimants, in possession under the laws of the United States, have a right to prove the true character of the land, and that it is not swampy; and they are not concluded from so doing by a certificate of purchase, or a patent issued under the laws of this State.

It is clear that the State has no valid right to sell or convey land to which she has no vested or prospective right or title. Whether she has even a prospective or inchoate title to swamp lands, depends entirely upon the single question, are they swamp lands within the Acts of Congress? If they are not, neither the State nor its officers have any right, power, or authority, to sell or convey them. Nor has she, by her legislation, authorized the sale of lands, unless they are of that character. The first sections of the Acts of 1855 and 1858, only authorize the sale of "the swamp and overflowed lands belonging to this State," and her officers, acting under it, have no right, power, or authority, to sell and convey any other; and if they attempt to do so, they exceed their powers and jurisdiction, and their acts are therefore void.

This very question has been passed upon by this Court, in the case of *Summers v. Dickinson* (9 Cal. 554), which was concurred in by all the Justices, including Justice Field, who delivered the opinion in *Doll v. Meador*. In it they say that "the Legislature, by the Act of April, 1855, provided for a sale of these lands, and

Kille e. Tubbs.

authorized the Governor to issue patents in favor of persons purchasing under this act. In issuing patents, the Governor acted as the agent of the State, under the powers conferred by the statute; his authority extended only to such lands as were granted to the State by the Act of September, 1850; and a patent issued by him, for any land not embraced in this grant, would be void for want of power to convey." The Court, in commenting on this decision, in *Doll v. Meador*, say: "Undoubtedly a patent issued by the Governor for any land not embraced in the grant to the State would be void for want of power to convey. * * * Nor do we question the further proposition, that the defendant might have disproved the evidence of title furnished by the patent, by showing that the land in question was not included in the Act of Congress, or was within the exceptions contained in the Act of this State. We only annex to the proposition the qualification that to do this, he must first have brought himself in some privity with the common source of title."

A person who has, in good faith, settled upon a tract of public land, as a preëmptioner under the laws of the United States, acquires a prior right to purchase the land at Government price, when the Government has made the proper surveys, and declared such land open for entry by preëmptioners. The interest in the land thus acquired by his *bona fide* occupation and residence, and his performing the acts required by the laws of the United States, giving him such prior right to purchase, is of such a character as the Courts will recognize and protect; and the Possessory Act of this State was adopted for that very purpose. We think these facts, upon being proven, give a *bona fide* occupant and preëmptioner such a status; brings him in such privity with the common source of title, to wit: the Government of the United States; as will entitle him to prove that the land in question was not included in the Act of Congress. In the case of *Doll v. Meador*, the defendants had let the time pass by within which, under the laws of the United States, they could have procured the Government title; and they were, for that reason, held to be strangers to the title; at least until further action by the Government on their behalf. In this case, it appears that the plats of the United States surveys of

Kile v. Tubbs.

this land have not been sent to the proper Land Office; so that it is out of the power of the defendant to file his notice of claim to preëmption, or to enter and purchase the land under the United States laws; so he has done all in his power, and has lost no rights acquired under those laws.

Even if the holder of the State patent should recover the possession under his patent, if the defendant should afterwards establish his preëmption claim and procure a title from the United States, he could then undoubtedly recover back the land, with the intermediate rents and profits. So that there can be no essential advantage to the patentees in postponing the trial of this question of fact, so essential to his right to the land; while a contrary rule would work with great hardship upon *bona fide* occupants of the land. If, however, the State shall hereafter procure the title to this tract, the plaintiffs can then maintain an action for the possession, and for rents and profits, upon proof of that fact and the patent.

In *Stoddard v. Chambers* (2 How., U. S., 284), it was held that the issuing of a patent is a mere ministerial act, which must be performed according to law; and if it be issued for lands reserved from sale by law, it is void. So, too, it has been held, that a grant from the State is to be considered void where the State had no property in the land granted, or where the officers had no power to receive the entry and issue the grant. (*Curle v. Barrel*, 2 Sneed, 63.) Where the law forbids the entry of the vacant land, in a particular tract of country, a grant for a part of such land is absolutely void; and that fact may be shown in ejectment. In such case, the subject matter is not within the jurisdiction or capacity of the executive officers, who therefore transcended their powers in issuing the grants. (*Stanwix v. Powell*, 13 Iredell, 312.) Where the State has no title to the thing granted, or where the Governor has no authority to issue the grant, if the defect appears on its face, it is absolutely void, and may be impeached collaterally in a Court of Law, in an action of ejectment. (*Winter v. Jones*, 10 Ga. 190.) A patent which issues from the General Government, to land which has been previously appropriated by the Government, and reserved from entry, is void. (*Hit-tuk-cho-me v. Watts*, 7 S. & M. 363; *Bercy v. Gamble*, 8 Mo. 88; *Perry v. O'Hanlon*, 11 Id. 585; *Wright v. Rutgers*, 14 Id. 585.)

Waugenheim & Childs.

The evidence in this case, shows that the plaintiffs had the prior actual possession of the house, corral, orchard, and garden, formerly occupied by Stayton; and there is no proof of any abandonment of the right acquired by such prior possession; and the verdict of the jury as to this portion of the premises is contrary to the evidence.

The judgment is therefore reversed, and the cause remanded for a new trial.

WAUGENHEIM *et al.* v. CHILDS.

THE vendor of personal property is not a competent witness for his creditors, to impeach a sale made by him, or to prove the sale fraudulent, in a contest respecting it between his creditors and his vendee.

The case of *Howe v. Scannell* (8 Cal. 325) commented on and overruled.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

This action was commenced in the District Court on the tenth day of September, 1861, and no notice was given by the defendant of the intention to examine Bambour as a witness as required by the amendment of 1861 to the four hundred and twenty-second section of the Practice Act. The defendant recovered judgment in the District Court, and the plaintiff appealed. The other facts are stated in the opinion.

George W. Tyler, for Appellant.

W. J. Graves, for Respondent.

Bambour was a competent witness. The rule that a vendor is in general incompetent to impeach the *bona fides* of his own sales, does not include him *in limine*. He was competent, at all events, to testify as to the change of possession, and to that was his testimony confined. The transaction, according to his testimony, between him and plaintiff, was one of mortgage. He borrowed money from the plaintiff, and gave him an absolute bill of sale of the property

as security. The whole case turned on the fact of possession. About this Bambour could testify. Even if this were not so, the rule that a vendor cannot impeach the *bona fides* of a sale, has no application here. The exception to the rule is, where collusion is shown between vendor and purchaser. (*Howe v. Scannell*, 8 Cal. 325.) This case is within the exception.

It has been repeatedly decided that where a vendor is left in possession of property, and exercises acts of ownership over it after sale, this proves a combination to defraud creditors, and in that case the declarations, and, *a fortiori*, the sworn testimony of the vendor, would be evidence against his vendee. (*Wilbur v. Strickland*, 1 Rawle, 458; *Withes v. Farley*, 3 Car. & P. 395; *Borland v. Mayo*, 8 Ala. 113.)

CROCKER, J. delivered the opinion of the Court — COFF, C. J. and NORTON, J. concurring.

This is an action to recover damages for the alleged taking and conversion by the defendant of certain personal property claimed by the plaintiff. The defendant set up as a defense that the property was owned by one Bambour, and that he took the property as Constable, under and by virtue of certain executions issued on judgments against Bambour. The plaintiff claimed the property under a bill of sale executed to him by the execution debtor, which the defendant contends was made to defraud creditors. On the trial, the defendant called Bambour as a witness; the plaintiff objected that he was interested in the result of the suit, and therefore not a competent witness against him. The Court overruled the objection and allowed the witness to testify; and this is assigned for error.

Sec. 392 of the Practice Act provides that a person who has a present, certain, and vested interest in the action shall be excluded as a witness. Sec. 393 defines the test of this interest as follows: "The true test of the interest of a person, which shall render him incompetent as a witness, shall be that he will gain or lose by the direct legal operation and effect of the judgment, or that the record of the judgment will be legal evidence for or against him in some other action; but nothing in this or the last section shall prevent a party calling as a witness the adverse party to the action, or a per-

son whose interest is adverse, nor a party being a witness in the cases mentioned in Sec. 423." The witness in this case was clearly interested adversely to the plaintiff within the provisions of these sections. He had sold and conveyed the property to the plaintiff, and he was directly interested in defeating that sale and having the property applied upon the executions against him in satisfaction of his debts, and thus diminishing or paying liabilities outstanding against him. Such would be the direct legal operation and effect of a judgment in this case in favor of the defendant, and he would directly gain thereby.

It is no answer to say that he is liable to the plaintiff on an implied warranty of title in the sale made by him, and that therefore his interest is equally balanced; for if it is shown that the sale to the plaintiff was fraudulent and void, the plaintiff could not recover the value of the property in a suit against the witness on such implied warranty. The fraud would defeat all right of action. It has been decided in numerous cases, and upon the strongest reasons, that a vendor of personal property is not a competent witness to impeach a sale made by him, or to prove the sale fraudulent, in a contest respecting it between his creditors and his vendee. (*Rea v. Smith*, 19 Wend. 293; *Bland v. Ansley*, 4 Bos. & Pul. 331; *Gardenier v. Tubbs*, 21 Wend. 169; *Pratt v. Stephenson*, 16 Pick. 325; *Bailey v. Foster*, 9 Id. 139; *Smead v. Williamson*, 16 B. Monroe, 492, 535, 536; *Seymour v. Beach*, 4 Vt. 493; *Clifton v. Bogardus*, 1 Scam. 33; 3 Phil. Ev., C. H. & E.'s Notes, 691.) In numerous cases it has also been held that the vendor is in such cases a competent witness for his vendee. (*Miller v. Dobson*, 1 Gil. 572; *Cox v. Hall*, 18 Vt. 191; *Mizell v. Herbert*, 12 S. & M. 547; *Ewing v. Carghill*, 13 Id. 79; *Forsyth v. Palmer*, 14 Penn. 96; *Wetmore v. Click*, 5 Jones, 155; *Hawkins v. Ingalls*, 4 Blackf. 35; *Bradbury v. Dougherty*, 7 Id. 467.)

In the case of *Howe v. Scannell* (8 Cal. 325) the general rule was recognized that the vendor of goods is not a competent witness to impeach the validity of a sale made by himself; but an exception was made where evidence had been introduced showing a collusion between the vendor and purchaser to defraud the creditors of the former, in which case it was held that the declarations of the vendor

Connor v. Morris.

were admissible, and he was therefore a competent witness against the vendee. We think the exception thus made is not sustained by the authorities, many of which we have already quoted. The Court, in its opinion, refers to the case of *Borland v. Mayo* (8 Ala. 112). An examination of that case shows that the vendor was made a witness by the vendee, and it was held that certain declarations made by the vendor were inadmissible as evidence for the creditors, because he was a competent witness. The Court below, in this case, erred in permitting the witness to testify on behalf of the defendant.

The judgment is reversed and the cause remanded for a new trial.

CONNOR v. MORRIS.

If a statement on appeal is served and filed within the time required by the three hundred and thirty-eighth section of the Practice Act, unless the respondent, within five days thereafter, prepares and serves amendments, he is deemed to have agreed to the statement; and no settlement thereof, or certificate of the Judge is necessary.

In an application for a *writ* to a County Treasurer, to pay county warrants, it is sufficient to aver in the petition, that the warrants were drawn by the County Auditor, as it will not be presumed that the Auditor has violated his duty in issuing the warrants; but the County Treasurer has a right to show, in defense, that the warrants were founded on a demand not legally chargeable against the county.

The Auditor of a county is the mere Clerk of the Board of Supervisors; and he has no power or authority to draw his warrant on the County Treasurer for the payment of a claim, unless the Board of Supervisors have made an express order, that the claim be paid.

The Board of Supervisors made the following order: "Account allowed J. J. Cloud, surveying Little Lake and Big River Road, \$844.20."

Under this order, the Auditor drew a warrant on the Treasurer for the payment of the claim: *held*, that the order of the Board did not authorize the issuance of the warrant, and that the Treasurer could not be compelled to pay it.

APPEAL from the District Court, Seventh Judicial District, Mendocino County.

The facts are stated in the opinion of the Court.

Wm. Holden, for Appellant.

Connor v. Morris.

The appellant submits that the complaint does not state facts sufficient to constitute a cause of action to entitle plaintiff to the relief prayed for. It must appear beyond a doubt, that the payment of these warrants was an official duty to be performed by defendant; and that he was invested with no official discretion in this matter. Before payment of these warrants, it was the Treasurer's duty to ascertain that these warrants, to be paid, were founded upon a just claim, legally chargeable against the county (Wood's Dig. 713, Sec. 6); and that the claim or claims upon which they were founded, had been duly "examined, settled, allowed, and ordered paid." Unless the amounts had been ordered paid, the Auditor had no authority to draw the warrants (Wood's Dig. Art. 8446, Sec. 1); and if they were drawn without authority of law, then they must be void. (*Keller v. Hyde*, 20 Cal. 593; *Crandall v. Amador County*, Id. 75; Wood's Dig. 696, Art. 3326, Sec. 16.) If, then, such was the duty of the Treasurer, and if these facts must exist before payment of the warrants can be enforced, must not the complaint contain averments that the claims upon which the warrants were founded were legally chargeable against the county, and that they had been ordered paid? No such averments can be found, the omission of which renders the complaint fatally defective; and which objections are of a nature to entitle appellant to raise them for the first time in this Court. (Prac. Act, Sec. 45.) If we say that the word allowed is sufficient to the Auditor to draw his warrant, then we fail to give meaning to the phrase "ordered paid," found in Wood's Dig. 715, Art. 8446.

B. McGarvey and John Currey, for Respondents.

In July, 1862, judgment was entered on the report of the referee in this action. On the twenty-second of July, 1862, the defendant's attorney served on the plaintiff's attorney a notice of a motion to set aside the report of the referee and for a new trial.

On the twenty-sixth of July, 1862, defendant's attorney served on plaintiff's attorney a notice that he had filed a statement to be used on said motion, for the purposes specified in the first notice. This statement does not appear to have been agreed to by the

parties, or settled by the Court or referee. Hence it could not be properly regarded as a statement on the motion for a new trial. (*Seaver v. Fitzgerald*, 23 Cal. 85.) On the ninth of December, 1862, a statement was filed as alleged by defendant's counsel, and a copy served on the plaintiff's attorney by the Sheriff. A notice of appeal to this Court had been filed and served by defendant's attorney on plaintiff's attorney about the twenty-first of November, 1862. This appeal was from the order refusing the new trial, and ordering the peremptory *mandamus* to be issued.

In order to review the action of the Court below in denying the motion for a new trial, it is necessary to have the record of the case submitted to the Court below. The statement filed in July was no part of the record properly, because it was not settled or agreed to. The statement filed in December cannot be considered as a statement; because, first, it was not prepared within twenty days after the entry of the judgment or order appealed from (Pr. Act, Sec. 338); second, such statement does not contain the grounds on which the defendant intends to rely, and the evidence necessary to explain such grounds; third, the statement referring to the evidence elsewhere is not sufficient, nor in accordance with said Sec. 338, because the said section says that the appellant shall serve a copy of so much of the evidence as may be necessary upon the adverse party, to wit: on the respondent's attorney in this case.

CROCKER, J. delivered the opinion of the Court—NORRIS, J. concurring.

This is an application for a writ of *mandamus*, to issue against the defendant, Treasurer of the County of Mendocino, to compel him to pay two certain county warrants. The case was sent to a referee for trial, who reported a judgment in favor of the plaintiff, which was entered accordingly, and from which the defendant appeals.

The respondent moves to strike out all that portion of the record purporting to be the statement on appeal, on the ground that it is not properly authenticated, not having been agreed to by the parties or settled by the Judge or referee. The judgment in this case

was rendered in July, 1862; a motion for a new trial was overruled November 19th, and on the ninth day of December the defendant filed and served on the plaintiff a statement on appeal from the order refusing a new trial. The certificate of the Clerk, which is dated December 20th, 1862, states that no amended statement had been filed.

Sec. 338 of the Practice Act provides that the appellant shall, within twenty days after the entry of judgment or order appealed from, prepare and serve a statement, and the respondent may, within five days thereafter, prepare and serve amendments thereto. Sec. 339 provides that where a statement is made, and the respondent shall omit to prepare amendments within the time above limited, he shall be deemed to have agreed to the statement as proposed, "and no settlement of the statement or certificate thereto by the Judge shall be required." In this case the certificate of the Clerk shows that the respondent did not file any amendments to the statement within the time limited by the Practice Act; he is, therefore, to be deemed to have agreed to the statement as filed by the appellant, and no settlement thereof or certificate by the Judge is necessary. The evidence in the case was taken by the referee and reported to the Court, and consists wholly of written depositions and exhibits, and is sufficiently referred to as a part of the statement to authorize the Clerk to incorporate it in the transcript. The motion of the respondent is therefore denied.

The appellant contends that the petition for the writ does not state facts sufficient to constitute a cause of action. No objection to the sufficiency of the petition was taken, either by demurrer or answer. The statute (Wood's Dig. 715, Art. 3446) provides, that "the Auditor of every county may draw warrants on the county treasury for the payment of all claims and demands legally chargeable against the county, which are, according to law, examined, settled, allowed, and ordered paid by the Board of Supervisors of the county," etc. The appellant contends that the petition is defective in not averring that the claims on which the warrants in controversy were issued were examined, settled, allowed, and ordered paid by the Board of Supervisors. The complaint avers that the County Auditor drew the warrants, which are copied in full into the com-

Connor v. Morris.

plaint, and this is clearly all that is necessary to aver in the petition, the presumption being that they were duly issued according to law, as it will not be presumed that a public officer has violated his duty in issuing them. But the County Treasurer has a clear right to show, in defense of an application for a *mandamus* against him, that the warrants are founded upon a demand not legally chargeable against the county, and upon such showing the writ will be refused. (*Keller v. Hyde*, 20 Cal. 594.) This objection is therefore untenable.

Numerous objections are made to the findings, on the ground that they are defective or insufficient. Sec. 187 of the Practice Act provides that "when the referee is to report the facts, the report shall have the effect of a special verdict." The referee in this case was not "to report the facts," but to try all the issues, both of law and fact, and "to report a judgment thereon." It was not therefore any part of the duty of the referee to report findings, and it is unnecessary to examine the objections thereto.

One of the warrants mentioned in the petition is payable "out of the State portion of the Poll Tax Fund," and it is objected that the evidence shows that there was no fund known by that name in the treasury of the county. This objection is not tenable, as it was the evident intention that it should be paid out of the moneys provided for by the Act of April 18th, 1859. (Stat. 1859, 323.)

The record shows that on the eighteenth day of August, 1859, the Board of Supervisors of Mendocino County, made the following order: "J. J. Cloud, surveying State road from Cloverdale to Long Valley, \$678. Ordered to be paid from the Wagon Road Fund." Under this order the Auditor issued Warrant No. 32, for \$300, payable "out of the State portion of the Poll Tax Fund." We think this variance between the descriptions of the fund out of which the warrant was to be paid, is not sufficient to render the warrant void. It is evident that the Board of Supervisors intended to make it payable out of the moneys arising under the Act of 1859, and that those moneys are sufficiently specified under either designation.

It also appears that on the eighteenth day of August, 1859, the Board of Supervisors made the following order: "Account allowed

Rupley v. Welch.

J. J. Cloud, surveying Little Lake and Big River Road, \$344.20." Under this order the County Auditor issued Warrant No. 30, for \$344.20, payable out of the Road Fund. It is objected that this was a mere "allowance" of the claim, and that the County Auditor could not draw the warrant until it was "ordered paid," as required by the statute. (Wood's Dig. 715.) We think this objection well taken. The Auditor is a mere Clerk of the Board of Supervisors, and has no power or authority to direct a demand to be paid without an express order to that effect made by the board. Such is the evident meaning of the statute. It authorizes the County Auditor to draw his warrant on the County Treasurer only for the payment of claims which have been ordered paid by the board. Any other construction would leave the important words "ordered paid" without any meaning or effect. There may have been good reasons why the board did not order this claim paid. It is sufficient, however, that the statute has placed this power of ordering the payment of claims against the county in the Board of Supervisors, and not in the County Auditor.

The judgment is reversed and the cause remanded, with directions to the Court below to render judgment for the writ to issue commanding the defendant to pay the warrant, No. 32, for \$300, out of the County Treasury.

RUPLEY v. WELCH *et al.*

THE construction of a reservoir across the bed of a ravine, for the purpose of collecting the water flowing down the same, to be used in irrigating a garden, or fruit trees, gives to the party constructing the same, a vested right of property in the reservoir, and the right to have the water flow into the same, of which he cannot be divested by persons subsequently entering for mining purposes; and a Court of Equity will enjoin miners thus entering, from injuring the reservoir, or diverting the water therefrom.

A person entering upon and possessing public lands, under the Possessory Act of April 20th, 1852, holds the lands subject to the right of any person to enter upon it, and work the mines of precious metals thereon. This right of the miner to enter upon lands thus held, is subject to such regulations and restrictions as the Legislature may see fit to impose; and the Act of April 25th,

Rupley v. Welch.

1855, compelling the miner to give bonds to the owner of crops growing on such lands, before he can use the mineral lands on which crops are growing, is but a regulation of a right given by the Act of April 20th, 1852, and is not liable to any constitutional objection.

Where the miner, who desires to dig up crops growing on land held under the Possessory Act, offers to give the proper bond required by the Act of 1855, and the owner of the crops refuses to receive it, the miner acquires by such offer a right to enter and mine on the land, and cannot be treated as a trespasser. The miner is liable, however, for the damage to the growing crops, caused by his act, and if the owner of the crops should demand of the miner payment of the damage caused to the crop, and the miner should refuse to pay, a Court of Equity would restrain him from further working.

APPEAL from the District Court, Eleventh Judicial District, El Dorado County.

This action was commenced on the thirtieth day of November, 1860. The reservoir of the plaintiff was constructed across the bed of the ravine, and defendants were digging and sluicing immediately above the reservoir, and had excavated a ditch, by which they had diverted the water from the reservoir. The other facts are stated in the opinion of the Court.

Hume & Sloss, for Appellants.

The Court erred in refusing to order judgment for plaintiff, on the complaint and answer. The answer does not put in issue any material allegation of the complaint. An answer which does not, when the complaint is verified, contain a specific denial of each allegation controverted by the defendant, is to be disregarded. Every material allegation of the complaint not specifically controverted by the answer, shall, for the purposes of the action, be taken as true. (Pr. Act, 46, 65; *Dewey v. Bowman*, 8 Cal. 149; *Humphreys v. McCall*, 9 Id. 59; *Burke v. Table Mountain Water Co.*, 12 Id. 403.)

Conceding the correctness of the proposition laid down by this Court, in *Burdge v. Smith* (14 Cal. 383), that "there is no presumption that the person who goes upon mineral land is a trespasser," we insist that in this instance, that presumption is overthrown by the showing of the complaint—that the defendants had entered the plaintiff's inclosure, had destroyed, were actually engaged in

Rupley v. Welch.

destroying, and declare their intention to be, to continue to destroy the crops of the plaintiff.

McCallum & Upton, for Respondent.

We proceed to notice the propositions of the appellant, that the Court erred in refusing to order judgment for the plaintiff, on the pleadings. It is a sufficient answer to say, that defendants' answer sets up a distinct affirmative defense; setting up their offer to comply with the statute, and plaintiff's refusal to accept (Stat. 1855, 145), to which defense there was no demurrer, or objection of any kind, but to which plaintiff filed his replication, denying the plea; upon which issue the District Court found for the defendants. That the defendants had the right to enter, as miners, upon such land, and for the purpose of mining, this Court has decided in so many cases, that it is not regarded as an open question. (*Buridge v. Smith et al.*, 14 Cal. 380; *Hicks v. Bell*, 3 Id. 227; *Barrett v. Stokes*, 5 Id. 39; *Irwin v. Phillips*, Id. 146; *Conger v. Weaver*, 6 Id. 548.)

CROCKER, J. delivered the opinion of the Court — NORRIS, J. concurring.

This action is brought by the plaintiff to recover damages of the defendants, for entering upon certain inclosed premises, and digging up and sluicing the same, for mining purposes; and for an injunction to restrain them from continuing these mining operations.

The premises are described in the complaint as a field of ten acres, inclosed with a rail fence, part of a larger tract in the plaintiff's possession, on which ten acres were growing crops of grain, consisting of barley, wheat, Chile, and red clover, and other grasses of natural and planted growth. The plaintiff also avers, that near the place where the defendants are at work, he has a garden and fruit trees, and for the purpose of irrigating them, he constructed a reservoir to receive the water flowing down a ravine on the premises in question; and that the works of the defendants will divert the water from the reservoir, and render it useless for the purpose of irrigating the garden and fruit trees. It does not clearly appear where the reservoir is located, but the inference, from the mode of

Rupley v. Welch.

stating is, that the reservoir, and the garden and fruit trees, are not on the ten acres. The plaintiff also avers, that he has suffered damages to the amount of two hundred dollars, from these acts of the defendants.

The answer directly admits some of these allegations, and the residue are to be taken as true, because the complaint is verified; and the answer only controverts them by a general, instead of a specific denial of each allegation. (Civil Pr. Act, 48, 65.)

But the answer sets up, as affirmative matter of defense, that the premises are public lands, and only held by the plaintiff by a possessory title, under the act entitled "An Act prescribing the mode of Maintaining and Defending Possessory Actions on Public Lands in this State," passed April 20th, 1852; that they contained mines of precious metals; and that the defendants entered upon them for mining purposes; and that before making such entry they offered to execute to the plaintiff their bond with good and sufficient surety, in accordance with the provisions of an act entitled "An Act to protect Owners of Growing Crops, Buildings, and other Improvements in the Mining Districts of this State," approved April 25th, 1855; and that the plaintiff refused to accept the same; and they aver that they are now ready and willing to execute such bond, in accordance with the Statute of 1855, aforesaid. These allegations of the answer are also to be taken as true, because they are not controverted by the replication. (Civil Prac. Act. Sec. 65.) A judgment was rendered in favor of the defendants, from which the plaintiff has appealed.

The main question involved in this case is the validity of the Act of April 25th, 1855; the defendants claiming that, having complied with the provisions of that act, they lawfully entered upon plaintiff's land, and were authorized to commit the acts complained of. The threatened diversion of water from plaintiff's reservoir is a clear violation of a vested right of property, acquired by the plaintiff by virtue of his prior appropriation of the water, and of which he cannot be divested for any private purposes or for the benefit of a few private individuals.

But the injury to the growing crops presents a different question. The Statute of 1852 relating to possessory actions, provides that

Rupley v. Welch.

the possession of public land, containing mines of the precious metals, for agriculture and grazing purposes, shall not preclude the working of such mines by any person desiring to do so. The cultivation of the land, and raising crops of grain or grass, is a use of the land purely for agricultural and grazing purposes, and therefore clearly comes within the proviso of the act. The plaintiff's possession of the land was subject to this right of any person to enter upon the land and work the mines of the precious metals thereon. This right of the miner has been fully recognized by this Court, but it has invariably been held to apply only to the possession of public lands held purely for agricultural and grazing purposes, and not extended beyond them. (5 Cal. 36, 97, 308, 395; 14 Id. 380.)

The Act of April 25th, 1855, provides that whenever any person shall, for mining purposes, desire to occupy or use any mineral lands then occupied by growing crops, etc., such person shall first give bond to the owner of the growing crop, etc., that the obligor shall pay to the obligee any damage sustained by reason of the destruction of the growing crops, etc., of the obligee. So far as this act relates to "growing crops," such as are usually raised upon lands used exclusively for agricultural or grazing purposes, it merely regulates a right previously vested in the miner, and to which the plaintiff's possession was subject; and to that extent, it is not liable to any constitutional objection. The right reserved to the miner, by the Act of 1852, is subject to such regulations and restrictions as the Legislature may see fit to impose; and the Act of 1855 is but a regulation of that right, requiring a bond to be given before it can be exercised. The defendants in this case, complied with the requirements of the Act of 1855, so far as they could, by offering to give the proper bond, which the plaintiff refused to receive. This was all that the defendants were required to do, before entering upon the premises. They could not tender such a bond as the act requires, because the law requires the sum to be fixed by three disinterested persons, one of whom was to be selected by the plaintiff; and this he refused to do, by refusing to receive any bond. The entry of the defendants upon the land upon which the growing crops were, for mining purposes, was therefore lawful, and cannot properly be treated as a trespass. They

Van Winkle v. Stow.

are, however, liable for the damage to the growing crops caused by their acts; and if the plaintiff should demand of them the bond required by the statute, or they should refuse to pay the damages thus caused by them, they might then be restrained from all further working or trespassing upon the land. But no such case is presented by the record in this action.

It follows, from these views, that the Court below erred in refusing the injunction against injuring the plaintiff's reservoir or diverting water therefrom.

The judgment is therefore reversed, and the cause remanded for further proceedings.

VAN WINKLE *et al.* v. STOW AND C. H. GRIMM,
INTERVENOR.

Mellon v. Borland (28 Cal. 144) affirmed.

To enforce a lien under the Act of May 17th, 1861, for securing the liens of mechanics and others, no complaint need be filed, or summons issued; but in lieu thereof a petition is filed, and the Clerk issues a notice, which is published. When a proceeding is commenced to enforce a lien under the Act of 1862, persons having a lien by mortgage upon the property upon which the lien is sought to be enforced, have no right to intervene.

APPEAL from the County Court of Sacramento County.

The facts are stated in the opinion of the Court.

Harmon & Hartley, for C. H. Grimm, Intervenor and Appellant.

George R. Moore, for Respondents.

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is a proceeding brought in a County Court under the Mechanics' Lien Law, to enforce a mechanic's lien upon the "I Street Railroad," in the City of Sacramento. C. H. Grimm

Van Winkle v. Stow.

claimed to hold three mortgages upon the property, and that they were liens thereon prior to those of the mechanics and material men. The case was tried by a referee, who reported findings of facts, and a judgment in favor of the holders of the mechanics' liens, from which the intervenor appeals.

The first object that we will notice is, that the County Court had no jurisdiction, because the amount of the lien of the plaintiff exceeded two hundred dollars, and therefore the action should have been brought in the District Court, which it is urged has exclusive jurisdiction of actions where the amount exceeds two hundred dollars, by the provisions of the Constitution. This objection is not tenable. This is not an action for the recovery of a sum of money, but a special statutory proceeding, in the nature of a proceeding *in rem* against the property alone, to subject it to the payment of the liens authorized by the statute; and under it no personal money judgment can be rendered against the owner of the property, but such judgment can only be recovered in some other Court of competent jurisdiction. (*McNeil v. Borland*, 23 Cal. 144.)

The next point raised by the appellants is, that the action was not commenced within the time required by the statute, and therefore the holders of the mechanics' liens were not entitled to any judgment. This objection is founded upon the fact that no summons was issued therein against the defendant, Stow, the owner of the road, or any other person. Sec. 6 of the Mechanics' Lien Law provides, that no lien provided for by the statute shall bind the property "for a longer period than six months after filing the same, unless suit be brought in a proper Court within that time to enforce the same." Sec. 22 of the Practice Act provides that, "civil actions in the District Courts and the County Courts shall be commenced by the filing of a complaint with the Clerk of the Court in which the action is brought, *and issuing of a summons thereon.*" It has been held by this Court, that actions under the Mechanics' Lien Law must be commenced by the filing of the complaint, and the issuing of the summons thereon, within the six months prescribed by the statute; and if the summons is not issued within the time, the lien is lost, even though the complaint be filed within the time. (*Flandreau v. White*, 18 Cal. 639; *Green v. Jackson Water Co.*, 10 Id. 374.)

But these cases were decided under statutes very different from the one under which the present action was brought. In the case of *Green v. Jackson*, the statutes under which the lien was claimed, provided that the lien might be enforced "by suit in any Court of competent jurisdiction, etc., and at the time of filing the complaint, and issuing summons, the plaintiff shall make publication," etc. (Stat. 1855, 158, Sec. 8.) In *Flandreau v. White*, the statute was slightly changed, it providing that the liens might be enforced "by suit in any Court of competent jurisdiction, on setting forth in the complaint," etc.; and there is no special direction about issuing a summons. (Wood's Dig. 538, Sec. 7.) But the Act of 1861 (Stat. 1861, 495), changes the character of the proceedings entirely, by providing that the liens may be enforced in the County Court, by any lienholder upon his filing a *petition*, upon the filing of which the Clerk is directed to issue a notice, which is to be published as therein required. The proceeding, under this amendment to the Lien Law, is no longer an action, but a special proceeding. No complaint is filed, or summons issued under it, as is in actions proper; but a petition is filed, and notice published in lieu thereof. This change in the statute requires a different rule of construction upon this point; and we think it clear that the "suit" which is required to be brought within six months after the filing of the lien in the Recorder's office, or the expiration of the credit, is properly "brought" when the *petition* is filed and the *notice* is issued by the Clerk, as required by the amendment of 1861. The petition was filed and notice was issued in this case within the time, and it follows that this objection is not well taken.

It is urged by the respondent that the intervenor, having only a mortgage lien, and not claiming any lien under the statute, had no right to intervene in the action. In the case of *Whitney v. Higgins* (10 Cal. 551) it was held by the Court, that all persons interested in the premises, prior to a suit brought to enforce a mechanic's lien, whether purchasers or incumbrancers, must be made parties to the suit, otherwise their rights would not be affected.

But under the change of the statute this rule has no proper application to the present form of proceeding. The "lienholders,"

Van Winkle v. Stow.

mentioned in the amendment of 1861, to Sec. 7, properly include only such persons as hold the kind and character of the liens provided for and authorized to be enforced by the special proceedings there laid down. Any other construction would draw within the jurisdiction of the County Court, in a special proceeding of this kind, the determination and enforcement of all kinds of liens upon the property, by mortgage, judgment, or otherwise, and thus a mortgage might be substantially foreclosed in those Courts in such cases, by simply making the holder of the mortgage a party, or by his coming in as an intervenor. It is evident that the Legislature never intended to establish any such rule, and never intended to give such an extended significance to the term "lienholder." It is true, that a decree for the sale of property under these proceedings will not affect the rights of the holders of any other kinds of liens, and that great difficulties must thus necessarily arise as to the rights of the purchasers under such decrees; yet these difficulties arise from the fact that the Legislature has conferred jurisdiction over a most important class of cases, affecting the title to real estate, upon a Court of limited powers and jurisdiction, utterly unable in consequence thereof to fully adjudicate the rights and claims of different classes of lienholders or claimants of the title, so that a sale under its decree will not settle the title, but often result in merely laying the foundation for other lawsuits. By transferring jurisdiction of such cases to the District Court—a Court with full and ample powers—these difficulties might be avoided. That, however, is a matter for the Legislature, and not for this Court to act upon. It follows, however, that the objection of the respondent is well taken, and that the mortgagee, Grimm, had no right to intervene in the case.

Under the view we have taken of this case, the judgment of the Court below is correct, and it is therefore affirmed.

On petition for rehearing, SAWYER, J. delivered the opinion of the Court—SANDERSON, C. J., SHAFTER, J., and RHODES, J. concurring.

We are satisfied, upon examination of the record, that Grimm, the intervenor, had no right, as mortgagee, to intervene in the pro-

Baldwin v. Ferre.

ceeding in the Court below, for the reasons stated in the opinion of Justice CROCKER.

Upon this ground the petition for rehearing is denied.

BALDWIN *et al.* v. FERRE *et al.*

Whereas a statement is filed and served by the moving party, on motion for a new trial, and amendments thereto are made by the opposing party, and the only settlement of, or certificate to, the same was an indorsement by the Judge at the bottom of the statement, that the amendments to the statement were allowed: *held*, that the statement would not be considered on appeal.

APPEAL from the District Court, Fourteenth Judicial District, Nevada County.

J. J. Caldwell, for Appellants.

A. C. Niles, for Respondents.

The facts are stated in the opinion of the Court.

CROCKER, J. delivered the opinion of the Court — NORRIS, J. concurring.

This is an action to recover the possession of a quartz ledge in Nevada County, with a prayer for an injunction. The plaintiffs recovered judgment against the defendants, two of whom, Baldwin and Latour, appeal to this Court. The appeal is from the judgment, and from an order overruling a motion for a new trial. The respondents contend that the statement on the motion for a new trial was never settled, and cannot, therefore, be considered as part of the record. The record shows, that the defendants filed their statement, on motion for a new trial, November 19th, 1861; that, on the twenty-third day of November, amendments thereto were filed; that, on December 2d, the statement was submitted to the Court, and taken under advisement; and at the end of the original statement appears the following clause, signed by the Judge of the

Parsons v. City and County of San Francisco.

District Court, to wit: "The amendments to the within statement are hereby allowed."

The amendments, thus allowed, were not incorporated into one document, as they should have been, but appear in the transcript in separate papers; and this Court has repeatedly held, that in such case they do not constitute such a statement as will be noticed on appeal. (*Marlow v. Marsh*, 9 Cal. 259; *People v. Edwards*, Id. 291; *Skillman v. Riley*, 10 Id. 300.) The only errors assigned by the appellants are founded upon the statement; and as that cannot be noticed, they cannot be reviewed by this Court.

The judgment is therefore affirmed.

PARSONS v. THE CITY AND COUNTY OF SAN FRANCISCO.

THE act known as the Consolidation Act, passed in 1856, released the City and County of San Francisco from all liability for damages for injuries sustained by any person on its graded streets or public highways, in consequence of said streets or highways being out of repair.

Sec. 64 of said act is not unconstitutional.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The defendant recovered judgment in the Court below, and plaintiff appealed.

Cook, Brownson & Hittell, for Appellant.

John H. Saunders, for Respondent.

CROCKER, J. delivered the opinion of the Court—NORRIS, J. concurring.

This is an action brought by the plaintiff against the City and County of San Francisco, to recover damages for injuries sustained by him, caused by falling down an embankment on Stockton Street.

The defendant sets up that she is not liable, under the provisions of Sec. 64 of the act known as the Consolidation Act (Stat. of 1856, 162), which determines the liability in such cases. Said section is as follows:

"If, in consequence of any graded street or public highway being out of repair, and in a condition to endanger persons, horses, or other animals passing therein, any person, while lawfully using said street or public highway, and exercising ordinary care to avoid the danger, suffer damages to his person; or if any horses, animals, or other property, being lawfully ridden, driven, or conveyed through such street or public highway, be injured, lost, or destroyed through any such defect therein, no recourse for the damage thus suffered shall be had against the City and County of San Francisco; but if such defect in the street or public highway have existed for the period of twenty-four hours or more, then the person or persons on whom the law may have imposed the obligation to repair such defect in the street or public highway, and also the officer or officers through whose official negligence such defect remained unrepaired, shall be, jointly and severally, liable to the party injured for the damage sustained."

The street in question was not a "graded street" at the time of the accident, and the appellant therefore contends that it could not be "out of repair," within the meaning of this section. The statute reads, "graded street or public highway;" and it is clear, that if it was not a graded street, it was a *public highway*, and therefore it was within the statute. The terms "public highway" are most general in their meaning, and include all kinds of thoroughfares in which the public have a right of way or passage. It clearly includes graded and ungraded, finished and unfinished streets. The statute says, "being out of repair, and in a condition to endanger persons," etc. These terms are not properly confined to graded, constructed, or finished streets, but include those public highways in a state of nature, or partially-graded condition, when they are in such a state as to endanger persons or animals passing therein.

It is urged, that the defendant did not show that the embankment, or other defect in the street which caused the injury com-

Creanor v. Nelson.

plained of, had existed for twenty-four hours or more before the accident. The nonliability of the city does not depend, under the statute, upon any such fact. The act exempts her from liability in any event; but the liability of other persons and public officers, for the damages, is made to depend upon that fact. It was not, therefore, a matter which the defendant was in any way bound to plead or prove.

We do not think that this section is a violation of the State or National Constitution; or that it prevents any person from enjoying the inalienable rights of life and liberty, or acquiring, possessing, and protecting property, or pursuing and obtaining safety and happiness, as declared by the first section of the State Constitution; or that it has the effect of taking the property of the plaintiff for public use without compensation. The statute, while relieving the city from liability, affords an ample remedy against those whose acts or negligence were the cause of the injury; and there is evidently no violation of any constitutional right in such a provision.

The judgment is affirmed.

CREANOR v. NELSON.

WHEREAS all the proceedings required by law have been taken to condemn land for a public highway, and the damages to the owner have been assessed, and a warrant, drawn by the Auditor on the Treasurer of the county for the amount of the damages has been tendered to the owner of the land, but refused by him, a Court of Equity will not enjoin the Road Overseer from tearing down the fences and opening the highway to the public.

The County Judge who grants an injunction, may dissolve or modify the same, upon a proper application.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

The facts are stated in the opinion of the Court.

H. O. Beatty, for Appellant.

Cresnor v. Nelson.

At the present time, Courts interfere to prevent trespass to real estate when the title is not disputed, or when, if disputed, the facts are all before the Court, and it appears there is no just reason for disputing the title, and the injury will be continuous or irreparable. Formerly, the Courts only held such injuries irreparable as the skill of man could not repair; such as destruction of trees, removing of beds of mineral, etc. But the more modern decisions hold another kind of injury irreparable. That is an injury done by a trespasser who has not the pecuniary means or ability to repair the damage he has done. This kind of irreparable injury, is alluded to in many of the cases decided by the Supreme Court of this State. (*Merced Mining Co. v. Fremont*, 7 Cal. 329, 330; *Bensley v. Mountain Lake Water Co.*, 13 Id. 313.)

That the threatened repetition would be a strong reason for the granting of an injunction, we refer to the remarks of Justice Burnett, in *Coker v. Simpson et al.* (7 Cal. 341, 342).

The justification turns upon a single point. Is it payment or compensation for a man's property, to give a warrant on an empty treasury? The proceedings to condemn this property for road purposes seem to be regular, except that they offer no payment for the property condemned, unless a warrant on a treasury without money is such. On this point the Supreme Court of this State has repeatedly held, that it is necessary, when taking private property for public use, that the money should be paid before or simultaneous with the taking; or, if not so paid, that the fund shall be provided, so as to pay as soon as the rights of the party deprived are determined by a Court of competent jurisdiction. (*McCam v. Sierra County*, 7 Cal. 124; *McCauley v. Weller*, 12 Id. 528, 531.)

Brown & Graves, for Respondent.

CROCKER, J. delivered the opinion of the Court — NORRIS, J. concurring.

This is an appeal from an order dissolving an injunction. The complaint alleges that the defendant had entered upon the plaintiff's land, torn down the fences, and threatened to continue these acts. The County Judge granted an injunction upon the com-

plaint alone. The defendant filed an answer justifying the alleged trespass, on the ground that the land in question was a public highway; that he was Road Overseer, and that he entered on the land as such Road Overseer, to open the highway—but did not aver that the money had been paid to the plaintiff as a compensation for the land taken. Upon this answer the County Judge who granted the injunction dissolved the same on motion of the defendant. It appears that the County Judge dissolved the injunction upon two grounds: 1st. That the complaint was insufficient to authorize the injunction; 2d. The defendant's answer showed that the injunction ought not to be continued.

The answer alleges that the road in question was duly declared a public highway by the proper authorities, all the steps required by law having been taken, and that he was duly ordered by the Board of Supervisors to open the road as surveyed and marked out, and cause the same to be kept open to the public; that the damages to plaintiff's land were duly assessed at five hundred dollars; that the Board of Supervisors had ordered that said sum be paid to the plaintiff from the General Fund of the county, and ordered the County Auditor to draw his warrant therefor on the County Treasurer, which was done; and before defendant entered on the land, said warrant had been duly tendered to the plaintiff, which he refused to accept; and the warrant is still ready to be delivered to the plaintiff on demand.

The granting of injunctions is an equitable proceeding, and the party seeking this peculiar equitable relief should show that he has a right under all the circumstances to this extraordinary writ. In a case like the present it must appear, that he will suffer "great or irreparable injury" if the defendant is suffered to continue the acts complained of; it must also appear, that the plaintiff is not in default in the matter.

Under the circumstances of this case, it is clear that the plaintiff will not suffer any injury whatever by the acts of the defendant. The land has been duly condemned to public use for the purposes of a public highway. The amount the plaintiff is entitled to as a compensation for his land thus taken for public use has been duly ascertained according to law, and the public officers have issued

the proper warrant to the plaintiff, which is the only mode prescribed by law by which the money can be drawn from the public treasury, and the proper mode by which this compensation is payable to the plaintiff under the provisions of the statute. His refusal to receive the warrant and draw the money is his own fault, and affords him no just ground for saying that he has received no compensation, or a proper foundation for the writ of injunction. When he asks equity, he must show that he is not in fault. (*Harper v. Richardson*, 22 Cal. 251.)

In the case of *Bruce v. The Delaware and Hudson Canal Company* (19 Barb. 371), the defendants, in enlarging their canal — which they had a legal right to do — raised by a dam the waters of a creek on which the plaintiff had a mill, which was injured thereby: held, that the remedy for the injury was by an action for damages, or by proceedings under the statute for the appraisal and payment of the damages, and not by an injunction to restrain the act; that it is not every case, even of a clear violation of the plaintiff's rights, that entitles him to an injunction to restrain such violation. He must first show clearly that the act itself is illegal. To authorize a temporary injunction, it must appear the act sought to be restrained is unlawful. So, it has been held that an act done under a lawful authority, if done in a proper manner, will not subject the party doing it to an action for the consequences, whatever they may be. (*Radcliff v. Brooklyn*, 4 Com. 195.) So, where a party, whose land has been taken by a railroad company, might have insisted on receiving a compensation at the time, but neglected to do so, and forbears to assert his right until after the road is completed — and when an interruption of its business would be seriously injurious — an injunction should not be granted; at least, not until all ordinary means for obtaining an indemnity have failed. (*Hentz v. Long Island R. R. Co.*, 13 Barb. 647.) Where an authority about to be exercised by a municipal corporation, is of a public nature, and for the interests, necessities, and conveniences of the public — and is lawful in its character — all private rights and interests are, to a certain extent, subordinate to it. (*Ely v. City of Rochester*, 26 Barb. 133.) We cite these authorities to show that the granting or continuance of an injunction in cases like this, where the

Ward v. Preston.

public interests are involved, is not a matter of absolute right, but to be determined by a consideration of all the equities of the case.

It is also urged, that although the County Judge had power to grant the injunction, he had no power to dissolve it — and, therefore, the order dissolving it is void. Sec. 111 of the Practice Act authorizes a County Judge to grant the order, or writ, and his right to act under this section has been sustained by this Court. (*Thompson v. Williams*, 6 Cal. 88; *Crandall v. Woods*, Id. 449.) Sec. 118 of the Practice Act provides that, “if an injunction has been granted without notice, the defendant, at any time before the trial, may apply, upon reasonable notice, to the Judge who granted the injunction, or to the Court in which the action is brought, to dissolve or modify the same.” Under this statute, the County Judge, who has granted the injunction, may dissolve or modify it, upon a proper application; and the same reasons which sustain the power to grant, apply equally to the power to dissolve and modify. We see no valid constitutional objection to his exercising the powers vested in him by these sections.

The order is affirmed.

WARD v. PRESTON.

THE declarations of an agent, while acting as such, made in and about matters connected with and in the scope of his agency, are admissible in evidence against the principal.

When, in the course of a trial, irrelevant testimony is offered by one party, and objected to by the other, and admitted by the Court, and the Court afterwards strikes out the testimony, and directs the jury to disregard it, the error in admitting the evidence is cured, and affords no valid ground for reversing the judgment.

APPEAL from the District Court, Fifteenth Judicial District, Tehama County.

One Smith recovered a judgment against Kretzer and F. Crosby, partners in trade, for seven hundred and forty-one dollars and sixteen cents, and costs; and on the ninth day of January, 1861, assigned the judgment to plaintiff, Ward, and on the same day an

Ward v. Preston.

execution was issued on the judgment, by virtue of which the Sheriff levied on and sold the hogs in controversy. Kretzer & Crosby were the owners of the hogs, when levied on. At the time of the sale by the Sheriff, Ward was absent in Mendocino County, and Lewis Crosby bid in the property for Ward. When Ward returned he satisfied the judgment, and directed the Sheriff to call on Crosby for some six hundred dollars, being the amount of the purchase more than the judgment. The defense was, that Ward never owned the hogs, but that they were purchased in his name by Crosby, who was the real owner. The other facts are stated in the opinion of the Court.

W. H. Rhodes, for Appellant.

Injury will be presumed, where error is apparent. Every error in the Court below, in rejecting, and much more in admitting evidence, is, *prima facie*, an injury; and it rests with the other party, clearly, to show that no hurt would have been, or was done, by the error. (*Jackson v. Feather River Water Co.*, 14 Cal. 25.)

The declaration, or admission, of a person competent to be a witness, and who is not shown to have acted on behalf of the adverse party, cannot be proved, even though, when subpoenaed, he absents himself from the trial. (*Woodward v. Paine*, 15 Johns. 493.) A party who can call a witness cannot give evidence of his declarations. (*Alexander v. Maher*, 11 Johns. 185; *Bristol v. Darr*, 12 Wend. 142.)

It was error to admit the papers in the case of *Betts v. Crosby & Chapman*. But it may be argued that the Court, on motion, struck out the evidence. The answer to this is apparent. It is the province of the Judge to control the admissibility of evidence; and he has no right to permit evidence to go before a jury, unless its relevancy and competency be first shown. In most cases, it is impossible to erase from the minds of a jury, the effect produced by incompetent proof, even though the Judge should instruct the jury to disregard it. The safest rule in cases of written proof, is to allow the instrument to be proven, and afterwards, on showing by other proof its relevancy, then to introduce it, and not till then. (*Matter v. Brown*, 1 Cal. 224; 1 Graham on New Trials, 240.)

Ward v. Preston.

W. H. Long, for Respondent.

CROCKER, J. delivered the opinion of the Court — NORRIS, J. concurring.

This is an action to recover the possession of two hundred and fifty hogs. The plaintiff claimed the property, as purchaser at a Sheriff's sale, on an execution issued on a judgment owned by him, in which L. Crosby and another were defendants, and which were levied upon as the property of Crosby. It seems that the plaintiff requested Crosby, after the sale, to look after the hogs, and to make a contract with some one to fatten them. He made an arrangement with one Gill, and directed him to go to the plaintiff to make the bargain, which he did, and the plaintiff entered into a contract with Gill for the latter to fatten and market the hogs; that is, after fattening them, to sell them in the market to the best advantage; and they were to divide the proceeds equally between them. Gill took possession under this agreement, and soon after sold them to the defendant. The defendant recovered judgment, from which the plaintiff appeals.

At the trial, a witness was asked whether Crosby ever offered to sell the property, and what Crosby said when applied to to remove the hogs? The permission to ask these questions, is assigned for error. It seems that after the purchase at Sheriff's sale, Crosby, at the request of plaintiff, took charge of the hogs, and was authorized, to some extent, to act as agent for the plaintiff; and as such, his acts and statements connected therewith while thus acting as agent, were admissible as evidence. But even if they had not been strictly admissible, they could not have operated as a material injury to the plaintiff, nor would the error be such as to justify us in reversing the judgment.

It appears that one Betts recovered a judgment against Crosby and one Chapman, issued an execution, and procured an order for the examination of Gill, under Sec. 241 of the Practice Act, to testify as to any property he might have in his hands, belonging to Crosby. Gill appeared, and stated that he had sold certain hogs, belonging to Crosby & Preston, and had five hundred dollars of the money in his hands. Thereupon, the Court ordered Gill to pay this

money to the Sheriff, to be applied on the execution. At the trial of this case, the Court permitted the defendant to introduce the record of these proceedings in evidence, and this is assigned for error. This evidence was clearly irrelevant to the matters in issue in this case, and not competent to be used against the plaintiff. He was not a party to those proceedings, had no notice thereof, and they cannot be held to bind or affect him in any way. But the Court afterwards struck out the evidence, and directed the jury to disregard it. The Court may have admitted it under the supposition that the defendant would show, that in some way, the plaintiff was bound thereby, but finding that was not done, ordered it stricken out. Under these circumstances, the error in admitting the evidence, was cured by this act of the Court, and it affords no valid ground for reversing the judgment.

At the trial, the Court gave the jury the following instructions, to which the plaintiff excepted, and now assigns for error: "You, gentlemen of the jury, are to try in this cause two principal questions: First, Did this property belong to Loomis Ward at all? and, second, if it ever did, did he authorize the man, James Gill, to sell the same to defendant? In the first inquiry, you can investigate the question—Was not L. Crosby the owner of the property? and, if so, you need not go any further; for if L. Crosby was the owner, the plaintiff has no right to complain, and cannot maintain this action. In order to ascertain whether L. Crosby was or was not the owner, the jury can take into consideration all the circumstances attending the sale by the Sheriff; the care and control of the hogs taken by Crosby, if any; the offer by him to sell them to Jaynes and others; and the conversation of witness Bell with plaintiff, Ward. This conversation is not admitted, to show an estoppel as against Ward, for such is not the effect of it, but it is admitted, with other testimony, to contradict or disprove Ward's claims of property in the hogs." We see no valid objection to these instructions. It drew the attention of the jury to the main questions of fact they were called upon to decide, and they violate no rule of law. The defendant clearly was not injured by them.

The judgment is affirmed.

Irvine v. McKeon.

IRVINE v. McKEON.

SECTION 14 of the general Corporation Law of April 22d, 1850, making the directors of a corporation jointly and severally liable for the excess of the debts of the corporation, over and above the amount of capital stock actually paid in, being a statute creating a forfeiture, or imposing a penalty, is to be strictly construed.

The parties to a deed are not estopped by the consideration expressed in it, from showing what the real consideration was.

In an action brought against one of the directors of a corporation, under Sec. 14, above referred to, it is necessary for the plaintiff to prove that defendant was a director when the debt was created, and was present at the meeting of the board when the same was passed upon.

APPEAL from the District Court, Sixteenth Judicial District, Calaveras County.

The plaintiff, in this case, was a judgment creditor of the corporation. The corporation had not been dissolved before the commencement of this action, by any proceeding under the statute; but its property had all been sold under execution about two years before the commencement of this action, and from that time it had ceased to hold meetings, elect officers, or perform any act in its corporate capacity. The Court, in its opinion, has not found it necessary to pass upon the question of its dissolution; but as the brief of appellant's counsel discusses the question, some portion of it is inserted.

John G. Hyer, for Appellant.

It is one of the most patent rules of interpretation, one too patent to need fortification with authorities, that when a statute makes a certain class of persons liable, under a given state of facts, and then states certain exceptions to the general rule, that a person who is *prima facie* liable as within the rule, if he desires to show that he is within the exception, must allege and prove such facts as will bring him within it. The only question upon which there can be any doubt, is as to the dissolution of the corporation. But under the state of facts shown: the property of the corporation being all sold out in 1859 at forced sale, they have held no election of officers or trustees since June, 1858; have performed no corporate

act, done nothing whatever since September, 1858; have been regarded and have themselves regarded the corporation as dissolved, and treated it so. We contend that it makes no difference whether there had been any actual formal dissolution of the corporation or not; that the contingency has happened upon which, in the contemplation of the statute, the liability of the trustees to the creditors of the corporation should attach, for the excess of the debts of the corporation above the amount of the capital stock actually paid in. In Angell & Ames on Corporations, Chap. "Dissolutions," etc., 740-741, 3d Ed., the following argument is used: "But if a corporation suffer acts to be done which destroy the end and objects for which it was instituted, it is equivalent to a surrender of its rights. This doctrine has been maintained and applied by the Courts of New York, in the construction of the statute of that State concerning manufacturing corporations, which provides that for all debts due and owing by the company at the time of its dissolution, the persons then composing such company shall be held individually responsible to the extent of their respective shares of stock, and no further. Under this statute, if a corporation being indebted, suffer all its property to be sacrificed, and the trustees actually relinquish their trust, and omit the annual elections, and do no one act manifesting an intention to resume their corporate functions, the Courts may, for the sake of remedy against individual members, and in favor of creditors, presume a virtual surrender of the corporate rights, and a dissolution of the corporation. And an election of trustees, made after insolvency of the company, for the mere purpose of keeping it in existence, will not prevent such dissolution. In these cases, the Courts of New York did not decide that the companies had lost all their rights; but, that even if they had a right to reorganize themselves, the case had happened in which, with regard to their creditors, they were dissolved."

In this case, the same doctrine is sought to be applied (that is, on the hypothesis that the corporation is not dissolved) to enforce the statutory liability of the trustees, as was applied in New York (see the cases cited in notes to the above quotations) to the liabilities of stockholders upon dissolution. That the doctrine there laid down is correct in principle, will appear from the consideration,

Irvine v. McKeon.

that if it were not so, a set of trustees could run a corporation into debt far above the amount of capital stock paid in—the statutory limit of their capacity to contract—and then by keeping up a show of corporate existence, prevent the attachment of the personal and individual liability. The law favors no such factitious theories. It says, in the event of dissolution, the trustees shall be liable for the excess of debts above the amount of capital stock actually paid in.

Dudley & Adams, for Respondents.

[No brief on file.]

CROCKER, J. delivered the opinion of the Court—NORRIS, J. concurring.

This is an action brought by the plaintiff, as a creditor of a corporation called "The Murray Creek Quartz Mining Company," against the defendant as trustee of said company, on the ground that the debts of the company exceeded its capital stock actually paid in. The case was tried by a jury, who found for the defendant, and from the judgment rendered thereon the plaintiff appeals.

This action is founded upon Sec. 14 of the general Corporation Law of April 22d, 1850 (Wood's Dig. 116), which is as follows: "The total amount of the debts which any incorporate company shall owe, shall not at any time exceed the amount of the capital stock actually paid in; and in case of any excess, the directors, under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large on the minutes of the said directors at the time, and except those who were not present when the same did happen, shall, in their individual and private capacities, jointly and severally, be liable for such excess to the said corporation; and in the event of its dissolution, to any of the creditors thereof, to the full amount of such excess, with legal interest from the time such liability accrued; and no statute of limitation shall be a bar to any suit against such directors for any sum of money for which they are made liable by this section. This statute provides for making one person individually liable for the debts of another, and prescribes how and under what circumstances he shall be held thus liable. Like other stat-

Irvine v. McKeon.

utes which create a forfeiture or impose a penalty, it is to be strictly construed; and every intendment and presumption is in favor of the defendant in such cases. He is to be held liable only on full and strict proof of all the facts by the statute made essential to create the liability.

The evidence as to the "amount of capital stock paid in" was that a quartz mill and lode was put in, worth from \$6,000 to \$8,000, and that McKeon put in \$1,095, and that the debts of the company, when it ceased to do business, amounted to \$9,084. These facts would not be sufficient to show that the debts exceeded the amount of the capital paid in. There is no evidence that this was *all* the capital stock paid in, and that fact is not to be presumed. But it is urged that as the deed from the former owners of the mill and lode to the corporation expressed a consideration of only twelve dollars, therefore that is to be considered the amount paid in, instead of the real value of the property. We do not agree with the appellant on this point. The grantors in that deed were the members of the new corporation, and they evidently did not deem it important to insert the full value of the property as the consideration. The real consideration of a conveyance of property may always be inquired into, and the parties are not estopped by the deed from showing it. The value of the property thus conveyed was to be deemed as so much "capital stock actually paid in."

It was necessary for the plaintiff to prove also that these debts were contracted under the administration of the defendant, as one of the directors or trustees of the corporation, and that he was "present when the same did happen;" for "those who were not present when the same did happen" are expressly excepted from the liability imposed by the statute. In this case, there was no evidence whatever upon this material point. The verdict of the jury was therefore clearly in accordance with the law and evidence.

The judgment is therefore affirmed.

In Matter of Estate of Pacheco.

IN THE MATTER OF THE ESTATE OF PACHECO.

When letters of administration have been granted to any other person than the surviving husband or wife, the child, father, mother, or brother of the intestate, and either of the persons occupying that relation to the deceased, present a petition to the Probate Court to have the letters of administration revoked, and to be appointed in place of the incumbent, it is the duty of the Probate Court to make the revocation, and appoint the petitioner, if he or she be competent to perform the duties of the trust.

The word "competent," as used in the sixty-ninth section of the Probate Act, and applied to a surviving husband, or wife, child, father, mother, or brother, means, not addicted to drunkenness, not imprudent, or wanting in integrity or understanding.

APPEAL from the Probate Court, Santa Clara County.

The facts are stated in the opinion of the Court.

Chase and Brown, for Appellants.

Appellants submit that, as against the whole world beside, they have an absolute, unqualified, personal, statute right to have the appointment of respondents revoked.

Probate Act, Sec. 52, prescribes this absolute right, and the order of priority in cases of estates of intestates. Sec. 97 makes the same right and priority applicable to cases of estates devised, and where testamentary administration is sought. Sec. 67 grants the right of revocation, by petition, of letters granted to one not a relative. Such is the case at bar. Sec. 68 provides for issuance of citation to administrator to appear and answer such petition. Sec. 69 provides, that if the prior right of applicant be established, and he or she be not incompetent, the former letters "shall be revoked," and letters issued to applicant. Sec. 70 provides for the assertion of the prior right generally, even as against an administrator who is a relative, but has only a secondary right.

As to the foregoing provisions, it is submitted that they are expressed, each of them, in language too plain to warrant any attempt to construe or interpret them out of the natural import of the language used.

Appellants have, alike, absolute, unqualified, personal, statute

right to have their nominees, in their petition named, appointed to administer upon said estate.

In the matter of this last proposition, the Probate Court had no discretion to exercise, save only in determining: first, whether the nominees, or either of them, were subject to statute disqualifications, as enumerated in Probate Act, Sec. 55; second, whether, in the case before him, the nominees were "equally entitled" with others. (Prob. Act, Sec. 54.) Sec. 66 provides, that one or more competent persons, though not legally entitled, may be appointed at request of those who are legally entitled. (*Kirtlan's Estate*, 16 Cal. 163.)

The statute grounds are the only grounds of disqualification, as against an applicant legally entitled, or entitled by request of one legally entitled. (*Coope v. Lowery*, 1 Barb. Ch. 45; *Harrison v. McMahon*, 1 Brad. Sur. 283.)

Where the applicants are equal in right, and not subject to statute disqualifications, then the majority of those in equal right, *ceteris paribus*, controls the minority, though the latter be in the same order of right. (*Peters v. Public Administrator*, 1 Brad. Sur. 207.)

Pratt & Clarke, for Respondent.

Under the provisions of our Probate Act, executors or administrators may be removed for the following causes:

1. For failing to render an exhibit, when required so to do by the Court. (Prob. Act, Sec. 227.)
2. For neglecting to give additional security, or file new bond, when so required by order of the Probate Court. (Sec. 81.)
3. For fraud, embezzlement, waste, removal from the State, or wrongfully neglecting the estate. (Secs. 281-283.)
4. When letters of administration have been granted to any other person, other than the surviving husband or wife, and a child, father, mother, or brother of intestate competent to the trust, applies for the revocation of such letters, and to have letters issue to such applicant. (Probate Act, Secs. 67-69.)

Of these several grounds for removal, the fourth and last is the only one upon which appellants rely in their efforts to remove

In Matter of Estate of Pacheco.

respondent from the administration. Respondent contends that this ground is not tenable in this case, because—

1st. It is not a case within the provisions of Secs. 67–69. Those sections make provisions for such cases, and such cases only, as arise when a party dies intestate, and original letters of administration have been granted. Now, in this case, the record shows that Juana Sanchez de Pacheco, died intestate, and that respondent holds letters of administration, with the will annexed, duly issued after the original letters testamentary had been revoked. And, because,

2d. Under the provisions of Secs. 67–69, the applicant must not only be a child, father, mother, or brother of an intestate, but must in addition thereto, be by the Court adjudged “competent;” and the Court, in this case, passing upon the evidence before it, has adjudged the appellants not competent to the trust solicited.

The Court below refused to remove Emeric upon the showing of the petitioner, and until such removal, no new administrator can be appointed. With this action of the Probate Court refusing to remove Emeric, this Court will not interfere, unless it be clearly shown that there has been a gross abuse of discretion. (*Deck's Estate*, 6 Cal. 669.) This Court surely will not hold that the Probate Court has been guilty of a gross abuse of discretion, in refusing to remove an administrator whom it decreed both capable and faithful, that it might appoint one whom it adjudged not competent to the trust.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

Juana Sanchez de Pacheco died in 1853, leaving a last will and testament, appointing therein two executors, who administered upon the estate until their letters were revoked on account of mismanagement of the estate, and the respondent in this proceeding, Emeric, was duly appointed administrator, with the will annexed. Some time after the appointment, several of the children and grandchildren of the deceased, and who are the appellants herein, united in a petition praying that Emeric be removed from the administration of the estate, and that one of their number, Rosa Pacheco de Sibrian,

In Matter of Estate of Pacheco.

and one Penniman, be appointed in his place, on the ground that he was not entitled to the position by any relationship to the deceased or interest in the estate; that his appointment was not requested by any of the children of the intestate; and other objections are urged in the petition filed by the appellants. The application was heard by the Court, who found the following facts: "That the estate of Juana Sanchez de Pacheco is one of great value, to wit: of the value of at least \$100,000; that the acts of the present administrator in all respects meet the approval of this Court; that the petitioner, Rosa Pacheco de Sibrian, is wholly incompetent to perform the duties that would be devolved upon her as administratrix of said estate, and the applicant, Penniman, is a trespasser upon the property of the estate, and is a very improper person to be intrusted with an estate to the prosperity of which he is shown to be in interest opposed. The Court therefore, now, on this ninth day of December, denies said petition with costs against said applicant." From this judgment the applicants appeal.

The first point urged by the appellants is, that they have an absolute, unqualified, personal statutory right to have the appointment of the respondent revoked; and second, that they have the same right to have the applicants for letters appointed to administer upon said estate. One ground of objection to the continuance in office of the present administrator is, that the estate consists of a large tract of land, which has never been partitioned between the heirs; that several of the heirs are and have been for several years residing upon and occupying portions of the land, and that he has brought several suits against them to eject them therefrom, and to recover large sums for back rents, when he has means of the estate in his hands more than sufficient to pay all liabilities against the estate.

Sec. 67 of the Probate Act provides, that "when letters of administration have been granted to any other person than the surviving husband, or wife, the child, the father, mother, or brother of the intestate, any one of them may obtain the revocation of the letters by presenting to the Probate Court a petition praying the revocation, and that letters of administration be issued to him or her." The next section provides for issuing a citation to the

In Matter of Estate of Pacheco.

administrator, and Sec. 69 is as follows: "At the time appointed, the citation having been duly served and returned, the Court shall proceed to hear the allegations and proofs of the parties; and if the right of the applicant is established, and he or she be competent, letters of administration shall be granted to the applicant, and the letters of the former administrator be revoked." The appellants contend that the incompetency referred to in this section must come within the disqualifications prescribed in Sec. 55 of the same act, which was amended in 1861, as follows: "No person shall be entitled to letters of administration who shall be, first, under the age of majority; or, second, who shall have been convicted of any infamous crime; or, third, who upon proof shall be adjudged by the Court incompetent to execute the duties of the trust by reason of drunkenness, imprudence, or want of integrity or understanding." (Stat. 1861, 632.) On the trial, it was admitted that one of the applicants, Rosa Pacheco de Sibrian, cannot read, write, or speak the English language; that she cannot read or write the Spanish; that she is sixty-nine years old, a Californian by birth, and a daughter of the intestate. It is not claimed that the other applicant, Penniman, is subject to any of the disqualifications mentioned in Sec. 55, nor is the other applicant properly included therein. The fact of her great age, and that she cannot read or write, and cannot speak English, do not show any want of understanding within the statute. It is true, they may render it difficult for her to perform some of her duties properly, yet they do not render it impossible.

In the case of *Coops v. Lowerrre* (1 Barb. Ch. 45), it was held by the Court of Chancery of New York, in construing a similar statute, that the Surrogate had no discretion to exclude a person declared by the statute to be entitled to a preference, except for some of the causes specified in the statute. And it was held, that no degree of legal or moral guilt or delinquency was sufficient to exclude a person from the administration, as the next of kin, in the cases of preference given by the statute, unless such person had been actually convicted of an infamous crime. In that case, the administration was granted to a person proved to be dishonest, and against whom a large judgment had been recovered in a case of *crim.*

Phoenix Water Company v. Fletcher.

con. The same principles were affirmed in the case of *Harrison v. McMahon* (1 Brad. 283), where the administration was granted to one charged with being addicted to gambling and betting, and who had no regular business except that of a gambler. We therefore hold that under the admissions and evidence in this case the daughter, Rosa Pacheco de Sibrian, was entitled to letters of administration.

The evidence in relation to the character and fitness of the other applicant, Penniman, is clear and conclusive in his favor; in fact, no evidence seems to have been introduced impeaching it. The finding of the Court was, that he was a trespasser upon the property of the estate; but the appellants offered to prove, on the trial, that he and his partner were the owners of five hundred acres of the land formerly belonging to the estate, and which he purchased from one of the heirs; but the Court refused to admit the evidence. How the Probate Judge could make such a finding, after excluding the evidence offered to disprove it, we cannot conceive. But even if the findings on this point were true, they form no just ground for his exclusion, where he is the choice of so large a proportion of the children as in this case. Under the admissions and evidence in this case, we think it clear that both the applicants are entitled to be appointed to administer upon the estate. All the facts necessary to show that the applicants were entitled to administration, were admitted by the parties at the trial, and it is not, therefore, necessary to send the case back for a new trial.

The orders appealed from are therefore reversed, and the Probate Court is directed to enter an order in accordance with this opinion.

PHOENIX WATER COMPANY v. FLETCHER *et al.*

The prior appropriator of a stream of water for mining purposes, has a right to have the water flow down above the point of his appropriation without interruption or diminution in quantity.

One who enters upon a stream of water above the prior appropriator and erects hydraulic works, must so construct them as not to impede the regularity of the flow of the water, if its irregular flow would injure the first appropriator.

Phoenix Water Company v. Fletcher.

A mere temporary or trivial irregularity in the flow of the water, such as does not cause actual injury to the prior appropriator below, will not be actionable; but if a sensible or positive injury be caused, such as would diminish the value of the water right, an action will lie, not only to recover damages, but to enjoin the future commission of the wrong.

Where special issues are submitted to a jury, they should include all questions of fact raised by the pleadings and necessary to determine the case, and should be separately and distinctly stated, so that each question should relate to only one fact.

APPEAL from the District Court, Fifth Judicial District, Tuolumne County.

The facts are stated in the opinion of the Court.

H. P. Barber, for Appellants.

Let us examine the reasons assigned by the Court below for its decision:

1st. "That the dam was necessary for defendants' mill."

Admit this; but it by no means follows that the necessities of defendants can deprive us of prior vested rights.

2d. "That the water was suffered to flow into plaintiffs' ditch after its use by the mill."

True; but it was returned in an impure and deteriorated condition, being filled with refuse bark and sawdust, which is not attempted to be excused even on the plea of "necessity," and which would be a legitimate ground of action, even if defendants had been prior instead of subsequent locators. A proprietor above cannot use the water so as to corrupt or impair its quality to the injury of others, as in permitting sawdust to fall into it. (*Lewis v. Stein*, 16 Ala. 218.) We make no complaint as to the mere user of the water by defendants, but they cannot destroy its utility for our user—a *fortiori* where we have a prior right.

3d. "That the injury was *damnum absque injuria*."

This is certainly a novel application of the rule. (20 Barb. 645.) Broom (Legal Maxims, 156) says: "It frequently happens in the ordinary proceedings of life, that a man may lawfully use his own property so as to cause damage to his neighbor, provided it be not *injurious*; or he may, while pursuing the reasonable exercise of an established right, casually cause an injury which the law will

Phoenix Water Company v. Fletcher.

regard as a misfortune merely, and for which the party from whose act it proceeds will be liable neither at law nor in conscience."

All these conditions are wanting in the present case.

I. The deterioration of the water by sawdust and refuse bark was not a lawful use of it.

II. This was not defendants' "own property." So far as prior appropriation could establish the right, it was that of plaintiffs'.

III. This abuse of defendants' user was "*injuriousum*" to plaintiffs'.

IV. Defendants, as against us, were not in the exercise of any "established right," for our rights being prior in point of time were superior in law. (*Tuolumne County Water Co. v. Chapman*, 8 Cal. 392; Angell on Water Courses, 159, Sec. 140; *Id.* 412, Sec. 335.)

As to the user by defendants of the water for over five years, that makes no difference; it is not the use, but the abuse of this user that we complain of. They have not pleaded any right to accelerate or retard the natural flow of the water; nor to throw sawdust or refuse bark into it. The rule of law is, that until plaintiffs sustained damage from the abuse of defendants' user, no claim of prescription would lie against them—the Statute of Limitations running, not from the date of the lawful use, but the unlawful abuse. (*Murtrugoza v. Robinson*, 7 Ellis & B. 391.)

We refer to the following authorities as showing the decisions of this Court as to water rights acquired by prior appropriation: (5 Cal. 145, 146; 6 *Id.* 108; 7 *Id.* 49, 262, 329; 8 *Id.* 336; 11 *Id.* 154; 12 *Id.* 47; 13 *Id.* 38, 233; 15 *Id.* 181; 3 Kent. 595.)

There are three legal maxims peculiarly applicable to this case: "*Qui prior est in tempore potior est in jure*;" "*Ubi jus ibi remedium*;" "*Sic utere tuo ut alienum non laedas*."

John Reynolds, for Respondents.

In the case cited by appellants' counsel, from 20 Barb. 644, the Court held, that it was no answer to the violation of a clear legal right, that the injury was nominal. So in this case, if the defendants had no right in common with the plaintiffs to use this water, then the finding that the injury was nominal would be no

Phoenix Water Company v. Fletcher.

answer, according to this authority. But in the case at bar, the defendants have a clear right to use the water for mill purposes, if they use it in a reasonable manner—if no actual and material injury results therefrom to the plaintiffs. And the defendants have a right to use the water for mill purposes in any manner they please, if no material injury results to the plaintiffs.

In the case of *Bear River Co. v. York Mining Co.* (8 Cal. 336), this Court say:

1st. The ditch owner is entitled to have the water flow, without material interruption, in its natural channel.

This right would seem to be compatible, in general, with the fair use of the water above.

2d. He is entitled to the water, so undiminished in quantity, as to leave sufficient to fill his ditch as it existed at the time the locations were made above.

In the case of *Butte Canal and Ditch Co. v. Vaughn* (11 Cal. 153), the Court say: "The first appropriator of the water of a stream passing through the public lands in this State, has the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that its quality shall not be impaired so as to defeat the purpose of its appropriation. To this extent his rights go, and no further. In subordination to these rights, subsequent appropriators may make such use of the channel of the stream as they think proper."

The special findings show that the defendants used the water in subordination to these rights of plaintiffs; that no damage was done to the waters which materially affected the use of the water by plaintiffs for the purposes for which they had appropriated it.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action to recover damages, and for an injunction to restrain the defendants, who are the owners of a sawmill on a stream, the waters of which the plaintiffs claim by prior appropriation for mining purposes, from interfering with the regular flow of water to plaintiffs' ditch, and from throwing sawdust and other refuse into the water, to the plaintiffs' injury. Special issues were

submitted to a jury, who returned the following special verdict: "First. At what time did the plaintiffs' grantors appropriate the waters of Sugar Pine Creek for mining purposes? Answer: March, 1852. Second. At what time were the waters of Sugar Pine Creek appropriated by defendants' grantors for mill purposes? Answer: July, 1852. Third. Is the injury inevitable, and can the defendants have and enjoy the mill in the place they do, without creating the injury? Answer: Yes. Fourth. Do defendants use the water in running their mill in a reasonable way, and if any injury is had to plaintiffs, is it nominal, merely? Answer: Yes." The plaintiffs moved for perpetual injunction, to restrain the defendants from doing the acts complained of; which the Court denied, and ordered that the restraining order, issued at the commencement of the action, be dissolved, and that the bill be dismissed with costs; from which judgment the plaintiffs appeal.

The injuries complained of are: first, that the defendants' dam, which is above the plaintiffs' ditch, causes the water to flow irregularly, at times holding it back, and suffering but a small quantity to flow to the plaintiffs' ditch, and at others letting it down in greatly increased quantity; second, that the sawdust and refuse bark of the sawmill is thrown into the stream by the defendants, clogging and filling the plaintiffs' ditches and reservoirs, and thereby diminishing their capacity to flow and hold water. The evidence shows that these are serious injuries to the plaintiffs, causing them considerable loss and damage; but after the evidence was closed, the plaintiffs' counsel stated to the Court and jury that they did not care about the amount of damages, and would consent that they should be considered as merely nominal, as the suit was brought for the purpose of protecting plaintiffs' rights, and not for the amount of damages. This may have induced the jury to find that the damages were merely nominal. The Court refused the injunction and dismissed the action, "on the ground that the dam was necessary for the defendants' mill, that the water was flowed into plaintiffs' ditch after its use by the mill, and that the injury was *damnum absque injuria*," to which the plaintiffs excepted.

It is not controverted that the plaintiffs have a prior right to the use of the water of the stream, and that the defendants have done

and continue to do the acts complained of; and the real question is, whether the injuries are of such a character as to entitle the plaintiffs to a remedy by injunction, to restrain the defendants from the future commission of the acts complained of.

First, then, as to the injury caused by the irregularity of the flow of water. The importance of a regular flow of water to mining ditches is apparent. The profits of the business of mining depend, to a very great extent, upon a steady, constant supply of water, flowing with regularity to the reservoirs constructed to receive and hold it, and regularly distributed to the miners who depend upon it for their supply. The rule of law is well established, that the owner of hydraulic works on the stream above, has no right to detain the water unreasonably. He must so construct his mill, or other works, and so use the water, that all persons below him, who have a prior or equal right to the use of the water, may participate in its use and enjoyment without interruption. Still, a mere temporary or trivial irregularity in the flow of water, such as does not cause actual injury to the proprietor below, will not amount to an actionable injury. The question, in such cases, will turn upon the nature and extent of the injury. It is said that the proprietors above have a right to a reasonable use of the water; but the true test of this is, whether such use causes any positive or sensible injury to the prior appropriator or proprietor below, by diminishing the value of the right. (*Angell on Water Courses*, Secs. 115-118; *Merritt v. Brinkerhoof*, 17 J. R. 306; *Tyler v. Wilkinson*, 4 Mason, 401.)

In this case the jury found that the defendants could enjoy the mill in the place it was located, without creating injury; but the dam was necessary for the defendants' mill; evidently predicated its action upon the idea that if it was necessary for the use of the mill, the plaintiffs had no right to complain. This is clearly an erroneous view of the principles governing such cases, as we have already shown. It is true that the jury found that the defendants used the water in a reasonable way, coupled with a finding that the plaintiffs' damages were merely nominal. But, as already stated, the latter finding may have been predicated upon the statement of the plaintiffs' counsel that they would only ask nominal damages, as they were not the main object of the suit.

Besides, the third and fourth questions were submitted to the jury, at the request of the defendants, the plaintiffs' counsel objecting thereto, and one of the assignments of error is, that the Court erred in submitting them. Each question submitted to a jury as a basis for a special verdict, should relate only to *one fact*; and grouping together several facts, as was done in these two questions, was very objectionable. The evil of this practice is evident, when we consider the answer to the third question in this case, which is in the affirmative as to the two facts stated in the question. The answer as to one of these facts, to be consistent, should be directly the contrary of the other. They answer that the injury was inevitable, and yet the defendant could have enjoyed the mill without creating the injury. Although the same contradiction does not exist in the answer to the fourth question, yet the two facts submitted therein should have been separated, and put in two questions instead of one. The great difficulty in applying the principle of law to the case, arises from the manner in which those questions were framed and submitted. The Court therefore erred in overruling the objection.

The next question is as to the right of action caused by throwing sawdust and refuse bark into the stream, causing damage thereby to the plaintiffs. This kind of injury to water is a peculiar one, as, while the actual quantity of the water in the stream is not thereby materially diminished, yet these acts so affect the water as to materially diminish the quantity the plaintiffs are able to take from the stream and use for mining purposes. Practically, it is well known to be a serious injury, very materially diminishing the value and profits of the ditch property. As prior appropriators the plaintiffs are entitled to damages for such injuries, and to be protected from future loss. The prior appropriator is clearly entitled to protection against acts which materially diminish the quantity of water to which he is entitled, or deteriorate its quality, for the uses to which he wishes to apply it. This rule was applied to a case where sawdust from a mill was thrown into a stream near the City of Mobile, which injured the water for the use of the parties below. (*Lewis v. Stein*, 16 Ala. 214.) So it has been applied to a tannery. (*Howell v. McCoy*, 3 Rawle, 256.) So to water corrupted

Phoenix Water Company v. Fletcher.

by mining operations. (*Magor v. Chadwick*, 11 A. & E. 571.) So to throwing dead animals in a spring. (*Tate v. Parrish*, 7 Monroe, 325.) In the case of *Hill v. King* (8 Cal. 336) and *The Bear River and Auburn Water and Mining Co. v. The York Mining Co.* (Id. 327), the question as to the liability of mining companies, on a stream above a ditch, for damages caused by mixing the water with mud and sediment, was examined, and one conclusion was that the prior appropriator below was entitled to the water so as to fill his ditch as it existed at the time of subsequent locations above; and that such subsequent locators had no right to so use the water as to diminish the quantity to which the prior appropriator was entitled.

The evidence shows that there was no necessity for throwing that refuse of the mill into the stream; and that prior owners of the mill wheeled it away; and the jury found that the defendant could enjoy the mill without creating the injury. The evidence also shows that these acts cause very material injury to the plaintiffs; but there is no finding of the Court or jury upon this important question. It is true that the Court gave, as a reason for dismissing the action, "that the injury was *damnum absque injuria*;" but it would seem that this remark was intended to apply solely to the first ground of the action, to wit: the irregularity of the flow of water; but if it was intended to include also the acts we are now examining, then it is clearly contrary to the evidence. It is probable, however, that this reason was intended as an announcement of a principle of law, governing both classes of injuries complained of; and if so, it is clearly erroneous. So that in any view of the case, there is error in the proceedings of the Court below. In cases where special issues are submitted to a jury, it is important that they should include all questions of fact raised by the pleadings and necessary to determine the cause, and that they should be separately and distinctly stated. The record in this case is very defective in this respect. Not only are some of the questions objectionable for not stating the points separately, but several important issues were not submitted to the jury. Under these circumstances, the plaintiffs are entitled to a new trial.

The judgment is therefore reversed, and the cause remanded for a new trial.

McDermott v. Higby.

McDERMOTT v. HIGBY.

WHEN the jury are directed by the Court to find a general verdict, and also to make a special finding of facts upon questions submitted to them—and a general verdict is returned in favor of one party, while the findings upon the special issues are in favor of the other party—the Court should render judgment in accordance with the special findings, if they embrace all the issues raised in the pleadings. If, however, there is any one issue in the pleadings, not covered by the special findings, the judgment should be rendered on the general verdict.

APPEAL from the District Court, Sixteenth Judicial District, Calaveras County.

The facts are stated in the opinion of the Court.

Tod Robinson, for Appellant.

Wm. Higby, for Respondent.

CROCKER, J. delivered the opinion of the Court — NORRIS, J. concurring.

This is an action to recover damages for an alleged diversion of water claimed by the plaintiff. The defendant, among other defenses, sets up an abandonment of the water right claimed by the plaintiff, by those under whom he claimed. The case was tried by a jury who were directed to return a general verdict, and also a special verdict upon several questions submitted to them by the Court. They accordingly returned a general verdict for the defendant, and a special verdict upon the questions submitted in favor of the plaintiff. Judgment was rendered for the defendant; and it is contended that in this the Court erred. Sec. 175 of the Practice Act provides, that "where a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter; and the Court shall give judgment accordingly." It is urged, that the judgment rendered in this case is in violation of this clause of the statute. It would undoubtedly be so, if the special verdict had been upon all the issues in the case; but none of these special findings are upon the issue of abandonment; and if the jury founded their general verdict, in favor of the defendant, upon

Natoma Water and Mining Co. v. McCoy.

that one issue alone, the special verdict is not "inconsistent" with the general verdict. A special verdict upon a single point may often determine the whole case, either for the defendant or plaintiff; and in such case the special verdict would control any general verdict to the contrary. But where the special findings do not have such controlling effect — if they do not include issues which, if found for the defendant, would sustain a general verdict in his favor — the special verdict cannot properly be deemed "inconsistent with the general verdict." This was probably the view taken by the Court below in rendering the judgment.

The judgment is therefore affirmed.

NATOMA WATER AND MINING CO. v. McCOY *et al.*

THE owners of a ditch, by which the waters of a stream have been first appropriated, are entitled to recover damages for injury or loss sustained, caused by dams or other obstructions having been erected on the stream, above the head of the ditch, by which the regularity of the flow of its waters is so disturbed as to cause actual injury or loss to the proprietors of the ditch.

On the trial of an action to recover such damages, proof that in consequence of the irregularity of the flow of water, the owners of the ditch have lost their customers, is competent evidence.

APPEAL from the District Court, Sixth Judicial District, City and County of Sacramento.

This action was commenced on the twenty-first day of June, 1861. The complaint averred, that plaintiffs for four years had owned and possessed a water ditch, starting out of Alder Creek, about one mile below Prairie City, by which ditch plaintiffs had appropriated and used the waters of said Alder Creek for mining purposes, during all that time, except as disturbed by defendants; and that defendants, about the first day of June, 1861, had erected a dam across Alder Creek, about one-half a mile below Prairie City, by which they had obstructed the flow of water in Alder Creek; and that plaintiffs had suffered great loss by means of the irregularity of the flow of water, and would sustain a loss of one hundred dollars per week, in future, etc. The answer set up that defendants

Natoma Water and Mining Co. v. McCoy.

were miners, and had entered upon the bed of Alder Creek, for mining purposes, and had erected a dam and placed some twenty sluice-boxes in the bed of the creek, each about twelve feet long, and that by means of the dam, they conducted the water through the sluice-boxes, and emptied it again into the creek, about one-fourth of a mile above plaintiffs' dam. The answer also denied that plaintiffs had sustained, or would sustain any injury from defendants' acts. The jury found a verdict for defendants. Plaintiffs moved for a new trial, which was denied by the Court; and from the order denying a new trial, plaintiffs appealed.

A. P. Catlin, for Appellants.

Defendants are liable to the plaintiffs for the damages sustained by them, by the detention of the body of water confined in the dam and reservoir of the defendants. (*Bear River Co. v. York Mining Co.*, 8 Cal. 327.) Second, defendants are liable for the damages caused by the irregularity in the flow of water caused by them. (*Id.*) This is not a case of conflicting evidence upon any of the facts. The defendants simply claim that they, as miners, have a right to use the water in the manner in which they did use it. In regard to their manner of using it, there is no conflict of evidence. The only evidence introduced by the defendants, is to the effect that the natural and usual flow of Alder Creek varied upon different days, being more on some days and less on others. If this were so, it does not justify defendants in causing additional irregularities.

Frank Hereford, for Respondents.

I deem it entirely unnecessary to file any extended brief in reply to the argument of the appellants, or the authorities cited by him. As to the objection that the Court erred in striking out evidence, which tended to prove a loss of customers, I think the authorities cited by the appellants show that the Court was correct in holding that it was too remote.

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is an action to recover damages, arising from an irregularity

Murray v. Board of Supervisors of Mariposa County.

of the flow of water to the plaintiffs' dam and ditches, on Alder Creek, caused by a dam erected by the defendants on the creek above. The right of the prior appropriator of water to recover damages for such an injury was settled by this Court, in the case of *The Phoenix Water Co. v. Fletcher* (23 Cal. 481).

'At the trial, the Court excluded the evidence offered by the plaintiffs, to show that the irregularity of the flow of water was a material injury to them, as in consequence of such irregularity they lost their customers, who refused to purchase water from them. In the case above referred to, it was held that a mere temporary or trivial irregularity in the flow of water, such as does not cause actual injury to the proprietor below, would not amount to an actionable injury. The question will turn, in such cases, upon the nature and extent of the injury. In such cases, evidence of the kind offered by the plaintiffs, was clearly admissible, as showing that the damage to the plaintiff was not trivial or temporary, but of such a character as to cause actual and serious injury to him. More pertinent evidence to prove that fact, could hardly be produced. The Court, therefore, erred in excluding it. The fact that the defendants are miners, and hold the water back, causing it to flow irregularly to the plaintiffs, who are prior appropriators of the waters of the stream, does not take the case out of the rule laid down in the case of *The Phoenix Water Co. v. Fletcher*.

The judgment is reversed, and the cause remanded for a new trial.

MURRAY v. BOARD OF SUPERVISORS OF MARIPOSA COUNTY.

THE District Courts have power to grant writs of *certiorari*, to review the action of a Board of Supervisors in granting a ferry license.

A complaint which avers that plaintiff is the owner of a ferry franchise over a stream, and that the Board of Supervisors have granted license to another person to establish a ferry within less than one mile of plaintiff's ferry, without having published the notice required by statute; and that such ferry is not required by public convenience, nor rendered necessary by the intervention of any creek or ravine; and that the reason given by the board, in their

Murray v. Board of Supervisors of Mariposa County.

minutes, for granting the license, was, that no legal excuse was shown why it should not be granted, states sufficient facts to authorize the issuance of a writ of *certiorari*.

APPEAL from the District Court, Thirteenth Judicial District, Mariposa County.

The facts are stated in the opinion of the Court.

Coffroth & Spaulding, for Appellant.

The Board of Supervisors had no power to grant the second license, until it should affirmatively appear in evidence before them that public convenience, or some other one of the reasons enumerated in Sec. 6 of the act, existed at the time. (Wood's Dig. 460.) No such fact was established before the board; and the record of the board shows that no evidence, whatever, was taken before them. Thus the facts disclosed in the petition show that the Board of Supervisors acted without jurisdiction in granting the license above referred to. *Certiorari* is the proper remedy. (*The People v. Supervisors of El Dorado Co.*, 8 Cal. 61.)

H. H. Hartley, for Respondents.

The petition of plaintiff shows no grounds for the issuance of the writ, and the demurrer was properly overruled. It exhibited on its face, the fact, that the Board of Supervisors heard his remonstrance, and decided that he had given no legal excuse why the ferry license complained of by him should not have been granted. This was conclusive of the case. It was not necessary for the board to have spread upon their records the reasons why they had come to the conclusion they did. It was sufficient that the appellant had a hearing before them, and they decided against him. The Board of Supervisors of each county is vested with almost exclusive control over ferries, bridges, and roads; and their action is almost final, and will not be disturbed, except in cases of the most manifest abuse of their discretion. (*Waugh v. Chauncey*, 13 Cal. 11; 7 Id. 287.)

In this case, the appellant, himself, shows that the Board did recite in their record, that he had had a hearing before them; and that they had considered the reasons assigned by him, but found

Murray v. Board of Supervisors of Mariposa County.

them insufficient. The writ, therefore, was properly refused, and the judgment of the Court below should be affirmed.

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is an application for a writ of *certiorari* to issue to the defendants, commanding them to certify to the District Court the proceedings of the Board of Supervisors, relating to the granting of certain ferry licenses, and that their action therein be vacated and set aside. The defendants appeared, and demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, or to authorize the writ. The Court sustained the demurrer, and rendered final judgment for the defendants, from which the plaintiff appeals.

The complaint avers that the plaintiff is the owner, and has been for a long time, of a franchise, sometimes a bridge, and at others, a ferry franchise, over the Merced River, at a certain place; that the Board of Supervisors, without the notice required by statute, granted a ferry license to one Nelson, to run a ferry across said river, about twenty rods above the place of plaintiff's ferry; and that such ferry is not required by public convenience, nor is it rendered necessary by the intervention of any creek or ravine; that he appeared before said Board of Supervisors and opposed the granting of the license to Nelson, on the ground that the granting of the license was in violation of the statute; that the reason given by the board, in their minutes, for granting the license, was, that due notice of the application had been given, and no legal excuse was shown why it should not be granted.

Although the complaint is very imperfectly drawn, and is not very clear in its averments, still there are sufficient facts stated to authorize the issuing of the writ. The objections to the proceedings appear to be: 1st, that the proper notices had not been published or served, as required by the statute, to give the Board of Supervisors jurisdiction in the matter; 2d, that the record of the board merely shows that the license was issued on the ground that no legal excuse was shown against it, when it should show affirmatively that it was required by the public convenience, or by the sit-

Bullock v. Hubbard.

uation of a town or village, or the crossing of a public highway, or that the intervention of some creek or highway renders it necessary under the provisions of Sec. 6 of the Act concerning Ferries and Toll Bridges. (Wood's Dig. 460.) Sec. 456 of the Practice Act authorizes the writ of *certiorari* to issue "in all cases where an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the Court, any plain, speedy, and adequate remedy."

There can be no doubt of the power of the District Courts to grant a writ of *certiorari* to review the action of a Board of Supervisors in granting a ferry license. (*Waugh v. Chauncey*, 13 Cal. 11; *Fall v. Paine*, 23 Id. 302; *Robinson v. Board of Supervisors of Sacramento*, 16 Id. 208; *People v. Supervisors of El Dorado*, 8 Id. 58.) The District Court has a clear right, upon the return of the writ of *certiorari*, to determine at least whether the board had jurisdiction of the proceeding in which the license was issued, and whether it was a case within the provisions of the statute authorizing a ferry to be established within one mile of a regularly established ferry or toll-bridge. The averments of the complaint are sufficient to show that in fact it was not such a case as would authorize them to issue a license for a new ferry, and that the proper notices necessary to give the board jurisdiction of the matter had not been served or published. Those are questions to be determined upon the return of the writ.

The judgment is reversed, and the cause remanded, and the defendants are required to answer the complaint within ten days from the service of notice of the filing of the *remittitur* in the Court below.

BULLOOK v. HUBBARD *et al.*

B. & L. were partners. B. & L. as a partnership was also a member of two other firms—B., L. & S., and B., L., S. & D. The firms all failed, and their property was attached by creditors. The creditors of B., L. & S. and B., L., S. & D. obtained the first attachments, and placed them in the hands of the Sheriff,

Bullock v. Hubbard.

before the creditors of B. & L. placed their's in his hands. The Sheriff levied all the writs on the property in the order in which they were placed in his hands. The Sheriff had in his hands a sum of money received from the sale of the property of B. & L. to apply on the executions issued on judgments rendered in the actions:

Held, that the creditors of B. & L. were entitled to the money; and that, where a partnership is composed of two or more firms, the creditors of one of the firms are entitled to a preference in the payment of their debts, over the creditors of the whole partnership, out of money the proceeds of the property of that firm.

APPEAL from the District Court, Eleventh Judicial District, Placer County.

Bishop & Long were general partners. The partnership extended to several kinds of business, including farming, and buying, and selling, and raising stock. The firm of Bishop & Long, as a partnership, entered into a partnership with Seifert & Dodsworth, in the butchering business. The firm of Bishop & Long, as a partnership, also entered into a partnership with Stewart, in buying, raising, and selling sheep.

Hubbard, Hall, and Allen were creditors of Bishop & Long and Seifert & Dodsworth; and were also creditors of Bishop & Long and Stewart. Duncan was a creditor of both said partnerships. Reed was a creditor of Bishop & Long. The partnerships failed, and said creditors procured attachments. The attachments of Hubbard, Hall & Allen, and Duncan, were issued and placed in the Sheriff's hands, before Reed procured his. When the Sheriff made the levy, he had all the attachments in his hands, and made a levy on all the property, by virtue of each, but in the order in which they had been placed in his hands.

Judgments were rendered in all the actions on the same day, and executions issued on the judgments and placed in the Sheriff's hands on the same day. The money received from the sale of the property of Bishop, Long, Seifert & Dodsworth, and Bishop, Long & Stewart, did not satisfy the executions against those firms; and the Sheriff then had remaining in his hands about \$1,800, the proceeds of the property of Bishop & Long. Hubbard, Hall & Allen, Duncan, and Reed, each, claimed this money—Hubbard, Hall & Allen, and Duncan, because their attachments were prior in

Bullock v. Hubbard.

point of time — and Reed, because he was a creditor of Bishop & Long. The Sheriff commenced an action requiring the creditors to litigate their respective rights to the money. The District Court rendered judgment awarding the money to Reed and Hubbard, Hall & Allen; and Duncan appealed. It was stipulated that the decision should be made according to the principles governing Courts of Equity in such cases.

A. S. Higgins, for Appellants.

The firm of Bishop & Long occupied the position of an individual member of the partnerships of Bishop, Long, Seifert & Doda-worth, and Bishop, Long & Stewart. Bishop had no separate interest in either of said partnerships—nor had Long. Reed, then, was a creditor of an individual member of each of the said firms, to wit: Bishop & Long.

The contract of a partnership is in its character joint and several, and not simply a joint contract. All are liable, both collectively and individually, and the creditor has a right to look for the satisfaction of his debt, either to the partnership or its individual members, or to both; and his attachment or execution may in the first instance be levied upon the joint property or the property of the individual members, or any of them. This conclusion is irresistible, if the partnership contract is in its character joint and several—for it must be considered like any other joint and several contract.

“Every partnership debt is joint and several, and in all such cases resort may primarily be had for the debt to the surviving partners, or to the assets of the dissevered partners,” etc. (Story’s Eq. Jur. 6th Ed. 676; Id. on Part. Sec. 362; 7 Eng. Ch. 588.) “It is now established beyond controversy, that in the consideration of Courts of Equity, a partnership debt is several as well as joint.” (Coll. on Part. Sec. 580, and cases cited.)

The indebtedness being in its nature joint and several, and creditors entitled to pursue their remedy against the joint assets, or the individual property of the respective parties, or both, is there any rule of law by which the private creditor of an individual partner can be preferred before a partnership creditor in his remedy against

Bullock v. Hubbard.

the private estate? It is true, that a partnership creditor is preferred to the extent of partnership assets, before a private creditor of an individual partner; and the reason of the rule is too obvious to require a statement. But no such reason exists in the other case; neither does the rule itself. In the one case, it is impossible to ascertain the interest of the individual partner until partnership debts are paid, for his interest only relates to the surplus which may remain; while in the other, his interest and property is definite and certain, having no connection with the rights or interest of others. Again, in the case of partnership, each partner is entitled to the payment of the partnership debts out of the partnership fund; and thus the partnership creditor is preferred through the operation of the equities between the partners themselves.

It will be found that all the cases giving to private creditors preference over the partnership creditor upon the private estate, arise under the old rule in bankruptcy, or voluntary assignment of a debtor for the benefit of creditors, when a Court of Equity distributes the assets of the bankrupt or insolvent, giving to each class of creditors priority and preference upon the particular property belonging to its class; and this has been adopted even in such cases, more as a rule of convenience, than as founded in law and equity.

In the case of *Tucker v. Oxley, Assignee* (5 Cranch), Chief Justice Marshall holds, that a joint creditor has a right to go upon the private estate of an individual partner equally with his private creditor, in the absence of a statute of bankruptcy, and cannot be restrained, to the preference of any individual creditor, without the power of a Court of Equity; and this rule in bankruptcy is "an equitable restraint on the legal rights of parties." (See also *Dorr v. Shaw*, 4 Johns. Ch. 18, 19.)

I have been unable to find any cases in our American Reports controverting the position above taken, while there are numerous cases supporting it. The English cases relied upon in support of the preference of the private creditor upon the private estate are, without exception, based upon the rule of distribution in bankruptcy; and even under that rule, the English cases present great doubt and conflict of authority.

Bullock v. Hubbard.

The question is very ably considered and numerous and leading cases collated in the case of *Bed et al. v. Newman* (5 Scarb. & R. 77), particularly in the opinion of Duncan, J. (Id. 95-100). The Court will observe that the particular rate of distribution in that case was adopted because of the express requirement of the statute; but the general reasoning and law of the case apply directly to this, and support the position taken by the appellant Duncan, and his right to priority in claim upon this fund.

Another case, presenting directly the point in this, and sustaining the position that, "the separate property of each member of a copartnership is liable to be attached for the debts due from the copartnership, and having been thus attached, the lien thus acquired is not to be defeated by a subsequent attachment by a separate creditor. (*Allen v. Wells et al.*, 22 Pick. 450; *Bardwell v. Perry et al.*, 19 Vt., 4 Wash., 292.)

If the position which we have assumed be correct, then the judgment of the Court below is erroneous, in preferring separate creditors subsequent in attachment and lien upon the separate property, to partnership creditors, who are first in these attachments; and appellants are entitled to a reversal of the judgment and relief accordingly.

Tuttle & Hillyer, for Respondent.

It is a general principle in equity, that the creditors of a partnership have a prior claim to the funds of the copartnership for the payment of their demands; and that creditors of separate members of a firm have, in like manner, a prior claim to the separate funds; and though this rule had its foundation in bankruptcy cases, yet it is now applied in all cases where funds of either character are to be distributed; and equity will interfere to prevent any different distribution.

In England, with the exception of one or two decisions made by Lord Thurlow, the cases are uniform. (3 Vesey, Jun. 288; 9 Id. 118; 2 Russ. 191.)

In America, there is some conflict, but the best authority supports the proposition as stated. (3 Kent's Com. 65-77, 9th Ed.; 3 Paige's Ch. 168; 1 Har. & Gill. 96; 6 Mass. 42; 1 Story's

Eq. Jur. Sec. 675; 5 Johns. Ch. 60.) Appellant relies upon 22 Pick., 5 Serg. & Rawl., and 19 Vt. The case in 22 Pick. is an admitted departure from the general rule, based upon no authority, except one previous decision of that Court. It is not this case, because the fact of insolvency did not appear, and because Bishop & Long are not an individual, but a partnership, whose creditors have the equitable lien of partnership creditors. The inequity of the rule there laid down is shown in the statement at the close of the opinion, that the Legislature had revived the old rule. The case in 3 Serg. & Rawl. is authority for nothing. Three Judges rendered opinions, and no two agreed. Probably Justice Gibson had the best of the argument. The case in 19 Vt. 278, is not an authority against us, but in our favor. Two cases in this Court (the only ones touching the question) affirm the old rule, to this extent: that the creditors of a partnership have a lien upon the partnership property for their demands, which will prevail against a prior attachment by an individual creditor; and this without reference to the fact of insolvency or the tribunal in which this question is raised. (*Conroy v. Woods*, 13 Cal. 626; *Chase v. Steel*, 9 Id. 64.) The reason of the rule is stated to be, that the partnership creditors, when they become such, trust to the partnership fund, and the individual creditors to the separate estate. This reason, whether of much or little force, applies with its full strength to a case of two firms situated as these were.

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is an action in the nature of a suit in equity, brought by the plaintiff, Sheriff of Placer County, against the defendants, who are the judgment creditors of three partnership firms: one composed of "Bishop & Long," the second of "Bishop, Long, Siefert & Dods-worth;" and the other of "Bishop, Long & Stewart," to determine which of said creditors are entitled to a sum of money in his hands — the proceeds of the sale of certain partnership property, owned by the firm of "Bishop & Long." It seems that the same Bishop & Long were members of each of these partnership firms, and each firm was engaged in carrying on separate kinds of busi-

 Hughes v. Devlin.

ness—each owning its separate partnership property. The property levied upon and sold by the Sheriff, was owned by the firm of "Bishop & Long," and none of the others, as partnership firms, had any interest therein. The Court below held, that the creditors of the firm of "Bishop & Long" were entitled to the money realized from the sale in order of the priority of their several attachment liens; and judgment was rendered accordingly, from which the other defendants appeal.

The judgment of the Court below is correct. It has been repeatedly decided by this Court, that the creditors of a partnership are entitled to a preference over the creditors of the individual partners in the payment of their debts out of the partnership property, or moneys arising therefrom, without regard to the priority of attachment liens. (*Chase v. Steel*, 9 Cal. 64; *Conroy v. Woods*, 13 Id. 626; *Dupuy v. Leavenworth*, 17 Id. 262; *Burpee v. Bunn*, 22 Id. 194.) And the same principle applies as between the creditors and several partnership firms as in the present case.

The judgment is affirmed.

HUGHES v. DEVLIN.

Persons claiming and in the possession of mining claims upon the public lands of the United States, are as between themselves, and all other persons except the United States, owners of the same, having a vested right of property founded on their possession and appropriation of the land containing the mine.

When a mining claim upon the public lands is claimed and possessed by several as joint tenants, tenants in common, or as coparceners, or even as partners, such several interests or estates are in the nature of an estate of inheritance, and liable to be partitioned between the several claimants the same as other real property.

The mere fact that a mining claim is owned and worked by several persons as partners, is no valid objection to a partition of the same between the owners, where the answer does not set up, and it is not shown, that a suit in equity is necessary to settle the accounts and adjust the business of the partnership; and all the material allegations in a complaint for partition of real property which are not denied by the answer, are deemed admitted for the purposes of the trial.

Hughes v. Devlin.

APPEAL from the District Court, Ninth Judicial District, Shasta County.

The complaint averred that plaintiff and defendant were, and for a long time had been, tenants in common, owners and holders of certain mining claims, and a water ditch (describing the same), and that the plaintiff was the owner and holder of the undivided two-thirds part, and the defendant of the undivided one-third part of said property. The complaint further averred, that plaintiff was desirous of having and demanded partition of said property, and every parcel thereof, according to the respective rights of the parties in interest; and that on the hearing of the cause, plaintiff would show that the property, from its nature and peculiar character, could not be divided without great prejudice to the rights and interests of the respective owners.

The following is a copy of all the material portions of the answer:

"The defendant admits that he has and holds a possessory and usufructuary interest of the one-third part or share of all and each and every piece and parcel of the estate and property named and described in the complaint; but this defendant denies that he has or holds an estate of inheritance in the said property, or any part thereof, and avers that the said plaintiff has not, and that he never had or held an estate of inheritance in the said property, or in any part or parcel of the same; but, on the contrary thereof, this defendant alleges that the mining grounds in the said complaint described, are of and belong to the public lands and domain of the United States; and this defendant says, that neither himself nor the said plaintiff has or holds any right or title under the United States or any person, and that neither this defendant nor the plaintiff has, holds, or possesses the said property, or any part thereof, by any right or tenure, which gives them or either of them, an estate of inheritance therein.

And the defendant further shows, that the said plaintiff and this defendant are partners in the business of mining, and that they are carrying on the business of mining with and upon the said mining grounds, and by means of the said ditch, and the waters therein flowing; and that the said ground, claims, ditch and waters consti-

Hughes v. Devlin.

tute the capital stock and means upon and by means of which the said copartnership business is carried on and conducted to the great benefit and advantage of the said plaintiff and defendant.

The plaintiff demurred to the answer; the Court sustained the demurrer; defendant declined to amend; and the Court without hearing any evidence gave plaintiff judgment in accordance with the prayer of his complaint.

Defendant appealed.

Robinson & McConnell, for Appellant.

The first point relied on by appellant is, that the Court erred in sustaining the demurrer to defendant's answer. The demurrer admits the truth of the facts alleged in the answer. (*Selkirk v. Sacramento County*, 3 Cal. 326; *Tuolumne Water Co. v. Chapman*, 8 Id. 397.) Anything may be pleaded which will abate the action, or bar the petitioner's right to a judgment. (1 *Whitaker's Practice*, 499; *Buel v. Child*, 4 How. 125.) The question then is, whether the facts set up in the answer constitute a defense to the action.

The complaint sets up the fact that the mining claims and water ditch, for which partition is asked, are held by the plaintiff and defendant as tenants in common, and that the plaintiff and defendant each have in the premises in question an estate of inheritance.

These allegations are substantially denied by the defendant, and the answer shows that the plaintiff and defendant are partners in the business of mining, and that they are carrying on the business of mining with and upon the said mining grounds, and by means of the said ditch, and the water therein flowing. There being then, a partnership between the parties, it is hardly necessary to say that the present action cannot be maintained; that the only remedy of the plaintiff is by the bill in equity to dissolve the partnership and obtain an account. (*Nugent v. Locke*, 4 Cal. 320; *Stone v. Fourie*, 3 Id. 294; *Wilson v. Lassen*, 5 Id. 116; *Barnstead v. Empire Mining Co.* 5 Id. 299.)

The answer having set up the partnership of the parties, and the truth of the same being admitted by plaintiff's demurrer, it constitutes a complete defense to plaintiff's action, and the Court there-

Hughes v. Devlin.

fore erred in sustaining the demurrer. The second point made by appellant is, that the Court erred in rendering judgment for the sale of the premises in question, without evidence. The statute only authorizes a sale of the property when it appears to the satisfaction of the Court, by the evidence, that the premises are so situated that partition cannot be made without great prejudice to the owners. (Pr. Act, Sec. 275.)

"In general, a partition should be denied rather than a sale. The latter course is authorized only in cases where an actual partition cannot be made without great prejudice to the owners. If, therefore, a sale would be equally prejudicial, an actual partition should be made." (Willard's Eq. Jur. 703; *Smith v. Smith*, 10 Paige, 470.)

The third point upon which the appellant relies is, that the Court erred in rendering a judgment for the sale of the premises in question without having ascertained the title by proof to the satisfaction of the Court. The statute expressly requires that before the judgment of sale shall be made, the title shall be ascertained by proof, to the satisfaction of the Court; and where service of the complaint has been made by publication, like proof shall be required of the right of the absent or unknown parties before such judgment is rendered. (Pr. Act, Sec. 271.) A Court cannot render judgment declaring the rights, titles, and interests of the parties to an action of partition, without first ascertaining the facts in relation thereto as described by statute; and in case the defendant omits to answer the complaint, the plaintiff must still exhibit proof of his title. (*Ripple v. Gilborn*, 8 How. 462; *Porter v. Lee*, 6 Id. 491; *Griggs v. Peckham*, 3 Wend. 436.)

R. T. Sprague, for Respondent.

The question raised by the demurrer is, whether possessory claims upon the lands of the United States, for mining purposes, in this State, are estates of inheritance. These possessory claims upon the public land, have been uniformly regarded by the Supreme Court of this State as real estate, and persons in actual prior occupancy, as possessing valid titles as against all the world, except the United States Government. (*Lowe v. Alexander*, 15 Cal. 302.)

These estates are estates of inheritance. (Bouvier's Law Dic. Title "Real Estate," 2-11; Tomlon's Law Dic. 196; Jacob's Law Dic. 446.) It is such a right, property, interest, and estate in lands, as will, by the operation of law, pass to the heirs of the intestate holder or owner (Bouv. Law Dic. 633), and therefore is the subject of partition under the statute of this State.

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is an action for a partition of a mining claim and water ditch connected therewith, the plaintiff claiming an undivided two-thirds, and the defendant the undivided one-third thereof. The two hundred and sixty-fourth section of the Practice Act provides that "when several persons hold and are in possession of real property, as joint tenants, or as tenants in common, in which one or more of them have an estate of inheritance, or for life, or lives, or for years, an action may be brought by one or more of such persons for a partition thereof, according to the respective rights of the persons interested therein; and for a sale of such property, or a part of it, if it appear that a partition cannot be made without great prejudice to the owners." The action was brought under this section of the statute.

The defendant contends that the interest of miners in mining claims and ditch property upon the public lands, is not an estate of inheritance, or any of the other kinds of real estate mentioned in the statute; and therefore the same are not liable to be partitioned between the owners under the act. In this he is clearly in error. In *Merritt v. Judd* (14 Cal. 64), this Court say, in commenting on the Law of Fixtures: "From an early period of our State jurisprudence, we have regarded these claims to public mineral lands as titles. They are so practically. Our Courts have given them the recognition of legal estates of freehold, and so, to all practical purposes — if we except some doctrine of abandonment, not, perhaps, applicable to such estates — unquestionably they are, and we think it would not be in harmony with this general judicial system, to deny to them the incidents of freehold estates, in respect to this matter." So, too, they have been held to be "real property," re-

Hughes v. Devlin.

specting which a suit will lie under the two hundred and fifty-fourth section of the Practice Act, against a person claiming an adverse "estate or interest therein." (*Merced Mining Co. v. Fremont*, 7 Cal. 319.) They are held to be real estate within the act relating to the place of trial of civil actions. (*Watts v. White*, 13 Cal. 324.) So, too, they are held liable to levy and sale on execution, like other real estate. (*McKeon v. Bisbee*, 9 Cal. 142.)

The ownership of a right to a mine, with the right to work the same, situated on land belonging to another, is a very common interest in mining countries. It has been held to be such an interest as would descend to the heirs of an owner. The mere right to work such mines, is held to be an incorporeal hereditament in the land of other persons. But in such cases it is held that it is indivisible, because a division of the right would create new rights, and would prejudice the owner of the soil; and it has been, therefore, held that the coparceners must work the mines jointly with one stock, or each enjoy the right at successive periods of time. (*Bainbridge on Mines*, 115, 116.) But a different rule prevails where a distinct right of property in mines descends in coparcenery; and the coparceners in such case are entitled to a partition, as their rights would not thereby interfere with the property of others. They are seized, not of a bare right, but of an estate in fee, divisible in its nature. (*Id.* 116.) And the same rules apply to joint tenants and tenants in common of mines. (*Id.* 117; *Collier on Mines*, Secs. 5, 12; *Rockwell on Mines*, Secs. 47-49.) The distinction between the right to mine in the land of another and a distinct right of property in a mine, as to this right of partition, has no application to the public mineral lands in this State. Although the ultimate title in fee in our public mineral lands is vested in the United States, yet as between individuals, all transactions and all rights, interests, and estates in the mines are treated as being an estate in fee, and as a distinct and vested right of property in the claimant or claimants thereof, founded upon their possession or appropriation of the land containing the mine. They are treated, as between themselves and all persons but the United States, as the owners of the land and the mines therein; and as such, where the land or the mine is claimed by several, as joint tenants, tenants in common, or as coparceners,

or even as partners, such several interests or estates are in the nature of an estate of inheritance, and liable to be partitioned between the several claimants, the same as other real property.

The judgment is therefore affirmed.

On petition for rehearing, CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

It is urged in the petition that the property in controversy being used as partnership property, an action for a partition will not lie, and that a suit in equity must be brought to dissolve the partnership, and for an account of the partnership business. It does not appear in this case, that any suit in equity is necessary to settle and adjust the business of the partnership. The mere fact that real estate, owned by persons as tenants in common, or even as partners, is used in a partnership business, affords no valid objection to an action to partition the same between the owners. The property was of such a character, and the owners had such an interest therein, as afforded a proper ground for an action for a partition, as has been shown by the previous opinion of this Court; and as the answer did not deny any of the allegations of the complaint, but merely set up the facts upon which the claim that a partition would not lie was founded, the demurrer to the answer was properly sustained.

It is objected that no evidence or proof was offered to show that the property was not capable of being partitioned without great prejudice to the owners, to authorize the Court to order a sale. The fact was averred in the complaint, and was not denied by the answer, and it was therefore properly deemed admitted, like any other material fact affecting the rights of the parties, or the form of the remedy to which they might be entitled. The terms of the two hundred and seventy-fifth section of the Practice Act are a little peculiar upon this subject, but it does not vary the rule laid down in other sections, as to what facts are to be deemed admitted. No objection of this kind was made in the Court below; and even if such proof were necessary, it may properly be deemed to have been waived under the circumstances, the defendants evidently relying upon their answer being a sufficient defense to the action. The same remarks apply to the objection that there was no proof of the

Blackman v. Pierce.

title to the premises. The title and ownership was averred in the complaint, and not denied in the answer, and no objection of this kind was raised in the Court below. If it had been, and the Court had ruled that proof was not necessary, then such ruling might have been reviewed by this Court. But the objection should not be raised here for the first time.

The Court appointed a referee, to make sale of the property, in accordance with the decree, to which no objection appears to have been made in the Court below; but it is now contended that the Court should have appointed three instead of one. Sec. 275 of the Practice Act provides, that if a sale is not directed to be made, the Court shall order a partition, and shall "appoint three referees therefor." This does not apply to a case like the present, where a sale, and not a partition is ordered; and such sale can be as well conducted by one as three referees. This objection is not, therefore, well taken.

The rehearing is denied.

BLACKMAN *et al* v. PIERCE.

THE vendor of goods who has sold them on credit to one who is insolvent, has a right to stop the goods and take them into his possession at any time before they arrive at their place of destination, and go into the possession of the purchaser.

This right of stoppage *in transitu* is paramount to any lien on the goods claimed by third persons through the purchaser, and may be exercised to defeat an attachment or execution levied upon the goods by a creditor of the vendee.

When a warehouseman, who has goods in charge, states to one who is about to take possession of the same, by a legal process, that he has no charges on the goods, this is a waiver of the warehouseman's lien for charges, if any he had.

APPEAL from the District Court, Fifteenth Judicial District, Tehama County.

After the sale of the goods by Blackman & Co., at San Francisco, to McDaniel, Blackman & Co. shipped the same to McDaniel, the vendee, at Trinity Center. The bills of lading were made out in the name of the vendee. The goods, in ordinary course of

Blackman v. Pierce.

transportation, arrived at the head of steamboat navigation, at Red Bluff, where they were placed in the hands of Pierce, Church & Co., warehousemen, who had orders from the vendee to forward them to him. Defendants, Pierce, Church & Co., defended on the ground of right of property, in the vendee, McDaniel. The Sheriff, Johns, justified under the attachment issued in *Fuller v. McDaniel*. The other facts are stated in the opinion of the Court.

W. S. Long, for Appellants.

The right to stop goods *in transitu* ceases, whenever the goods come into the actual or constructive possession of the vendee. (1 Parsons on Cont. 484-490, and the notes referred to by the author; also, Parsons' Merc. Law, 60-64, and notes.)

The goods were delivered to the vendee as soon as they were put on shipboard at San Francisco, because the bills of lading were made out to him, and not to the vendors. The transit stopped at Red Bluff, and the defendants, Pierce, Church & Co., as the agents of McDaniel, received them, and kept them, under instructions from McDaniel, until he would send for them.

W. H. Rhodes, for Respondent.

The right of stoppage *in transitu* continues in force until the goods sold arrive at the point of destination. (*Markwald v. Creditors*, 7 Cal. 213; Abb. on Ship. 521, Ed. 1854.)

The right is not defeated by process of attachment, at suit of a creditor of vendee. (Abb. on Ship. 520, Ed. 1854; Smith's Merc. L. 654; 15 B. Mon. 270.)

Possession taken by an agent of consignee, but before the goods reach the actual possession of the vendee, is not sufficient to terminate the *transitus* and destroy the right. (*Markwald v. Creditors*, 7 Cal. 213.)

Even a resale by the first vendee, and payment to him, will not destroy the right. (Hill on Sales, 218, Sec. 102; *Craven v. Ryder*, 6 Taunt. 433.)

Absolute insolvency of vendee, not absolutely necessary to justify the exercise of the right. (14 B. Mon. 324; 17 U. S. Dig. 512, Sec. 107.)

Blackman v. Pierce.

When the defense set up is the existence of a lien in behalf of warehousemen, the lien must be asserted at the time of the demand, or else it is waived. (Smith's Merc. L. 664, and Note; 6 Wend. 608; 20 Id. 267; 15 Id. 475; 2 Bing. 23.)

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is an action brought against Pierce, Church & Co., warehousemen at Red Bluff, and Johns, the Sheriff of Tehama County, to recover the value of a lot of goods sold by the plaintiffs, merchants in San Francisco, to one McDaniel, of Trinity Center, Trinity County; and which they claim by the right of stoppage *in transitu*, the purchaser having become insolvent after the sale of the goods. It appears that the goods were duly marked to McDaniel, care of Pierce, Church & Co., Red Bluff; that the plaintiffs shipped them on a steamer at San Francisco, and they duly arrived at Red Bluff, the point of transshipment from the river steamer to wagons, to be transported to their final destination; that Pierce, Church & Co. put them in their warehouse, advised McDaniel of their arrival, and he wrote them that he would send a team after them; that while they were thus in the warehouse at Red Bluff an attachment was levied upon them by the Sheriff, issued in an action brought by one Fuller against McDaniel; that after the purchase of the goods McDaniel became insolvent, and the price remained unpaid; that after the levy the plaintiffs, by their agent, gave notice to the warehousemen and the Sheriff that McDaniel had become insolvent; that the goods had been sold to him by them; that the price was unpaid, and that they claimed the right of stoppage *in transitu*, and demanded the goods of them, and they refused to deliver them.

The right of a vendor who has sold goods on credit, when the vendee is insolvent, to stop and take them into his possession, at any time before their arrival at the place of destination, and going into the actual or constructive possession of the purchaser, is well established. Depositing them at an intermediate point, with an agent of the purchaser, for the purpose of being forwarded, does not terminate the *transitus*. (*Markwald v. His Creditors*, 7 Cal.

Hale v. Brennan.

213.) It is clear, therefore, that the mere fact that the goods had come into the possession of Pierce, Church & Co., to be forwarded to the purchaser, did not terminate the *transitus* or divest the plaintiffs of their right of stoppage *in transitu*.

This right of stoppage *in transitu* is paramount to any lien on the goods claimed by third persons against the purchaser. Thus it may be exercised to defeat an attachment or execution levied upon the goods by a creditor of the vendee; for the lien acquired by the levy operates only upon the interest of the debtor, but cannot defeat the paramount right of a stranger. (Hilliard on Sales, 217.) The Court found that the warehousemen stated to plaintiffs' agent, at the time of the demand, that they had no charges upon the goods. This was stated in reply to a question of the agent, who told them he was ready to pay their charges if any they had. By this, the warehousemen waived their lien for charges, if they had any. (*Everett v. Saltus*, 15 Wend. 474; *Everett v. Coffin*, 6 Id. 608; *Saltus v. Everett*, 20 Id. 268.)

The judgment is affirmed.

MARTHA HALE *et al* v. JAMES BRENNAN, EXECUTOR,
ETC.

A brought an action against B to recover for the value of services alleged to have been rendered by A, for B, in keeping a hotel. The defense was, that A and B were partners. On the trial, B, after introducing some evidence, which tended to show a partnership, offered in evidence the books of the hotel, as further evidence of the partnership: *held*, not to be error, and that if the books afforded any evidence of a partnership, the entries were admissible.

The books of a partnership are evidence in actions between the partners, and when kept subject to the inspection of each, must be admitted as correct until the contrary is shown.

APPEAL from the District Court, Third Judicial District, Santa Cruz County.

The facts are stated in the opinion of the Court.

Joseph H. Skene, for Appellants.

Hale v. Brennan.

The account books of the deceased, the defendant's testator, were his own written declarations, made without the knowledge of the plaintiffs, and inadmissible in favor of the executor representing him in this action. (1 Phillips on Ev., Cowen, Hill & Edwards' Ed. 37.)

The entries made by his servant were equally inadmissible to prove a partnership existing between his employer and the female plaintiff; made as they were without her knowledge, and by a person not under her authority, and coming within no exception to the general rule excluding hearsay evidence. (1 Phil. on Ev. 357.)

Error is presumed from the admission of improper testimony, until the contrary is shown. (*Grimes v. Fall*, 15 Cal. 63.)

Robinson & McConnell, for Respondent.

A proper foundation was laid for the introduction of the book in evidence. And the rule is well settled, that the books, in such cases, are admissible in evidence. (1 Greenl. on Ev. Secs. 116-118; *Landers v. Turner*, 14 Cal. 574; *Le France v. Nevitt*, 7 Id. 186.) The fact of the death of said James Skene, is not material to the admissibility of this kind of evidence. (1 Greenl. on Ev. Sec. 120, and authorities cited.)

The second point relied on by the appellant is, that the entries in the books were inadmissible to prove a partnership. That the entries in the books were admissible in evidence, as being part of the *res gestæ*, there cannot be a question of doubt. (1 Greenl. on Ev. Sec. 120; *Dr. Pattershall v. Turford*, 3 B. & Ad. 890; *Poole v. Dieas*, 1 Bing. N. C. 654.)

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is an action brought by husband and wife, for services rendered by the wife before her marriage, for the defendant's testator, in keeping the Santa Cruz Hotel. The defense was, that she was a partner of plaintiffs' testator in keeping the hotel, and not his servant. The defendant recovered judgment, from which the plaintiffs appeal.

The only error assigned is the admission in evidence of the books.

of the hotel. It was admitted at the trial that she was the owner of one-half of the hotel, and of the furniture and fixtures therein, at the time of the performance of the alleged services. It was also proved that the business was carried on, and the books kept in the name of "The Santa Cruz Hotel;" and upon the death of the testator she took these books out of the trunk of the testator, in his room, and examined them; and that the executor afterwards took charge of them. They were proved to be the books of the hotel by a witness who, as clerk, had kept them in part; and that all the entries not in his handwriting were in the handwriting of the testator. It seems there was also other evidence tending to show a partnership. The books were then offered to show that several charges appeared therein against the testator, and also against her.

Under the circumstances of the case, there was no error in admitting the books. They may have afforded very little evidence upon the main question, whether or not there was a partnership existing between the female plaintiff and the testator during the time of the alleged services, but if they afforded any, they were admissible. The possession of books and documents, or the circumstance that a party had access to them, has been considered a ground for affecting him with the admission of the facts stated in them. (1 Phil. Ev., C., H. & E's Notes, 446.) So, although the books of an individual are not evidence in his favor against others, yet, from the very nature of the case, the books of a partnership must be evidence between the partners themselves. Such books, kept subject to the inspection of each, must be admitted as correct until the contrary is shown. (Id. 448, note.) The record does not show all the evidence introduced preliminary to the offer of the books, and it is to be presumed that there was sufficient to authorize the Court to admit them, as error in the action of the Court is not to be presumed. If it was shown that she had access to the books during the time they were kept, that would be a strong circumstance to hold her bound by the statements therein, if any there were. The record does not disclose what entries therein were used in evidence, so that we are unable to determine whether they were material or not.

The judgment is affirmed.

Bishop v. Hubbard.

BISHOP v. HUBBARD *et al.*

A & B were partners, and as such, owned two tracts of land. A for several years had resided upon one of the tracts with his family, using it as a homestead. The firm becoming embarrassed, they made a division of their lands, and B executed to A a deed of his interest in the homestead tract; and A executed to B a deed of his interest in the other tract. These deeds were executed for the purpose of enabling A to file a declaration of homestead on the tract deeded to him, and thereby preventing the creditors from selling it in payment of their debts. A soon after, executed and recorded a declaration of homestead on the land:

Held, that the conveyances were fraudulent and void as to creditors; and that, notwithstanding the homestead claim, the land was still liable for the debts of the firm.

Where a partnership, in embarrassed circumstances, converts its means, upon the strength of which it has obtained credit, into real estate, to be claimed as a homestead by one of the firm, for the purpose of placing those means beyond the reach of the creditors, the land is liable to the executions of the creditors, notwithstanding the declaration of homestead.

APPEAL from the District Court, Eleventh Judicial District, Placer County.

Bishop & Long were general partners, and had been for several years engaged in ranching, and raising, buying, and selling sheep and cattle. They owned two tracts of land which had been acquired with the partnership funds. Their circumstances had become embarrassed, and their creditors were pressing them. On the twentieth day of May, 1861, they made a division of their real estate, and executed mutual deeds. Bishop had been residing on one of the tracts for several years with his family, and in the division this tract fell to Bishop, who on the same day executed and recorded thereon a declaration of homestead. The deed and declaration of homestead were both recorded on the same day. Two days afterwards, the creditors commenced suits against the firm, and among other property, attached the land claimed by Bishop as a homestead. Judgments were rendered in the actions by default; and on the fourth of June thereafter, executions were issued on the judgments, and the property claimed as a homestead advertised for sale. Bishop filed a bill in equity to enjoin the sale, claiming that the same would create a cloud upon his title. Defendants set up in their answer that the sale from Long to Bishop was a fraud

Bishop v. Hubbard.

upon the creditors, and asked that the deed be canceled. The question of fraud was submitted to a jury, who found that the sale was fraudulent. The Court thereupon rendered judgment for defendants, and also canceling and annulling the deed from Long to Bishop.

Hale & Smith and Hereford & Williams, for Appellant.

Bishop & Long were each liable upon all of the judgments to their full amount, and it was impossible for the conveyance from Long to Bishop to operate as a hindrance to the defendants in the enforcement of their judgments, because the property was as much and as completely liable after the conveyance as before. Until Bishop withdrew the property from its liability to execution by his declaration of homestead, the defendants' right to execute it was as perfect as when it belonged to the firm of Bishop & Long.

The case is very different from that of a conveyance to a third party, or one who is not liable for the debts, because in the latter case the conveyance operates as a withdrawal of the property from its liability to execution; while, as we have shown before, a conveyance from one debtor to his joint debtor has no such effect. The only effect of the latter conveyance, is to change the title of the property as between the debtors.

If correct in our conclusions upon this proposition, we compel the defendants (respondents) to sustain the charge of fraud to the effect that the declaration of homestead was fraudulent in law, or their case falls.

We have examined the question with some care, and have not been able to find a case where the act of claiming property as exempt from execution has been held fraudulent, because done to hinder and delay creditors. And we cannot conceive it possible for any Court to so hold. On the contrary, instead of making it fraudulent, the law contemplates that the creditor will by his action delay his creditors. It authorizes him to do so, and makes his acts lawful, instead of declaring them void.

Every claim of exemption of property from execution sale, operates as a delay of the creditor that far. And the effect of such claim in fact, so far as the creditor is concerned, is precisely the

same as that of a sale of the property to a third party to avoid the debt. But the effect or consequence in law is very different, because in the former instance the law declares the act valid and legitimate under all circumstances, while in the latter it declares it void. The only case in our reports having any bearing upon the question under discussion which we have been able to find, is that of *Randall v. Buffington* (10 Cal. 491.) In that case, this Court held, that where an insolvent sold goods liable to execution, and applied the proceeds to the relief of his homestead by discharging a mortgage resting upon it, the transaction was not liable to impeachment for fraud in delaying creditors. In other words, that the act of relieving the homestead, so as to exempt it entirely from execution or from the reach of creditors, was not fraudulent.

S. Heydenfeldt, for Respondents.

It may be considered well established, that fraud in the transmutation of partnership property from one partner to another, will not prevail as against the creditors. In *Ex Parte Ruffin* (6 Ves. 125), although the circumstances did not call for an expressive decision of the points, yet the remarks of Lord Eldon, in his opinion, make it clear that such was his understanding. On page 127 he says: "A *bona fide* transmutation of the property binds the creditors." "When the effect is a *bona fide* transaction of this sort, it would be much better to examine the *bona fides* of each transaction than," etc.

From these quotations it appears evident, that a partition or sale among partners of partnership effects, is not free from inquiry into the good faith of the transaction; and if it lacks this essential quality it will, like all other fraudulent acts, be void.

In *Anderson v. Malby* (2 Vesey, Jr. 245), a retiring partner withdrawing funds as for his share, was declared fraudulent, and compelled to account. There must be a fair transmutation of the partnership property by the outgoing partner to the remaining partner, to enable the joint property of the firm to become the separate property of the remaining partner. (1 Montagu on B. L. 408.)

In *Yale v. Yale* (13 Conn. 190), the Court emphatically decide that an appropriation of the joint property by one partner to pay

Bishop & Hubbard.

his individual debt, would be fraudulent and void as against the partnership creditors.

The plaintiff says it is no fraud to dedicate a homestead. This proposition nakedly and abstractly we admit. So also, nakedly and abstractly, it is no fraud to pay a private debt. But here, the fraud consists in appropriating the partnership property; and it must be equally fraudulent, whether it be done for the one purpose or the other, or for any purpose which defeats the partnership creditors.

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

Bishop & Long were partners engaged in an extensive business, and as such owned the tract of land in controversy, on which is a dwelling-house, the house and land having been occupied by Bishop, with his family, as their homestead for several years. Becoming embarrassed, they made a division of their real estate, and executed mutual deeds to each other under it, by which the title to this property became vested in Bishop, who duly filed and had recorded his declaration of homestead. The defendants are creditors of Bishop & Long, and as such obtained judgments on their debts and levied upon the property. Bishop then brought this action, claiming the property as a homestead, and therefore not liable to sale on execution, and prayed for an injunction to restrain the defendants from selling it under their executions. The defendants contend that the division of the property between the partners was a fraud upon them as creditors, and therefore void as to them; that the property is still partnership property, and as such liable to the judgment of their debts, which cannot be defeated by the claim of homestead. The case was tried by a jury, who found a verdict for the defendants, upon which a judgment was duly rendered against the plaintiff, from which he appeals.

It has been repeatedly decided by this Court, that a homestead could not be established upon property held in joint tenancy, or tenancy in common. (*Wolf v. Fleishacker*, 5 Cal. 245; *Reynolds v. Pixley*, 6 Id. 165; *Giblin v. Jordon*, Id. 416; *Kellersberger v. Kopp*, Id. 565.) It follows that while the debtors owned the prop-

Bishop v. Hubbard.

erty as tenants in common, it was liable for their partnership debts; and the fact that it had been and was occupied by one of them as a homestead, would not have affected that liability.

In the case of *Riddell v. Shirley* (5 Cal. 488), a debtor in embarrassed circumstances made a sale of certain personal property for the purpose of raising funds with which to discharge certain debts, which were a lien upon his homestead, for the purpose of saving it to himself—of all which the purchaser had full knowledge at the time of his purchase. It was held that it was a transaction calculated to hinder, delay, or defraud creditors, and therefore the property was liable, in the hands of the purchaser, for the debts of his vendor. The Court say: "Although the law secures the homestead from execution arising from ordinary indebtedness, it is yet made chargeable for debts by the acts of the parties interested in its preservation, and in some cases by operation of law. Where such cases exist, it would seem to be only fair that the homestead should remain answerable for the debts charged upon it, and not, after becoming a source of credit, be relieved, intentionally, by the disposition of all the other property of the debtor, leaving nothing for the satisfaction of the other creditors." So in the present case, the land in question, before the division, was chargeable with the debts of the partnership by operation of law, and it was a source of credit to the parties while it remained in that condition; and it would not seem just and right that the debtors, after having thus obtained credit thereon, should, by their own act, without the consent of their creditors, place it beyond the reach of such creditors, who may have dealt with them on the faith of the liability of this property to be applied in payment of their just debts. The conveyance from Long to Bishop was a means of placing the property in a situation by which it might be put beyond the reach of the creditors; and if done for that purpose the jury were justified in finding that it was made for the purpose of hindering, delaying, or defrauding creditors, and therefore void.

The case of *Randall v. Buffington* (10 Cal. 491), referred to by the appellant, differs from the case of *Riddell v. Shirley* and the present, in this, that there the insolvent debtor paid money in his hands in discharge of a debt which was an incumbrance upon

Henderson v. Allen.

his homestead, and the Court held it to be valid, because "there is no rule of law which prevents a debtor in insolvent circumstances from the application of his property to the payment of one debt rather than another." In that case there was no assignment or conveyance to be held void for fraud. In the case of *Riddell v. Shirley*, and the present, there were conveyances made of property, the effects of which were, directly or indirectly, to put property beyond the reach of creditors. The question whether the conveyance in this case, from Long to Bishop, was made with the intent to hinder, delay, and defraud creditors, seems to have been fairly submitted to the jury, and we see no good reason for disturbing their verdict.

The judgment is therefore affirmed.

HENDERSON v. ALLEN *et al.*

It is doubtful whether in an action for a forcible entry, or a forcible detainer, the title of the premises can be involved in the controversy. But where the action is against a tenant, for unlawfully holding over lands after the termination of a lease, the title may become involved, in some cases; and in such cases the statute authorizing the removal of actions from a Justice's Court to a District Court, would be applicable.

In an action commenced before a Justice of the Peace, under the Forcible Entry and Detainer Act, an answer which denies generally the allegations of the complaint, is sufficient.

A, who claimed to be in possession of a tract of coal-bearing land, made a verbal agreement with B & C, by which they were to prospect for coal until they struck a particular seam, or ledge, and before they struck this ledge they were to do all the work and have two-thirds of the claim; but after the ledge was struck, the work was to be prosecuted by the parties jointly. A to bear one-third of the expenses, and B & C two-thirds: *Held*, that this agreement did not create the relation of landlord and tenant between A & B and C, but that it made them tenants in common, or partners in mining; and that the action of unlawful detainer was not the proper remedy for A, if excluded from the premises by B & C.

APPEAL from the District Court, Seventh Judicial District, Contra Costa County.

The facts are stated in the opinion of the Court.

Henderson v. Allen.

G. F. & Wm. H. Sharp, for Appellants.

M. S. Chase, for Respondents.

CROCKER, J. delivered the opinion of the Court—NORRIS, J. concurring.

This action was commenced before a Justice of the Peace, the plaintiff claiming to be the owner of a certain tract of land containing a coal mine, which he had leased to the defendant, Clark, under whom the other defendants claimed, and put him into possession, under an agreement by which the plaintiff was to have one-third of the coal taken from the mine in opening the same. The complaint avers that the term of the lease had expired, and the defendants refused to surrender the possession, and prays for restitution. The defendants Allen and Lander, filed an answer, denying the allegations of the complaint, and set up that they were owners of the premises; that the title was necessarily involved, and prayed that the cause be certified to the District Court for trial. The cause was afterwards so transferred, and at the trial, in the District Court, a judgment of nonsuit was rendered against the plaintiff; from which, and from a motion refusing a new trial, he takes this appeal.

The first point we will notice is, that the District Court had no jurisdiction of the action, it having been commenced before a Justice of the Peace. It is doubtful whether, in an action purely for a forcible entry or detainer, the title can be involved in the controversy, the question being one relating solely to the possession. This Court seems to have held both ways upon this point. (*Larue v. Gaskins*, 5 Cal. 507; *Dickinson v. Maguire*, 9 Id. 50.) But where the action is against a tenant and others for unlawfully holding over lands after the termination of a lease, and other actions not founded upon a forcible entry or detainer, the title may properly become involved, in some cases, and the statute authorizing their removal to the District Court would be applicable. (*Cullen v. Langridge*, 17 Cal. 67.) This point is therefore overruled.

It is objected that the plaintiff was entitled to a judgment in the Justice's Court, for want of a sufficient answer. The answers deny generally the allegations of the complaint, and this was sufficient in

Henderson v. Allen.

an action before a Justice of the Peace, where the strict rules of pleading do not apply. Secs. 19 and 20 of the act under which this action was brought, fully provide for such cases, the latter providing that "all matters of excuse, justification, or avoidance of the allegations of the complaint, may be given in evidence under the answer." The objection that the defendants had no right to file an amended answer in the District Court, is not well taken.

It is further urged, that the Court erred in granting a nonsuit. It appears that the land in controversy is public land; that the plaintiff claimed to have entered under the Possessory Act of this State; that he made a verbal agreement with the defendants, by which they were to prosecute the proper work thereon until they struck coal, to receive two-thirds of the claim until they struck coal on a particular lode or seam, and after that the work was to be prosecuted by the plaintiff and defendants jointly, the plaintiff to pay one-third of the expenses and the defendants two-thirds; that the coal was not struck at the point designated. The plaintiff was also to build a house upon the claim and hold possession thereof for the defendants, which he failed to do. Nor had the plaintiff performed the acts required by the Possessory Law to entitle him to hold or claim the land under that act. It appears that the defendants afterward located the tract, under the Possessory Act. Under these facts the nonsuit was properly granted, and the plaintiff must seek his remedy, if any he has, under a different kind of action. The relation which existed between the plaintiff and the defendants was not that of landlord and tenant, but that of tenants in common, or partners, in the nature of a mining partnership; and therefore this kind of action will not lie. It has been repeatedly held, that even the letting of land to a person to cultivate—the crops to be divided between the owner and the cropper, in certain proportions—did not amount to a lease, or create the relation of landlord and tenant between them. In such case, the owner is held to be in possession of the land, and the parties are joint tenants in the crop. (*Bradish v. Schenck*, 8 J. R. 151; *Foote v. Colvin*, 3 Id. 216; *DeMott v. Hageman*, 8 Cow. 220; *Putnam v. Wise*, 1 Hill, 234.) In such case, it is an agreement to work on shares, and not a lease to render rent, for which an action will lie against the tenant.

McCrea v. Craig.

(*Caswell v. District*, 15 Wend. 379.) So in the present case, the agreement is to work the mine on shares, and not a lease of the land to render rent; and this kind of action will not therefore lie.

The judgment is affirmed.

MCCREA v. CRAIG *et al.*

THE lien given by the statute to the mechanic or the material man, for work and labor performed or materials furnished in the construction of a building, commences and attaches to the property at the time of the commencement of the work, or the beginning to furnish the materials.

The reasonable construction of an allegation in a complaint, that "plaintiff furnished the materials between the sixth day of April, 1862, and the twenty-eighth day of June, 1862," is, that plaintiff commenced furnishing the materials on the sixth day of April, and continued furnishing the same from time to time up to June 28th.

Where the contract was made, and the materials were furnished, while the Lien Law of 1858 was in force, but the notice of lien was not filed in the Recorder's office until after the Lien Law of 1862 went into effect: *held*, that the lien was not lost, but must be enforced in accordance with the provisions of the Act of 1862.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

The facts are stated in the opinion of the Court.

J. M. Williams, for Appellant.

The demurrer of defendant Allen was sustained to the complaint, upon the ground that plaintiff never acquired any lien upon the property of Allen; and this decision was based and is now sought to be upheld upon the single ground, that as the Statutes of 1856 and 1858 were superseded by the Statutes of 1862, after the contract was made and the materials purchased, and before any notice of lien was filed or given, that plaintiff could not have any lien upon the building, though the time allowed for filing had not passed. Appellant invites the Court to the consideration of the following propositions: Under the Mechanics' Lien Law, the lien is acquired by the subcontractor, as material man, by doing the

McCrea v. Craig.

work or furnishing the materials. The radical error in the respondents' view of the case is, that they suppose the lien to be acquired by the filing in the Recorder's office and giving notice to the employer; whereas, the lien is acquired by the work, or the furnishing of the material, and the filing and notice only preserve it or make it effectual. The statute, it would seem, is sufficiently clear upon this point. (Stat. 1856, 203; Id. 1858, 225.) After the work has been done or the materials furnished and used, thirty days are allowed to file the claim. Can it be said that, during those thirty days, he has no lien? If he does not file, he loses his lien, but not until the thirty days have passed.

Patterson, Wallace & Stow, for Respondents.

Even supposing that the materials were furnished anterior to the twenty-sixth of June, 1862 (the date of the repeal of the Statute of 1858), which the complaint does not aver, there was no lien acquired. An act had been done, which, if followed up properly, would—otherwise would not—ripen into a lien; but which did not of itself constitute a "lien acquired" within the reservation of the twenty-fourth section of the Act of 1862 (Laws 1862, 390), and was therefore not saved thereby. "When an Act of Parliament is repealed, it must be considered, except as to those transactions passed and closed, as if it never existed." (*Butler v. Palmer*, 1 Hill, 333.)

The plaintiff, not having acquired any lien under the Act of 1858, of course could not acquire any lien afterwards under the Act of 1862, because the Act of 1862 was passed subsequently to the making of the contract of March 4th, 1862, between the builder, Craig, and the respondent Allen (*Donahy v. Clapp*, 12 Cushing, 441); and because it does not appear from the complaint, that the materials were furnished since the twenty-sixth of June, 1862. The Act of 1862 does not give a lien by reason of a furnishing of materials anterior to its taking effect. "*Nova constitutio futuris formam imponere debet*," is the maxim, unless the statute itself expressly declares to the contrary; * * * "and it is well settled that, in the absence of express words to that effect, a law can only operate upon future, and not upon past transactions." (*Grimes' Estate v. Norris*, 6 Cal. 625.)

McCrea v. Craig.

The respondent Allen therefore insists that appellant acquired no lien under the Statute of 1858; because: First, it does not appear from the complaint that any materials were furnished; second, nor that appellant complied with the provisions of that statute while it was in force; third, but it does appear that the statute itself (1858) was repealed before the appellant had any "lien acquired," and a mere "possibility" or "potentiality" of a lien was not saved by Sec. 24 of the Act of 1862. And that the appellant did not acquire a lien under the Act of 1862; because: First, the Act (1862) was passed after the fourth day of March, 1862, when the respondent Allen made the contract with McCrea, the appellant, to build the house; second, it does not appear that appellant furnished any materials under that act (1862).

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is an action to enforce a mechanic's lien. The building was owned by the defendant Allen. Craig was the original contractor who agreed to construct it; and the plaintiff furnished materials for its construction between April 6th and June 28th, 1862. On the third day of July, the plaintiff filed a notice of his demand and lien in the Recorder's office, and within five days thereafter gave Allen notice thereof; and July 3d, he presented his account to Craig, who admitted in writing thereon that it was correct. On the seventeenth day of July, 1862, the plaintiff again gave Allen notice of his lien, in accordance with the provisions of the Act of 1862 — the sum of \$2,000 then being due and unpaid under the contract from Allen to Craig; and also filed an account of his demand and lien in the Recorder's office. The building was completed August 20th, 1862. Allen demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and that it did not show that the plaintiff had any lien upon the property. The Court sustained the demurrer and rendered final judgment for the defendants, from which the plaintiff appeals.

On the twenty-sixth day of April, 1862, a law was passed in relation to liens of mechanics and others, which took effect June 25th, 1862, the last section of which repealed all prior laws upon

McCrea v. Craig.

the subject; but the twenty-fourth section provides that "Nothing contained in this act shall be deemed to apply to or affect any lien heretofore acquired." (Stat. of 1862, 384.) Although the lien in this case is created by and depends upon a compliance with the terms of the statute, yet it is a favored lien, because the very property upon which the lien attaches has been created by the labor or materials furnished by the person claiming the lien. The lien virtually commences when the labor or materials are begun to be furnished; and although such lien can only be enforced by filing and recording the proper notice in the Recorder's office, and commencing suit and performing the other acts required by the statute within the proper time, yet all these acts relate to, and the lien is deemed to have accrued at the time of the commencement of the work, or the beginning to furnish the materials. (*Tuttle v. Montford*, 7 Cal. 358; *Soule v. Dawes*, Id. 575; *Crowell v. Gilmore*, 13 Id. 54.) The evident intention of Sec. 24 of the Act of 1862, was to save and preserve to the claimants all rights and liens acquired under the preëxisting laws which were then repealed, and which, but for such saving clause, would have been liable to be lost by such repeal. The fair and reasonable construction of the averment in the complaint is that the plaintiff commenced furnishing the materials for the building on the sixth day of April, and continued furnishing the same from that time up to June 28th. Although he did not file any notice of lien until after the new law went into effect, yet his lien is to be deemed to have been acquired, and his notice will relate back to the time he commenced to furnish the materials; and such lien comes properly within the saving clause of the statute. After the new statute went into effect, all subsequent acts and proceedings relating to the lien or its enforcement were governed by and must have been in accordance with its provisions. The averments of the complaint show a substantial compliance with the new statute on the part of the plaintiff; and the complaint sets forth, therefore, a good cause of action. It follows, that the Court erred in sustaining the demurrer. The case of *Donahy v. Clapp* (12 Cushing, 440) is essentially different from the present, as that was evidently a new statute enacted where none had existed before; and not, like the present, the enactment

Cummins v. Scott.

of a new and revised law, saving previously-acquired rights, under a former statute upon the same subject.

The judgment is reversed and the cause remanded, with directions that the defendants answer the complaint within ten days after service on them of notice of the filing of the *remittitur* in the Court below.

CUMMINS v. SCOTT.

WHEREAS an undertaking on appeal is filed within the statutory time, and the sureties are excepted to, and appellant gives notice that they will justify, and both parties appear before the officer at the time fixed for justification, and a new undertaking is then filed in place of the old one, the appeal will not be dismissed because the undertaking was not filed within five days after filing notice of appeal.

It is an essential averment in the complaint, in an action of forcible entry and unlawful detainer, that at the time of the alleged forcible entry, plaintiff was in the actual possession of the premises; and in order to maintain the action, plaintiff must prove this averment on the trial.

APPEAL from the County Court, Marin County.

Plaintiff recovered judgment in the County Court, and defendant appealed. The other facts are stated in the opinion of the Court.

John Reynolds, for Appellant.

H. H. Hartley, for Respondent.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

The respondent moves to dismiss the appeal, on the ground that the undertaking on appeal was not filed within five days after the service and filing of the notice of appeal, as required by Sec. 348 of the Practice Act. The notice of appeal was served and filed February 24th, 1863, and the undertaking was filed March 11th. The record shows, however, that a matter of justification of sureties, on the appeal bond, was heard before the County Judge, on the eleventh day of March, at which a new bond was presented, and approved by the Judge. It states, that "both parties being present, by their counsel, and consenting to a hearing before me, this

Cummins v. Scott.

eleventh day of March, 1863, and a new bond being furnished, with Benjamin Miller and James T. Stocker as sureties, the following proceedings were had," etc. This new bond is the one copied into the record, and the whole proceedings show that it was a substitute for one previously filed, and which had been objected to, on the ground of the insufficiency of the sureties; and no objection appears to have been made that the first undertaking was not filed in time. The motion is therefore overruled.

The action is brought for an alleged forcible entry upon the land of the plaintiff. The complaint alleges, that the plaintiff had been for a long time, and was at the time of the alleged forcible entry, in the actual possession of the premises; and this is an essential averment, necessary for him to prove, under Sec. 9 of the Forcible Entry Act. The plaintiff claims, under a declaration filed in the Recorder's office, in pursuance of the Possessory Act. A portion of the land included in his claim appears to be in dispute, between the plaintiff and the defendant; the latter claiming an adjoining tract and a portion of the tract claimed by the plaintiff. The plaintiff does not seem to have ever had this disputed tract inclosed, or to have had any other actual possession. He commenced putting up a fence to inclose it, when the defendant interfered, stopped the work, and tore down part of the fence already built, a short time before the commencement of this action. The evidence leaves it uncertain where the dividing line between their respective claims is located, and the greater part of the testimony is directed to that point. The case has been previously before this Court, and will be found reported in 20 Cal. 83.

It is clear, from all the evidence in the case, that it is not within the provisions of the Forcible Entry Act; but the controversy between the parties is one which should be tried in a proper suit, in the District Court, where all questions relating to priority of settlement, location of boundary lines, and the validity and sufficiency of their possessory claims, filed under the Possessory Act, can be fully adjudicated, which they cannot be in the present action. The evidence does not show an actual possession, by the plaintiff, of the premises in dispute, which is a material fact to sustain the action. The verdict was therefore against law and evidence.

The judgment is reversed and the cause remanded.

Dyson v. Bradshaw.

DYSON v. BRADSHAW *et al.*

IN an action of ejectment, where the plaintiff in his complaint avers title of the demanded premises in himself, and the answer denies the averment, the defendant has a right to show, on the trial, that the plaintiff has divested himself of the title before the commencement of the action, by executing a deed to a third party, although the defendant does not connect himself with the title of such third party.

A deed takes effect only from the time of its delivery, and where a deed is placed in the hands of a third person, as an escrow, with an agreement between the grantor and grantee that it shall not be delivered to the grantee until he has complied with certain conditions, the grantee does not acquire any title to the land, nor is he entitled to a delivery of the deed, until he has strictly complied with the conditions.

The right of one who enters upon the public lands of the United States without the consent of the Government, to take possession of and hold more than one hundred and sixty acres, discussed.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The complaint in this case averred, "that heretofore and prior to the wrongful entry and ouster hereinafter set forth, to wit: on the twenty-eighth day of February, 1852, plaintiff was lawfully seized and in the possession of the following described property, to wit:— [here follows the description] — and being seized and possessed thereof, the above named defendants afterwards, to wit: on or about the first day of March, 1858, unlawfully and wrongfully entered into and upon said premises, and ousted the said plaintiff therefrom, and are still in the unlawful possession thereof, and wrongfully withhold the possession of the same from the plaintiff."

And plaintiff further says, "that said defendants, on or about the first day of March, 1858, unlawfully entered upon the premises aforesaid of the said plaintiff, and ejected, put out, and removed said plaintiff from the possession and occupation thereof, and kept him so removed for a long time, to wit: from the day and year last aforesaid until the present time," etc.

The pleadings were not under oath, and there were several defendants who answered separately, all denying, generally, the allegations of the complaint. The other facts are stated in the opinion of the Court.

Cook & Hittell, for Appellant.

The rule is stated, and the reasons for it adverted to, in *Bird v. Lisbros* (9 Cal. 1); *Piercy v. Sabin* (10 Cal. 22), and *Coryell v. Cain* (16 Cal. 567); and these cases have, ever since their adjudication, been regarded as a correct exposition of the law in California, and referred to in later decisions as high authority. They establish the doctrine, that a defendant who is a trespasser upon the prior possession of a plaintiff, cannot justify by showing the true title outstanding in a third person. The circumstances of these cases were different from the facts in the case at bar; but the reasoning applies, so far as it goes, with much force.

In *Bird v. Lisbros* (9 Cal. 1), the plaintiff claimed title under the prior possession, not of himself, but of his grantor. The defendant denied this alleged title, and attempted to prove that plaintiff had never in fact acquired the possessory title of his grantor, and, we admit, it was perfectly competent for him to do so. But the Court distinctly recognized the rule, that a trespasser upon the actual possession of a plaintiff cannot show title in a third person, and illustrated it with the following remarks: "We will suppose," said the Court, "A has the true title, but not the actual possession of real estate; and B takes possession, and C then ousts B of his possession. In a suit by B to recover possession from C, the latter cannot set up in bar the outstanding title of A. The possession of C gives him a *prima facie* title, but the prior possession of B proves superior to this *prima facie* title of C. If it were otherwise, and a mere trespasser upon the prior actual possession of a party could justify his act by showing the true title outstanding in a third person, no party to the suit, then a prior possessor might never gain any repose by virtue of his adverse possession, and could never gain a title under the Statute of Limitations."

In *Piercy v. Sabin* (10 Cal. 22), the plaintiff relied on his own prior possession, and defendants attempted to set up the outstanding title of one Ludlum, who had located a preëmption claim over the premises. This the Court below refused to allow; and on appeal, the Supreme Court said: "There is no error in this. The defendants did not claim under Ludlum, and the plaintiff did claim by

Dyson v. Bradshaw.

virtue of his own possession, and also under Crowell, who had formerly been in the actual possession of the premises. Whether plaintiff's or Crowell's possession was older or better than that of Ludlum, was a question that defendants could not raise as between themselves and the plaintiff."

If we correctly understand these decisions, they establish the doctrine, that when a person intrudes, without claim of right, upon the actual possession of another, he will not be permitted to show title in any third person whatsoever, but must restore the possession which he has illegally gained. The offer to show that the deed from plaintiff to Woods was placed as an escrow in the hands of of Sharp, to be delivered to Woods when certain conditions were performed, and that Woods never performed the conditions, was not an attempt to vary the terms of a written contract; for the proof of a delivery, in the very nature of things, must almost always rest in parol. And the rules of law upon this subject are so plain that we do not deem it necessary to collate authorities at any great length. We may refer to the very full and able note in Cowen & Hill's Notes to Phil. on Ev. (part 2, 826, note n), and particularly the case of *Barns v. Hatch* (3 N. H. 304) there cited, which shows that even the placing of a deed on record by a grantor, is not conclusive evidence of delivery. We may also invite the attention of the Court to *Elsey v. Metcalf* (1 Denio, 323), where it is held "that a presumption of delivery never obtains where a deed is proved to have been in the hands of the grantor at a period subsequent to its date," and that "the sending of a deed by the grantor to a stranger, or the deposit of it in a public office, is not a delivery to the grantee, unless it is so sent or deposited for his use."

In *Hatch v. Haskins* (5 Shepley, 397), Justice Shepley said: "The possession and production of a deed by the grantee, is *prima facie* evidence of its having been delivered; and for like reasons, in the absence of all contradictory testimony, the presumption arises, when found in the possession and produced by the grantor, that it has not been delivered." See also, *Cutts v. York Manufg Co.* (6 Id. 191).

In *Stiles v. Brown* (16 Vt. 565) Justice Hubbard said: "The case finds that the deed of the land and the note for the purchase

Dyson v. Bradshaw.

of the same, together with the contract, were all deposited with a third person, to be by him delivered, upon certain conditions; and that those conditions were not complied with. The deed seems to have been duly executed and recorded, and plaintiff offered it in evidence. The defendant objected to it on the ground that it had not been delivered. The delivery of a deed or other writing is as necessary to its validity as its execution, and it only takes effect from its delivery. (*Clayton v. Levirman*, 4 Dev. & Batt. 239.)

John Currey, for Respondent.

It is insisted, on behalf of appellant, that it was not competent for defendants to show an outstanding title in Mr. Woods, without showing connection with that title. The defendants, by producing the Woods deed in evidence, did not admit any title in him or in the plaintiff at any time; nor does the implication arise, that thereby the defendants conceded that plaintiff or Woods ever was the owner of the land, or had any cause of action against them, as the plaintiff's counsel seem to believe. It would be quite as logical to hold that the production of evidence in contradiction of a fact alleged, admits the truth of the alleged fact, as to say that such a consequence follows from the production of the Woods deed in evidence.

In *Bird v. Lisbros* (9 Cal. 5, 6) the Court held, that prior possession is evidence of title; and that this evidence may be destroyed by abandonment; and the Court say: "In ejectment, the plaintiff must show title in himself, as against the defendant." This is a cardinal doctrine in ejectment, that has never yet been overthrown by this Court, notwithstanding the repeated efforts that have been made to induce such a result. The Court also say: "Suppose that the defendant had proved that Ralph Bird had previously conveyed the property in controversy to another party. He certainly could have done so, and that would have defeated plaintiff's action." In *Schauber v. Jackson* (2 Wend. 48) Senator Oliver said: "Suppose the plaintiff produces and proves a *prima facie* regular paper title, and the defendant shows conclusively that the whole claim of title is a forgery, is this unavailable to him because he is a naked possessor? Is not his possession good against all the world, except

Dyson v. Bradshaw.

the legal owner? Has it ever been questioned that a defendant in ejectment, though a naked possessor, may defend himself by showing that the plaintiff has sold and conveyed his right to the premises to a third person, before the commencement of the action?"

Did the defendants do otherwise, in the case at bar, than is said, in the two cases last cited, it was competent for them to do? It is argued on the part of the plaintiff, that a defendant cannot show an outstanding title to a third person, without connecting himself with it, when the plaintiff relies on prior possession; but it is admitted that he may do so, when the plaintiff predicates his right to a recovery, on what they denominate "strict title." And, in order to render his status invulnerable to the attack of the defendants, because of his relinquishment to Woods of all his alleged right and title in and to the premises, the plaintiff's counsel disclaim any right for their client subsisting in title, saying: "He relied upon his prior possession, and was therefore in the position, in which, as we claim, an outstanding title could not be set up against him."

The instances in which a defendant is not permitted to controvert the plaintiff's right to recover, by showing the title to be in a third person, when he does not show directly his connection with it, are exceedingly few, and the reasons for the rule that prevails in those cases are obvious, and are necessary to the preservation of the law as a system. These instances may be arranged as follows: 1st, when the defendant enters into possession under, or claims the possession through the plaintiff; 2d, when the plaintiff claims under a valid judgment or decree against the defendant, and purchase of the premises duly made by authority of such judgment or decree; 3d, when the defendant, without claim of title, is an intruder into and upon the plaintiff's actual possession of the premises demanded. (*Schauber v. Jackson*, 2 Wend. 62.) It will be seen in the first and second of these cases, there is a direct privity existing between the parties, in relation to the subject matter; and in the third, the objection is threefold against allowing the defendant to show a paramount title in a third person, without connecting himself with it. The first of which is, that the actual possession of the plaintiff, of which he has been tortiously deprived by the defendant, is of itself evidence of the title in fee in the plaintiff, or evidence

Dyson v. Bradshaw.

that he holds in subordination to the title in whomsoever it may be. The second is, that the defendant, as a naked intruder and tortfeasor, cannot be permitted to avail himself of a status which he has acquired by wrong, to put the plaintiff to other proof of his right to the possession, than the very actual possession of which the defendant tortiously deprived him. And the third is, that the law does not accord to one who acquires possession by force and violence, the presumption that he entered upon the actual possession of the plaintiff in subordination to the better title, in the absence of affirmative evidence establishing his connection with it. It is stated also in objection to the Woods deed, that it was executed and placed in the hands of Solomon A. Sharp, in escrow, to be delivered to Mr. Woods, on performance by him of conditions alleged; and that these conditions were not performed. Nothing of this kind appears upon the face of the deed; nor is it pretended that any written contract was entered into by Mr. Woods with the plaintiff, to do anything whatever as a consideration for the plaintiff's release and quitclaim. The consideration expressed in the deed was \$5,000, and its payment was acknowledged, and the right of the plaintiff to contradict the truth of his acknowledgment in the deed of that consideration, is at least, questionable. But suppose the Woods deed was placed in the hands of Mr. Sharp, upon the condition alleged by the plaintiff. This condition might have been waived, or discharged without its performance; and the presumption is, that its performance did not continue a condition to be performed before delivery of the deed; for otherwise it must of necessity be assumed, that not only was Mr. Woods guilty of fraudulently obtaining the deed, but that Mr. Sharp was equally guilty with him, by delivering the deed before performance of the condition. Such a presumption will not be indulged, without affirmative proof of facts, from which as a legitimate deduction the presumption must follow. (*Starr v. Peck*, 1 Hill, 272; 1 Story's Eq. Jur. Sec. 190.)

The entry of the Treats in Sept., 1850, was a trespass on the Government domain. (U. S. Stat. at Large, 445, and Brightly's Dig. 487, Sec. 171.) So was that of the plaintiff. Neither the Treats, nor the plaintiff, were authorized to make an entry under

Dyson v. Bradshaw.

any Federal or State law. The plaintiff did not claim any right as a preëmtor under any law of the United States; nor a right under the Possessory Act of this State, passed in 1852, because then he would have been required to limit his claim to one hundred and sixty acres; but he relied, say his counsel, upon his prior possession. The evidence shows that plaintiff entered into the employment of George Treat, in 1851. He must be presumed to have known that Treat did not and could not acquire a right or title to so large an area by putting up an old fence across the neck that connected this peninsula with the main land. He must have known that the possession of Treat to the extent of his occupation was a trespass; and that the quitclaim deed executed by him operated only as a release of the possession of the portion of the land actually occupied, and could not become the basis of an adverse possession to any land not actually occupied by the releasor. Such deed could not have the effect to extend, by construction, the plaintiff's right beyond that which he actually occupied, and of which he had, in the language of the authorities, the *possessio pedis*; and it may well be doubted whether the possession which plaintiff obtained, if any, could be tacked to the prior possession of Treat. (*King v. Smith, Rice, S. C., 11; Beadle v. Hunter, 3 Strob. 331, 336.*) In *Lessee of Potts v. Gilbert* (3 Wash. C. C. 475) Judge Washington expressed himself as clear, that where several persons enter into possession, the last cannot tack the possession of his predecessor to his own; and even if there had been conveyances, he asks, "what had any of them in point of title to convey?" The plaintiff did not, as we have already said, claim any right as a preëmtor under the laws of the United States; nor any right under the "Possessory Act" of this State. He well knew that by such a claim he would be limited to one hundred and sixty acres—a quantity entirely too inconsiderable to satisfy one of his comprehensive grasp. Hence, he has sought by this action to extend his claim (though thereby he trenched on the rights of the Government and its policy, as well as upon the rights of her citizens, who were allowed under the Act of Congress of 1853—10 U. S. Stat. at Large, 246, Sec. 6, extended by an Act of 1854; Id. 268—to settle on the unsurveyed public lands) to the whole peninsula of

Dyson v. Bradshaw.

1,500 acres. If he could thus extend his right to the possession of 1,500 acres, why could he not have gained by the same means a right to 15,000 acres, if the Potrero Nuevo had contained so much? Will it be pretended that one who thus enters on a large tract of land surrounded by water that affords a barrier to the ingress of cattle, thereby acquires a right to the exclusive possession of the whole land? (*Preston v. Kehoe*, 15 Cal. 318; *Wolf v. Baldwin*, 19 Id. 313.)

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is an action to recover the possession of a large tract of about 1,000 acres of land in the City and County of San Francisco, known as the Potrero Nuevo. The tract claimed by the plaintiff is bounded on three sides by Mission Creek, Precita Creek, and the Bay of San Francisco; and on the other side by a line running from one creek to the other. It seems that one Treat, in 1850, erected a house and corral on the tract, which was then vacant, and built a stone wall and fence from one creek to the other, thus making, with the bay and creeks, an inclosure in which cattle and horses were pastured. In 1852, Treat conveyed the tract to Dyson, under which Dyson took and held possession, and claims the title thereto. The defendants entered and took possession of portions of the tract at different times, without title. In April, 1853, the plaintiff conveyed a portion of the premises, by quitclaim deed, to Robert E. Woods, under an agreement that Woods was to remove the settlers from the Potrero; and the deed was placed in the hands of one Sharp, as an escrow, and was not to be delivered to Woods until the latter had removed all the settlers, as per agreement. The case was tried by a jury, who found a verdict "in favor of the defendants, in consequence of the description contained in the deed from the plaintiff to Robert E. Woods — the land occupied by the defendants having been conveyed to said Woods."

The first point urged by the appellant is, that the Court below erred in admitting in evidence the deed from the plaintiff to Woods, on the ground that it was not pleaded, and the defendants

Dyson v. Bradshaw.

did not connect themselves with the title of Woods. The plaintiff avers, in his complaint, that he was the owner of the premises, which is denied by the answer, and the deed was clearly admissible to disprove this averment and sustain the denial, as it showed that plaintiff had no title to that portion of the premises described in the deed. The objection that the defendants did not connect themselves with the title of Woods is equally untenable. The appellant, to sustain this point, refers to several decisions of this Court, wherein it was held that in an action to recover the possession of real estate, brought solely on the prior actual possession of the plaintiff, a defendant, who is a mere trespasser, cannot justify his act by showing the true title to be outstanding in a third person. (*Bird v. Lisbros*, 9 Cal. 1; *Piercy v. Sabin*, 10 Id. 22; *Coryell v. Cain*, 16 Id. 567.) This rule has no application to the present case. It properly applies to a case where the title of such third person is superior or better than that of the plaintiff, or adverse thereto, and it has no application in a case like the present, where such outstanding title was derived from the plaintiff. In such case, it shows that the plaintiff has divested himself of all right to the possession by his own act, and that the right to maintain the action under his own claim of title is not in him, but in a third person. It defeats his action more effectually than proof of an abandonment, which is clearly sufficient. (*Bird v. Lisbros*, 9 Cal. 1; *Gluckauf v. Reed*, 22 Id. 468.)

The next point is, that the Court erred in excluding the evidence offered by the plaintiff to prove that Woods failed to comply with the agreement, which was a condition precedent to the delivery of the deed. A deed takes effect only from the time of its delivery; and where a deed is placed in the hands of a third person as an escrow, as in this case, the grantee was only entitled to a delivery of the deed upon a strict compliance with the terms of the agreement, which was clearly a condition precedent to its delivery. (*Beem v. McCusick*, 10 Cal. 538.) As was said in that case, a compliance with the agreement was "the only condition whereby Beem, the grantee, could acquire title;" and not having complied, it was held that the grantor had a right "to hold the contract void." So here, the removal of the settlers from the Potrero was a

Dyson v. Bradshaw.

condition precedent to the delivery of the deed to Woods, and to the vesting of any title in him; and if true that he did not comply with or perform that agreement, then he acquired no title by the deed, and the plaintiffs had a right to treat the contract as void, Woods having died in the meantime. The Court therefore clearly erred in excluding this evidence; and this is fatal to the verdict, which shows by its own terms that it was founded entirely on this deed.

The learned and able counsel for the respondents urges with much force, that the land being a part of the public domain of the United States, Treat and the plaintiff were trespassers on the land, and had no right, under the Federal or State laws, to enter upon or take possession of more than one hundred and sixty acres, that being the quantity to which settlers upon the public lands are limited, by the Federal as well as by the State laws, except in cases of swamp and certain school lands under the State laws. There is certainly much force in the argument of the counsel, that to hold otherwise would defeat one of the wisest and most important provisions of our National and State land system, and open the door for an unlimited monopoly of the public lands, by those able to inclose them in large tracts. The contrary doctrine was, however, early established by this Court, and has been maintained ever since. The same point was distinctly raised and overruled in *Hicks v. Davis* (4 Cal. 67), which was very similar in its facts to the present case; and also in *Bradshaw v. Treat* (6 Id. 172), which was for a portion of the premises in controversy in this case. (See also *Plume v. Seward*, 4 Id. 94.) We do not feel at liberty to overrule a law of property so long established, and which might produce disastrous consequences. Besides, it is a point not necessary to be determined on the present appeal, as the judgment must be reversed for the reason before given.

The judgment is reversed, and the cause remanded for a new trial.

Gyle v. Shoenbar.

GYLE v. SHOENBAR.

A BROUGHT an action against B, and averred in his complaint that C was indebted to A; that B promised A to pay C's debt if A would release C, and that in consideration of the promise A did release C: *held*, that the release of C, being the alleged consideration of the promise of B, was an essential fact to be proved, and that unless proved A could not recover.

APPEAL from the District Court, Fifteenth Judicial District, Tehama County.

The facts are stated in the opinion of the Court.

W. P. C. Whiting, for Appellant.

Admitting that the promise laid in the complaint, is not within the Statute of Frauds, yet "that plaintiff released Levinson," was an essential averment, necessary to be proved, and without which the promise laid is void, not only by reason of the statute, but for want of any consideration, and because the release was *ex vi termini*, a condition precedent upon the performance of which only the promise was to take effect.

Far as the Courts have gone in upholding claims which, to an ordinary understanding, would seem to be not only within the plain letter of the statute, but to present in themselves excellent illustrations of the very evils the statute was intended to remedy, they have thus far uniformly held, that in cases of promises to pay the debt of a third party, in consideration of his release, "the discharge of the original debtor must be complete and must be proved." (*Corbett v. Cochrane*, 3 Hill, 41; *Harrington v. Rich.* 6 Vt. 666.) And particularly the case of *Forth v. Staunton* (1 Saund. 211), in a note in which the following language is used: "The question whether each particular case comes within this clause of the statute or not, depends on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise."

W. S. Long, for Respondent.

Gyle v. Shoenbar.

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is an action to recover the sum of four hundred and ninety-four dollars and seventy-four cents, which the complaint alleges the defendant promised to pay the plaintiff, if he would release one Levinson from the payment of a debt which the latter owed the plaintiff. The complaint alleges that the plaintiff did release the Levinson debt, and that the defendant was therefore liable to pay the sum agreed upon; and the Court found that fact in favor of the plaintiff, and accordingly judgment was rendered in his favor, from which the defendant appeals.

The assignment of error is, that there was no evidence to sustain the finding that the Levinson debt had been released by the plaintiff. It appears from the evidence that Levinson was engaged in selling goods in Tehama, when, becoming heavily indebted to various persons, especially the defendant, the latter purchased his stock of goods, notes, and book accounts, in satisfaction of the debt due to him, and for other considerations, as is alleged. The plaintiff testified as a witness on his own behalf, and stated that at the time the defendant bought out Levinson, he promised to pay him his debt against Levinson, which amounted to the sum before stated; that defendant told him he wanted him to stay in the store, and he would pay him his debt, and the same wages that Levinson had paid him; that he saw defendant afterward in San Francisco, in April, 1861, when he promised to pay him in two weeks. The plaintiff does not state that he ever released Levinson from the payment of the debt, and after a careful examination of the evidence we are unable to find any evidence to that effect. This release was the alleged consideration of the promise of the defendant, and is an essential fact to be proved, it having been put in issue by the pleadings. (*Lewis v. Myers*, 3 Cal. 475.) It may be that it was a mistake of the pleader in averring that such was the consideration of the promise; but if so he should have corrected the mistake by amending the complaint. Not having done so, his proof must conform to his pleading. No other consideration for the promise is alleged in the complaint or found by the Court; and

Walden v. Murdock.

this being unsustained by any evidence, the Court erred in its finding in this respect, and such error constitutes a proper ground for reversing the judgment and ordering a new trial. (*Cummings v. Scott*, 20 Cal. 83.)

The judgment is therefore reversed and the cause remanded for a new trial.

WALDEN v. MURDOCK.

AN appeal from an order refusing a new trial, although taken more than one year after the rendition of judgment, brings up the whole record, and the Supreme Court, if satisfied that the Court below erred in refusing a new trial, may reverse the order and grant a new trial, the effect of which will be to vacate the judgment.

When an appeal is taken from an order granting or refusing a new trial, no statement on appeal need be made or filed after the entry of the order, but the statement prepared and used on the hearing of the motion in the Court below, will be sufficient in the Supreme Court.

A *bona fide* purchase made by a creditor of the goods of his debtor, who is in insolvent circumstances, is not fraudulent, merely because such creditor thereby obtains a preference over other creditors, and may be aware at the time that his purchase will have the effect of delaying or defeating the other creditors in the collection of their debts.

A *bona fide* sale of cattle roaming at large over the plains, upon a defined or certain range, is not fraudulent as against the creditors of the vendor, merely because the sale is not followed by an immediate delivery of possession; but the parties are entitled to a reasonable time after the sale, to prepare for a rodeo, and give the proper notices thereof, in order that they may separate the cattle purchased from stock owned by others, and to properly mark and brand them; and in the meantime the rights acquired by the purchaser will not be lost.

Where cattle, roaming at large, purchased in good faith, are collected together and marked with the brand of the purchaser, and then allowed to pasture on their accustomed range, these acts constitute a good delivery and continued change of possession.

A mere execution of a bill of sale of cattle roaming at large, in which the brand with which they are marked, is described, accompanied by a delivery of the branding iron, does not constitute a delivery of possession of the cattle.

APPEAL from the District Court, Thirteenth Judicial District, Stanislaus County.

Walden v. Murdock.

The cattle levied on by the Sheriff, and for which this suit was brought, were that portion of the herd sold by Wells to Walden, roaming at large over the plains, and of which Walden had not, previous to the levy, taken actual possession.

The verdict was rendered and the judgment entered up June 14th, 1861. On the same day plaintiff filed and served notice of motion for a new trial, and within five days thereafter filed and served his statement on motion for new trial. No other statement was made on appeal from the order.

The other facts are stated in the opinion.

John B. Hall, for Appellant.

I. The point is made by the respondent's counsel that more than a year having elapsed between the entry of the judgment and the appeal, this Court has no jurisdiction to hear it so far as the judgment is concerned; and that the record showing no statement of the case, made and filed after the order refusing a new trial, the statement in the record cannot be referred to the order, and "the whole case rests on the judgment roll," and the order of refusal must be affirmed.

Our statute provides for the immediate entry of a judgment on the verdict, unless the case be reserved for argument. (Prac. Act, Sec. 197.)

By the English rule, on the contrary, no judgment was entered on the verdict until the first four days of the next succeeding term had expired. (3 Black. Com. side p. 387-396.) But if before the end of that term a motion for a new trial came, the entry of the judgment was thereby suspended. (Id.) The same effect was formerly allowed (our statutory provision to the contrary) to the motion in many of the District Courts of this State, and the entry of the judgment was not made by the Clerk until the Court or Judge decided the motion against the moving party; and until then all proceedings subsequent to verdict were suspended. This practice regarded the motion, when perfected by the statement, as equivalent to a reservation of the Court for argument of the question, Shall judgment be entered on the verdict, or shall the issue be retried? The motion stood for argument by the statute. (Id. 195.)

Walden v. Murdock.

The decision in *Hutchinson v. Bours* (13 Cal. 50) suggests a different practice, and pursuant thereto the judgment was entered by the Clerk, although the motion and statement intervened. But this decision has not made a material change in the effect of the motion. It only enlarges its effect if granted, and causes the order to extend to setting aside the judgment as well as the verdict. (*Hutchinson v. Bours*, 13 Cal. 50; *Lurvey v. Wells*, 4 Id. 106.)

Now, the appellant maintains the converse of respondent's proposition, and says that the judgment which rests on the verdict follows the motion, and whether it is to continue to exist or perish depends exclusively and absolutely on the fate of the motion.

What is a new trial? "A reëxamination," says the statute, "of an issue of fact in the same Court after a trial and decision by the jury, Court, or referee." (Prac. Act, Sec. 192.) "The former verdict or other decision may be vacated," etc. (Id. 193.)

The motion brings up the single question, Shall the verdict be set aside or vacated? If the verdict be set aside, the judgment falls necessarily, and it would not require a declaration to that effect in the order of the Court. If the verdict be not canceled the judgment stands in full force and effect, still remaining subject to the power of the appellate tribunal to order that to be done which the Court below refused.

If, then, the power vested with the Court at the date of its action on the motion, either to vacate or to ratify the verdict, the right to appeal was saved to either party deeming himself aggrieved by the order, and to seek at the hands of the appellate tribunal a correction of the alleged wrongful exercise of the power. And if the higher tribunal shall order that to be done which was done by the order appealed from, the same consequence follows as though it had been so ordered by the inferior Court, viz.: the verdict is set aside, and the judgment which never had more than contingent vitality, also falls for want of a foundation. And the Supreme Court acquires full power over the judgment, although no appeal is directly taken therefrom by means of the order made on the motion from which an appeal is taken. (*Lower v. Knox*, 10 Cal. 480; *Hanscom v. Tower*, 17 Id. 518; *Burdge v. Gold Hill Co.*, 15 Id. 198.)

To enable the Court to review the judgment on the appeal from the order, the statement filed on making the motion, if filed within twenty days after judgment is entered, is sufficient, and no other statement is necessary. (*Loucks v. Edmondson*, 18 Cal. 203, 204.)

The plaintiff asked the following instruction :

That if the jury shall believe, from the evidence, that Wells was indebted to the plaintiff, on the twenty-eighth day of November last, in the sum of two notes, the one from Wells to Walden for eight hundred and thirty-six dollars and interest; and the one, Wells as principal and Walden surety, to Crow, for six hundred and fifty dollars and interest, in all, the sum of \$1,800, or thereabouts, it was lawful for Wells to sell, and Walden to buy, all Wells' cattle for a fair price, and in payment of said debt; although the jury should further believe, that said Wells was, at the time, in insolvent circumstances, and Walden knew it; and although such sale and transfer operated as a preference to Walden over any other creditor, or creditors; and although said Walden may have known that other creditors would thereby be defeated of his or their debts.

The Court refused this instruction, and thereby declared the rule therein embodied, as applied to the hypothetical state of facts, was not the law. This was error, which necessarily under the condition of the proofs, must have operated to the prejudice of the plaintiff's case when under deliberation by the jury. The instruction is no abstract proposition of law, having no reference to the case in hand; but it announces a rule which results from facts directly put in issue by the pleadings, and as to which most testimony has been offered.

One of the chief defenses, is a fraudulent and fictitious sale. It is a right of a creditor to protect himself by his vigilance, and if need be, to save himself by means of a purchase of his debtor's property, either in part, or in the whole, although the debtor may be *in extremis* of pecuniary embarrassment, and the sale work a preference over as well as actually to defeat equally meritorious claims, even with the knowledge of both contracting parties. The principle of law, not now to be questioned in this State, embodying this rule, is briefly and forcibly expressed by the Supreme Court of

the United States, in these words: "The debtor may prefer one creditor, pay him fully, and exhaust his whole property, leaving nothing for others, equally meritorious." (*Clark v. White*, 12 Peters, 178, 200.)

It may become the highest duty (says this Honorable Court) of an insolvent to sell his property in order to pay his debts. (*Kinder v. Macy*, 7 Cal. 206.) The rule announced in words, so few and cogent, by the Supreme Court of the United States, is adopted, without limitation or qualification of any kind, by this Court in the case of *Dana v. Stanford et al.* (10 Cal. 269, 277), in which the correlative right of the creditor in this State: "A creditor violates no rule of law when he takes payment on security for his demand, though others are thereby deprived of all means of obtaining satisfaction of their own equally meritorious claims." Now, the plaintiff's instruction simply announced this principle of the law of debtor and creditor, and requested its application to the facts.

II. The next ground of error is extracted from the action of the Court, in having refused the plaintiff's third instruction, and in having granted the defendant's two instructions, all on the subject of the sufficiency of the delivery. The law, as given to the jury, was, that the established facts shown by the plaintiff, fell short of the delivery demanded by the statute; and that the property being cattle grazing on the plains, within certain ranges, a delivery could be legally made, in order to avail against the attaching creditor, in this single manner, viz.: by being collected together, picked out, and actually delivered by Wells to Walden, or his agent. This Court, in commenting upon the statutory rule of delivery in *Chapin v. Doub* (14 Cal. 384), say: "although delivery be requisite, in cases of sale, yet what will constitute a delivery, must depend, in some measure, upon the character of the article sold, and the peculiar circumstances of the case." It is respectfully urged that the doctrine adopted by the Court below, wholly ignored the nature of the property, and the attendant circumstances of its condition.

The Legislature has declared that contracts for property of this kind shall be evidenced by "a written descriptive bill of sale;" and this requirement, it is insisted, has not been imposed without a

reason or an object. (Wood's Dig. 542, Art. 2815.) The act is subsequent in date to that requiring immediate delivery from vendor to vendee, of things sold. It is to be presumed that the provision for the execution of a bill of sale, was enacted with an intelligent reference to the nature of the property, its ranging at large for grazing, and the but periodical actual possession for the purpose of actual delivery of its owners, the condition of the country, and the requirements of trade and barter, and with full knowledge also, of the then existing general act, demanding immediate delivery in all sales of personalty. Sales are made, as was this, out of the season of rodeos, and a large force must be employed, and much time occupied and heavy expense incurred to comply strictly with the rule of immediate delivery, if, as the Court below hold, there must be a gathering together of the cattle, a separation, and actual turning over into the manual custody. To do all this, rodeos must be had at various points, within the exterior lines of the range; the owners of like property everywhere within the exterior boundaries of the range, and their cattle, must be put in motion, and, oftentimes, to the detriment of owners and property. Besides, the performance of this essential may be called for at a time and under circumstances, to wit: of season, condition of rivers, woods, and country generally, occupied by the cattle, as that performance may be either impossible, or so difficult and expensive, as to operate as an effectual suppression of contracts in this kind of property. If by immediate delivery is meant a delivery at the instant of time, or within the hour, or day, after the terms of sale are agreed upon, the rule as to property of this sort, in this State, will prove impracticable oftentimes, and "an actual and continued change of possession," if required to be so marked as, *per se*, to notify every one of the change, the conditions of performance will impose burdens on the buyer or else sacrifices, which must operate greatly in restraint of trade of which cattle are the subject. The article requiring a written descriptive bill of sale, was evidently intended to meet and to obviate these difficulties. It should receive a liberal construction, and be allowed a corresponding legal effect. It should be permitted to stand in lieu of the "immediate delivery" where at the time of the sale, the situation of the property renders immedi-

ate delivery impracticable, and where all the circumstances attending the transaction manifest a purpose on the part of the vendor to transfer full possession and control to the vendee.

H. P. Barber, for Respondent.

The first point made by respondent is, that this Court has no jurisdiction over the judgment, the appeal not having been taken within one year from the entry thereof. Sec. 336 of the Practice Act provides, that an appeal from a judgment may be taken within one year after rendition of judgment. Sec. 333 says, a judgment or order may be reviewed as prescribed by Title 9, and not otherwise. It is therefore plain that the judgment cannot be disturbed.

Let us now see if the order refusing a new trial can be reviewed on appeal, where the judgment must stand, and if the whole case does not rest on the judgment roll. An order granting or refusing a new trial is not a judgment. (*Duane v. N. Y. R. R. Co.*, 4 How. 364.) Where a party wishes to render an appeal from an order refusing a new trial effectual, he must also appeal from the judgment within statute time; for of what avail can an order for a new trial be, while the judgment stands against him unreversed and a final estoppel? The Practice Act, Sec. 336, gives an appeal within sixty days from an order refusing a new trial, and from any order made after final judgment. But by Sec. 338, the statement explaining the grounds of error in such order must be filed, or prepared within twenty days after the entry of such order. The same reasoning will apply as to a statement filed before the order appealed from, as to filing a bond on appeal, before filing the notice. (*Dooling v. Moore*, 19 Cal. 81.) Now, if the judgment be not appealed from in time, the statement, so far as it can affect the judgment, fails, or falls with the appeal, for want of jurisdiction. Nor can such statement, on motion for a new trial, be considered as appurtenant to the order refusing the motion; for it is not filed after the order, as required by statute, but before it. If the statement on motion for a new trial be used in this case as a statement on appeal, the same objection applies. It was filed June 14th, 1861, and the order overruling a new trial was not made till June 10th, 1862; so that the statement, instead of being filed twenty days after the

Walden v. Murdock.

order, was filed nearly a year before. When the statement, as settled by the Judge, is used as a statement on appeal, it becomes a part of and wholly appurtenant to the judgment; it becomes, in fact, a part of the record, like a bill of exceptions; and the appeal from the judgment failing, the statement falls with it. Upon this point we submit these propositions:

The appeal from a judgment, being taken after the expiration of one year, is a nullity.

If the appeal be considered as from an order refusing a new trial, the statement being filed before, instead of after the order appealed from, cannot, under Sec. 336 of the Practice Act, be considered as a statement on appeal from such order.

If it be considered as a statement on appeal from the judgment, the appeal from the judgment being a nullity, the statement is unavailable.

By Sec. 342, the statement, if from a final judgment, is to be annexed to the judgment roll (as in this case); if from an order, then to such order, or a copy thereof; but if the statement be on appeal from an order, it must be prepared after the entry of such order. Here, the record shows it was prepared and filed nearly a year before the order. In all cases either of judgments or orders, the statement on appeal must be prepared after the entry of such judgment or order, and can be referred as belonging solely to a judgment or order made antecedent to its filing or preparation.

As to the errors assigned by appellant. The first charge requested by him contains three errors. It requests the Court to charge, that if the jury shall find "that Wells was indebted to the plaintiff," etc. This is a case in which fraud was set up as a defense. The charge entirely omits the words "*bona fide*," or the question whether Wells was, *bona fide*, indebted to the plaintiff. Wells might very well have been indebted to plaintiff, and the indebtedness been perfectly good as between them, and yet fraudulent and void as against creditors. The least consideration for the notes would have been good as between Wells and plaintiff, but not so as against creditors. (*Proyne's Case*, 1 Smith's Lead. Cas. 1.) The third instruction requested by the plaintiff and refused was, that if a part of the cattle were within an inclosure, and delivered

Walden v. Murdock.

to the plaintiff, and the rest were remaining on their usual range, and not actually delivered (except by the bill of sale and transfer of the marking irons), that the actual delivery of the cattle in the inclosure constituted a valid delivery of the whole, as against creditors. Wood's Digest, Art. 403, Sec. 15, provides, that the sale must be accompanied with "an immediate delivery and an actual and continued change of possession." The instruction assumes, that a mere verbal delivery of the cattle running at large, would be sufficient. We apprehend this is not law. The Court laid down the law correctly in its own charge, "that if it is within a reasonable possibility for the vendee to receive or get actual possession, it must be done to make the sale valid as against creditors." This we believe is the correct doctrine, and plaintiff's requested charge, that it was absolute law that a verbal or symbolical delivery of cattle running on a range was sufficient, was properly refused. The delivery of the bill of sale and branding irons, is by no means an "actual" delivery of the cattle; and it was a question for the jury, under the circumstances of the case, as to whether there was any difficulty in the vendor making actual delivery, and whether he had made any endeavor so to do.

CROCKER, J. delivered the opinion of the Court — NORRIS, J. concurring specially.

The plaintiff sues to recover damages for the seizure and conversion of one hundred and seventy-five head of cattle, claimed by him. The defendant justifies under a writ of attachment in his hands, as Sheriff, issued at the suit of one Wilson against one Wells, the plaintiff's vendor. The cattle in controversy were part of a large lot bought by the plaintiff of Wells on the twenty-eighth day of November, 1860, in consideration of the plaintiff's note for two thousand dollars and a debt of eight hundred and thirty-six dollars, besides interest due from Wells to the plaintiff; and also a debt of six hundred and fifty dollars due one Crow, on which the plaintiff was surety. A bill of sale of the property was executed to the plaintiff on the twenty-ninth of November. The attachment had been issued at the time of this sale, but it was not levied on the property until the thirtieth of November. On the part of

Walden v. Murdock.

the defendant, it was contended, that there was no delivery or continued change of possession in the sale to the plaintiff, as required by Sec. 15 of the Statute of Frauds; that it was therefore fraudulent and void as against the defendant, who was a creditor of the vendor. The verdict and judgment in favor of the defendant was rendered June 14th, 1861, and an order overruling a motion for a new trial was made June 10th, 1862, and the notice of appeal from the judgment and order was filed August 4th, 1862 — within sixty days from the date of the order overruling the motion for a new trial, but more than one year from the rendition of the judgment.

The respondent contends, that this Court has no jurisdiction of the appeal from the judgment, it not having been taken in time; and that this Court cannot take any action affecting the judgment, under the appeal from the order denying a new trial, for the same reason. In the case of *Hanscom v. Tower* (17 Cal. 518), there was no appeal from the judgment, but only from the order refusing a new trial; and the Court in that case say, in answer to the same objection: "The appeal from the order refusing a new trial brings up the whole record; and there is nothing in the point that error cannot be assigned upon the judgment roll." Under this appeal, this Court has a clear right, should it be satisfied that the Court erred in refusing a new trial, to reverse the order and grant a new trial, the effect of which is to vacate the judgment. This objection is therefore overruled.

It is also contended, that the statement filed in the Court below, on the motion for a new trial, having been filed before the order appealed from, must be disregarded. The rules relating to statements and bills of exceptions were fully laid down by this Court, in the case of *Towdy v. Ellis* (22 Cal. 650). Under the principles as there announced, this objection is untenable. So, in the case of *Loucks v. Edmondson* (18 Cal. 203), it was held, that on appeal from an order granting or refusing a new trial, there is no necessity for preparing a statement on appeal, the statement on motion for new trial being sufficient.

At the trial, the plaintiff asked the Court to give the following instruction, which was refused, and this is assigned as error: "If the jury shall believe from the evidence that Wells was indebted to

the plaintiff on the twenty-eighth of November last in the sum of two notes — the one from Wells to Walden for eight hundred and thirty-six dollars and interest, and the one from Wells as principal and Walden as surety to Crow for six hundred and fifty dollars and interest — in all some \$1,800 or thereabouts — it was lawful for Wells to sell and Walden to buy all of Wells' cattle at a fair price and in payment of said debt, although the jury should further believe that said Wells was at the time in insolvent circumstances, and Walden knew it; and although such sale and transfer operated as a preference to said Walden over any other creditor or creditors, and although Walden may have known that other creditors would be thereby defeated of their debts." If the instruction had been limited to a statement that a *bona fide* sale of property by a debtor in insolvent circumstances to his creditor, in payment or satisfaction of his debts, is not fraudulent, merely because such creditor thereby obtains a preference over other creditors, and he may be aware at the time that it will have the effect of defeating the collection of other debts, it would have been proper, under the decisions of this Court. (*Dana v. Stanford*, 10 Cal. 277; *Kinder v. Macy*, 7 Id. 206.) But such sale must be *bona fide*, a point which is ignored in the instruction as asked; and it is therefore erroneous to that extent, and the Court did not err in refusing to give it in that form. Besides, the refusal did not injure the plaintiff, as the Court gave another instruction, embodying substantially the same principle relied upon in this instruction.

The important question involved in this case relates to the delivery of the cattle to the vendee. It seems that the sale from Wells to the plaintiff was of about five hundred head of cattle, about two hundred of which were at the time in a field of the vendor's; and the plaintiff, immediately on the day of sale, drove them over to his own ranch and put them in an inclosure of his own. There is no doubt as to the sufficiency of the delivery of this portion of the cattle. The remainder not thus driven from Wells' field to the plaintiff's were ranging upon open, uninclosed lands in the neighborhood, with the cattle of other persons, as far as twenty or twenty-five miles around. The vendor went out on the plains with the plaintiff and pointed out to him about fifteen to twenty head, which

Walden v. Murdock.

the latter took possession of, and the vendor pointed out the range and told the vendee to take the whole; but no further act of delivery or taking possession seems to have occurred, except the execution of the bill of sale, in which the cattle are described as having the brand of the vendor, which is set forth therein. It was these cattle that were attached, and are now in controversy. On this point the Court, at the request of the defendant, gave the following instructions, which are now assigned as error: "That if, in the present case, the cattle alleged to have been sold by Wells to the plaintiff were susceptible of actual delivery, and could have been brought under the actual control or within the actual possession of the plaintiff, as by being collected or picked out and actually delivered to him or his agents, and this was not done, the sale was void as against the creditor, Wilson, and the defendant is entitled to a verdict. That the sale of cattle grazing on the plains within certain ranges, if they can be collected together and delivered, is not valid as against attaching creditors without such delivery; that if they can be collected and brought within the personal supervision and control of the party purchasing, a mere transfer by bill of sale, while they are running loose on the plains, is not good in law as against such attaching creditors."

This question as to what will constitute a valid delivery and a continued change of possession in a sale of stock ranging at large over the immense uninclosed plains in this State, is a most important one, deeply affecting the interests of those dealing in that kind of property. It not only affects the right of the vendee as against the claims of the creditors of the vendor, but also as against his subsequent vendees. The difficulties attending a delivery by securing to the vendee the actual control of such stock, often wild and hard to manage, are great; but if in addition to that he is required to keep them under his actual control, and not allow them to pasture upon their accustomed range, in order to establish a continued and exclusive possession, the difficulty becomes almost insurmountable. The difficulties growing out of the ownership by numerous parties, of vast herds of stock roaming over our extensive plains with their rapid increase, even in cases where there is no contest between adverse claimants to the same animals, are great, and the

Walden v. Murdock.

Legislature, in order to prevent controversies, and to secure the evidence of ownership in a practicable mode best adapted to the circumstances of the country, has passed laws regulating the marking, branding, and counterbranding of stock, and requiring the owners to give rodeos at stated periods of the year, for the purpose of separating their stock, and marking and branding it so as to designate the owner. (Wood's Dig. 542, 659.) These laws are imperative in their character, and are required by the wants and necessities of the country.

Under the rodeo law, the owners of cattle in the county where the stock in controversy ranged, were required to give one general rodeo between the first of March and the thirty-first day of August of each year; and Sec. 9 of the act provides that "no person shall be allowed to mark or brand any portion or the whole of his cattle, at any other time or in any other manner than as prescribed in this act; and whoever shall act to the contrary will subject himself on conviction before any Justice of the Peace, to a penalty of not less than one hundred dollars nor more than five hundred dollars, at the discretion of the Justice." It is clear, that if the plaintiff had collected together the cattle purchased by him, and marked them with his own mark and brand, and then let them go, to pasture on their accustomed range, that would have constituted a good delivery and continued change of possession. But the third section of the law provides that "no owner of a stock farm shall be required to give a rodeo from the first day of November to the first day of March in each year, except on a contract for the delivery of cattle, or on a legal demand from the Sheriff or constable of his county, having an execution against the owner, and demanding a rodeo for the levy or delivery of cattle." Sec. 1 of the same act, requires that four days' previous notice of such rodeos shall be given to all the owners of adjoining farms, in order that parties interested may meet for the purpose of separating their respective cattle. Sec. 7 of the act respecting marks and brands provides, that "any person or persons selling cattle which are not intended for slaughter, or any horses, mares, mules, jacks, or jennies, shall be required to counterbrand them on the shoulders or give a written descriptive bill of sale, etc."

It is clear, that under the Statute of Frauds, the parties are

Walden v. Murdock.

entitled to a reasonable time in which to *complete* a delivery of personal property which had been commenced immediately after the sale, and under these statutory provisions the plaintiff was entitled to a reasonable time after the purchase to prepare for a rodeo, and to give the proper notices thereof, in order that he might separate the cattle purchased by him from the stock owned by others, and to properly mark and brand it; and in the meantime the rights acquired by his purchase will not be lost. As to what will constitute a reasonable time in such cases, will depend upon the facts and circumstances of each case. It is evident that he was not allowed any such reasonable time in the present case, as the Sheriff levied the attachment and proceeded to collect the cattle on the thirtieth of November, being the next day after the bill of sale was executed. The instructions given by the Court overlook and disregard entirely these important provisions of the statute regulating the delivery, as well as the necessity of giving the parties a reasonable time to complete the delivery, of cattle, and are in direct conflict therewith. The Court therefore erred in giving these instructions.

The appellant contends that the "written descriptive bill of sale," mentioned in the last section above referred to, is intended as a substitute for a delivery by actual transfer of the possession and control of the stock. It is evident that such is not the meaning of the statute. The law was designed to establish a rule by which the marks and brands of stock should be evidence of ownership; and upon a sale, where the lives of the animals were intended to be preserved, the vendor was required to put his counterbrand on the animals sold; and thus, while they would carry with them the evidence of his former ownership by his mark and brand, they would at the same time show a transfer by his counterbrand; but where it was not convenient to thus counterbrand, he was required, as a substitute, to give a "written descriptive bill of sale," which would equally show what animals he had sold, and estop him from claiming title evidenced by his brand. The intention clearly is to prevent the vendor from subsequently claiming the cattle, because they carry his mark and brand, and not to dispense with the delivery required by the law to make the sale valid as against creditors and subsequent purchasers. It seems that at the time of executing the

Miller v. Newton.

bill of sale, Wells delivered his branding irons to the plaintiff—and this is relied on as a circumstance showing a delivery. Such a fact has no effect upon this question of delivery. It was good as a delivery of the branding irons, if they were included in the sale, but not as a delivery of any other property.

The judgment and order refusing a new trial is reversed, and the cause remanded for a new trial.

NORTON, J. concurring specially.—I think the rodeo laws do not require a branding by the purchaser on a sale, but only a counter-branding by the seller, or a descriptive bill of sale. In this case, the latter mode was adopted, though the description by simply stating the brand was doubtless insufficient.

The parties, however, began an actual delivery before the levy by the Sheriff, and there was evidence of an intention to complete such delivery. A reasonable time to do it was allowed, and when done it would relate to the first part of the act certainly, and perhaps to the time of executing the bill of sale.

I therefore concur in the order reversing the judgment, and remanding the case for a new trial.

MILLER *et al.* v. NEWTON *et al.*

THE effect of a marriage, at common law, is to deprive the wife of all separate legal existence, rendering herself incapable of binding herself by a contract. Courts of Equity, however, for many purposes, treat the husband and wife as distinct persons, capable of contracting with and suing each other, and of having separate estates, debts, and liabilities.

Where a married woman, having a separate estate, creates debts with the intention of making those debts payable out of and a charge on her separate estate, a Court of Equity will decree the debts a charge on that separate estate, and direct it to be sold under the rules of the Court, in such manner as may be equitable, and the proceeds to be applied in payment of the debts.

This liability of the separate property of a married woman, can only be enforced in a suit in equity, where all interested can be made parties, and a decree rendered directly against the property for the payment of the debt, and no personal judgment can be recovered against the wife.

In such actions, to make the debts of a married woman a charge on her separate

Miller v. Newton.

estate, Courts of Equity are careful in guarding her against imposition, and in seeing that dealings with her, affecting her separate estate, are free from fraud, and reasonable in their terms, and that no unfair advantage has been taken of her.

APPEAL from the District Court, Seventh Judicial District, Sonoma County.

The complaint in this case averred the partnership of plaintiffs, and its style, and that at divers and sundry times between the twenty-eighth of March, 1858, and the thirteenth of March, 1861, plaintiff sold and delivered to the defendant America S. Newton (acting by the name of America S. Tate), at her request, divers goods, wares, and merchandise, food and raiment for the support of herself and family, and for the benefit and advantage of her separate estate, as described in said complaint. That the indebtedness due from her to plaintiffs for goods, etc., by her purchased of them, was a running account, extending through the period stated. It also alleged, that Mrs. Newton purchased said goods, etc., with the special promise and agreement on her part that she would be responsible and pay for the same out of her separate estate described, and that the price thereof should be a charge on said separate estate, and that she appointed her estate as security for the payment of her accruing indebtedness; and that plaintiffs, relying on her representations and promises, and upon the credit of such estate, sold and delivered to her the goods, etc., and that there was due thereon an amount thereof of \$1,516.67.

2. The complaint also stated that the firm of Pauli & Co., also sold and delivered to Mrs. Newton, who purchased, in her name of America S. Tate, goods, wares, merchandise, food, raiment, and necessities for the support and maintenance of herself and family, upon her request, and upon the like representations above mentioned, and that she became indebted to such firm in the sum of seven hundred and ninety-six dollars and forty-two cents, and which demand such firm assigned for value to plaintiffs, before this action was commenced.

3. The complaint further stated, that on the ninth of January, 1859, America S. Tate intermarried with defendant Russell Newton; and that she and her husband lived together only three or four

Miller v. Newton.

days, when they separated, and in a few days thereafter the said Russell left the country. That said Russell had no property then, but was insolvent, and so continued to be. That at no time has he exercised, or claimed the right to exercise any control or management of his wife's separate property, but, on the contrary, always denied and disclaimed all right or intention so to do, and disclaimed any interest in such property.

4. The complaint also stated, that at the time of and after said marriage, Mrs. Newton requested said firms respectively to keep her accounts as they had before then been kept, without change of name or responsibility, and assured them that she had sufficient property to pay them for what she had purchased and might purchase, and would pay them therefor out of her separate estate.

5. The complaint then contains a statement and description of Mrs. Newton's separate property, upon the credit of which she purchased the goods of plaintiffs, and of Pauli & Co., their assignors, and which she specified and appointed as a security for the payment of the debts which she had so contracted.

6. The plaintiffs then pray for a judgment and decree, charging the separate property of Mrs. Newton with and for the payment of the two demands above mentioned, and that such property may be applied to the payment of such demands, and also that a receiver may be appointed to take charge of such separate property, and dispose of it, or so much of it as shall be necessary to satisfy said demands.

George L. Wratten, Attorney, and *John Currey*, of Counsel, for Appellants.

It being impossible for Courts, proceeding upon the principles of the common law, to recognize a *femme covert* as capable of entering into contracts which could bind her, it became necessary, in order that she might be protected in her property, and that she might, to every needful extent, be enabled to enjoy it, to recognize her separate existence, and thus to invest her, as to her separate estate, with the power to subject it to her use and enjoyment; and to that end the doctrine of the civil law on the subject came to be incorporated into the jurisprudence of England, nearly or quite

two centuries ago. (Story's Eq. Jur. 1, 2; 1 Spence's Eq. Jur. 595-598.)

By the civil law, the husband and wife were and still are considered as distinct persons, and may have separate estates, contracts, and debts. (1 Black. Com. 444; Fonb. Eq. B. 1, Ch. 2, Sec. 6; 2 Story's Eq. Secs. 1367, 1368, 1399-1401.) The extent to which a married woman, having a separate estate, might enter into contracts and incur liabilities that would bind her separate property, has been a fruitful theme of forensic and juridical discussion in the Courts of Chancery in America and England; but that she is competent to enter into valid and binding engagements for her personal benefit, and for the benefit of her separate estate, is a doctrine that may be regarded as firmly established. It is the law of Courts of Equity, that a *femme covert*, in respect to her separate property, is to be considered a *femme sole*. By the law applicable to the subject, we believe the propositions following herein to be well established, as well on principle as by authorities:

1st. The respondent, Mrs. Newton, was competent to make the contracts entered into after her marriage, as mentioned and set forth in the complaint in this action, and thereby she incurred liabilities binding on her; and her separate property may be charged in equity for the debts contracted by her, as alleged, both before and after her marriage with Russell Newton; and such separate property may, under the decree of the Court, be disposed of for the payment and satisfaction of the demands due from her to the appellants.

When the case of *Yale v. Dederer* was first in the New York Court of Appeals (18 N. Y. 274-276), Comstock, C. J., after noticing the earlier decisions of the English Courts of Chancery, as well as the cases of *Murray v. Barlee* and *Owen v. Dickinson*, said: "The principle, in short, which now governs in cases of this kind is, that a wife's separate estate is liable to pay her debts during coverture, in whatever form they are incurred, not because her contracts have any validity at law, nor by way of appointment or charge, but because equity decrees it to be just that they should be paid out of such estate." Again, "If the promise is on her own account, if she or her estate receive a benefit, equity will lay hold of those circumstances to respond to the engagement." (Id. 276.) And

again, "Courts of Equity, proceeding *in rem*, will take hold of her estate, and appropriate it to the payment of her debts." Thus it appears that in order to subject the estate of a *femme covert* to the payment of debts, by her contracted for her own benefit or for that of such estate, it is not necessary to imply that she made any direct appropriation or appointment of it as a security for such payment, nor that such estate became charged, by reason of the contract, with a specific lien as security for the performance of her obligation.

A *femme covert*, having a separate estate, has power to contract debts that may bind her to the extent of her property; and when a Court of Equity undertakes to give effect to her obligations, by laying hold of the separate property as the means by which they are to be satisfied, as said by Lord Cottenham and reiterated by Chief Justice Comstock, the lien on such property is created by the decree of the Court.

2d. The *corpus* of the respondent's real estate, as well as the rents and profits of it, and as well as her personal property, may be subjected, and the avails thereof applied, under the decree of the Court, for the payment and satisfaction of her debts.

The Courts of Chancery of England, where the wife's separate estate was merely an equitable estate (the legal title to which was usually vested in trustees), limited the relief afforded to a creditor, against the separate estate of a married woman, to an application by her trustees of her personal property, and the rents and profits of her real estate.

The Constitution of the State of Texas, Art. 7, Sec. 19, is the same as our Constitution, Art. 11, Sec. 14, on the same subject. (Hartley's Dig. 78.)

In *Womack v. Womack* (8 Tex. 413), Hemphill, C. J. said: "That a married woman holds her property by as high, as full, and as perfect a title as does her husband his separate property, is a proposition not to be questioned." And at page 415, he decided that the wife had the right to pay her debt out of either the *corpus* or profits of her separate estate; that she might be sued for its recovery, and, on judgment, the decree would be that the execution be levied on her separate property; that the Court had the power

Miller v. Newton.

to direct the proceeds to be first applied to the satisfaction of the debt; and, if they were insufficient, that then the amount due should be made out of the *corpus* of the property. And, in the leading and ably-considered case of *Cartwright v. Hollis* (5 Tex. 156), the same learned Judge, after declaring that the right of the wife to separate property was guaranteed by the Constitution (Id. 170), said: "In some cases, the question of whether the capital or rents and profits of the separate estate are liable to the charges, has been much discussed. When the wife has the entire interest in the estate, the *corpus* as well as the issue of the estate would no doubt be liable. In this case, the application is for payment out of the property, or out of the rents or profits. If the latter be sufficient, they should, doubtless, and properly, be first subjected to the charge; if not, the capital should be appropriated for that purpose."

In the case of *Van Maren v. Johnson and Wife*, 15 Cal. 308, this Court held, that the judgment obtained might be enforced against the separate property of the wife; by which we understand, that the separate property of the wife, whether real or personal, might be sold to satisfy the judgment.

William Ross, for Respondent.

The complaint is uncertain. No description of the goods, etc., is given. There is no allegation as to who composed the "family" of the respondent, whether they were adults or minors; nor whether they possessed means sufficient for their own support, or whether it was the duty of or proper for the respondent to furnish their support.

In the absence of a description of the goods, etc., sold, the Court cannot determine whether they were necessities, or whether they were for the benefit of the separate estate of the respondent; and, there being no averment of the character and situation of the family, it cannot be determined by the Court, whether the respondent has a family, or whether she was under any obligation whatever to support or furnish necessities for the parties for whom she purchased the goods. If it was not her duty to support the family, or if the articles furnished were not necessities, nor for

the benefit of her separate property and estate, we think it is well settled that her separate real estate, at least, cannot be charged with debts thus incurred.

In *Maynard v. Johnson* (1 Hill. Ch. 228), it was held, that the Court would "inquire into the propriety of an express charge, and not allow the wife to charge her estate by her own mere act and will, without evidence that it was necessary, or at least proper."

A married woman cannot dispose of or change her separate estate, even by her consent in Court, unless in the mode prescribed by the instrument creating her separate property. (10 Ves. 585, 586.)

The expression of a particular mode of creating a lien on the separate property of the wife, denies and excludes any and all other modes of doing it. She can make no contract to bind her, except in the manner prescribed by law. (*Selover v. Am. R. Com. Co.*, 7 Cal. 266; *Barrett v. Tewksbury*, 9 Id. 13; *Pearce v. Barbiers*, 10 Id. 436.)

In *Jaques v. The M. E. Church* (17 Johns.), so much relied on by the appellants' counsel throughout his entire argument, was the case of a *femme covert* acting under a deed of settlement, where the question was, whether Mrs. Jaques, "with respect to her separate estate, is not to be regarded in a Court of Equity as a *femme sole*, and may not dispose of her estate as she pleases, without regard to her trustee, there being nothing in the deed of settlement requiring the consent or concurrence of her trustee, nor any negation of an unlimited power of disposition of the estate by her."

We contend that the statute answers this proposition, by requiring not only that the disposition must be in writing, but must also be signed and acknowledged in the manner pointed out by the statute.

The first proposition made by the appellant may be divided: First, was the respondent competent to make the contract entered into with the appellants after marriage? and, second, can her separate property be charged in equity for the debts contracted by her before her marriage?

We contend, that by the Constitution, and the statute made in pursuance thereof (Wood's Dig. 488, Sec. 6), the respondent,

during coverture, could not create any lien upon or incumber her separate property, unless by an instrument in writing, signed and acknowledged in the manner prescribed in the statute. If she is absolutely forbidden to create such lien directly by her own act, or by parol, she is restrained from creating such lien or incumbrance in any other manner than by an instrument in writing, with the concurrence of her husband.

This statute is not only intended to protect the wife from undue influence of her husband, but to guard her property from the attacks of any other person.

This statute is "a new chapter in the Statute of Frauds," and does not come under the reasoning of the Court in *Murray v. Barlee* (4 Simons, 82); but, even in the argument of Lord Brougham in that case, it is said, that as to her separate estate, the wife is to be considered as a *femme sole*, "unless restrained by positive and binding law to a particular mode of disposition." (3 Myl. & K. 223.) Can the Court create a lien upon the separate property, that by no possibility, either by mortgage, confession of judgment, or otherwise, could the wife herself have created?

In *Ingoldsby v. Juan* (12 Cal. 579), the Court sustained the validity of the Act of the seventeenth of April, 1850, and said "it was designed to fulfill the requirements of the Constitution, more clearly to define the rights of married women."

As to the second point contained in appellants' brief: Can the separate property of the respondent be charged, in equity, for debts contracted by her before her marriage? The appellants, by stating, in the complaint, that the respondent, after her marriage, promised to pay her debts contracted *dum sola*, seem to rely upon that subsequent promise to sustain the position assumed of her liability. If the complaint relied upon the previous promises, made at the time of the several purchases, the Statute of Limitations might have been pleaded in bar of the action on the account; for, in *Richie, Osgood & Co. v. Davis* (5 Cal. 453), this Court says: "When there have been various charges in a store account, and no reciprocal charges by the other party, each charge in the account becomes barred by the Statute of Limitations." The complaint is uncertain as to the promise relied upon; but, from the

argument made by the appellants' counsel, we must conclude they stand upon the one entered into subsequent to the marriage. This promise is not binding. It is within the Statute of Frauds. (*Fairbanks v. Dawson*, 9 Cal. 89.)

We do not doubt but that, by an action of law, if not barred by the Statute of Limitations, the appellants might have recovered a judgment for the contract debts of the respondent incurred before marriage, according to her liability as fixed by statute, as determined in the case of *Van Maren v. Johnson* (15 Cal. 309), and have execution ordered against her separate property.

We deny the appellants' second proposition, that "the *corpus* of the respondent's real estate, as well as the rents and profits of it, as well as her personal property, may be subjected, and the avails thereof applied, under the decree of the Court, to the payment and satisfaction of her debts."

The case of *Van Maren v. Johnson et al.*, so much depended on by appellants, is not in point; for that was an action at law, and depended upon the construction of the statute, which declares that the separate property of the wife shall be and continue liable for her debts contracted *dum sola*; and upon the question whether the common law was not in full vigor as to the further liability of the common property, acquired after marriage, for the payment of such debts — this latter proposition being by this Court decided in the affirmative.

The true doctrine is laid down by the Master of the Rolls, in *Aylett v. Ashton* (1 Myl. & Cr. 105-111), in this language: "Although a *femme covert* has power, and the Court has jurisdiction, over the rents and profits of her separate property, no case has given effect to her contracts against the *corpus* of her separate estate." The cases are not limited to her "general engagements."

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring — COPE, C. J. dissenting.

This is an action to recover, from the separate estate of a married woman, debts contracted by her, both before and since her marriage. The husband was made a party with the wife, but he was defaulted. The wife appeared and demurred to the complaint, on

the ground that the same did not state facts sufficient to constitute a cause of action, and for uncertainty. The Court sustained the demurrer, and rendered judgment against the plaintiffs, from which they appeal.

The complaint avers that Mrs. Newton purchased goods of the plaintiffs and their assignors, at various times from March 28th, 1858, to March 13th, 1861, for the support of her family and for the benefit and advantage of her separate estate, forming a running account during that period. That on the ninth day of January, 1859, she intermarried with her present husband, but they lived together only for a few days when they separated, and he soon left the country; that these purchases were made with the special promise and agreement on her part that she would pay for the same out of her separate estate, and that they relied upon these promises and upon the credit of her separate estate in selling the goods; that at the time of and after her marriage she requested them to keep her accounts the same as they had been kept before, without change of name or responsibility, and promised to pay them therefor out of her separate estate, which is described in the complaint. The complaint prays for a judgment for the amount due, and that the separate property of the wife may be applied to the payment of the demands sued for, and that for that purpose a receiver might be appointed to take charge and dispose of the separate estate.

At common law, the effect of a marriage was to deprive the wife of all separate legal existence, her husband and herself being deemed at law but one person. One result of this principle was, that at law she was incapable of binding herself by a contract. But the hardship of the rule was found so great that exceptions were made to it even at law. Thus, if the husband became *civilitur mortuus*, or even transported for a term of years, or had been abroad and unheard of for seven years, or even had left the State without the intention of returning, it was held that she could contract in her own name and was liable to be sued alone thereon. (1 Chitty's Pl. 28, 57, and notes.) Still, with all the modifications of the rule, the Common Law Courts continued to maintain it to a most rigorous extent.

But Courts of Equity have laid down rules upon this question

more in accordance with the spirit of modern civilization and the principles of justice. In doing so, they have followed, to a great extent, the more liberal doctrines of the civil law. In determining the question raised in this case, we must look to the rules laid down by Courts of Equity as our guide. They, for many purposes, treat the husband and wife as distinct persons, even capable of contracting with and suing each other, and of having separate estates, debts, and liabilities. The wife is held capable of taking, holding, and disposing of real and personal property to her own separate and exclusive use. Although her property is often, by the instruments conveying it, vested in trustees to manage for her use, yet this is not essential, and Courts of Equity will always protect her interest in property against the marital rights and claims of the husband, even though there be no trustee. And, if necessary, the husband will be held to be her trustee, and her rights enforced against him as though he were a stranger. And it can make no difference how her separate estate was derived, whether before or after marriage. (2 Story's Eq. Secs. 1368, 1378, 1380.) To a very great extent, equity considers a married woman, so far as relates to her separate property, the same as though she was not married. (2 Story's Eq. Sec. 1397.)

In accordance with these principles, her separate estate will, in equity, be held liable for all the debts, charges, incumbrances, and other engagements which she expressly or by implication charges thereon. Her agreement to that effect is not considered as an obligatory contract, but rather as an apportionment out of her separate estate. (2 Story's Eq. Sec. 1399.) Her direct expression of an intention to charge her separate estate with the debt is deemed sufficient to create such a charge; and the mere fact that the debt has been contracted by her during the coverture, for herself or even for her husband, or for the joint benefit of both, will generally be held as *prima facie* evidence sufficient to charge her separate estate, without any proof of a positive agreement so to do. The simple point to ascertain is, whether it was her intention to make her separate estate liable for the debt; and that intention may be ascertained either from her direct agreement to that effect, or from the circumstances of the case, by which it may be fairly inferred

that such was her intention. (2 Story's Eq. Sec. 1400; *Peacock v. Monk*, 2 Ves. Sr. 190; *Hulme v. Tenant*, 1 Brown, 17; *Owen v. Dickenson*, 1 Craig & Phillips, 48; *Murray v. Barlee*, 3 Mylne & Kune, 208, 223; *Jaques v. Methodist Episcopal Church*, 17 J. R. 577; *Gardner v. Gardner*, 22 Wend. 526.)

In the case of *Murray v. Barlee*, the Chancellor says: "In all these cases I take the foundation of the doctrine to be this: the wife has a separate estate subject to her own control, and exempt from all other interference or authority. If she cannot affect it no one can, and the very object of the settlement which vests it in her exclusively is to enable her to deal with it as if she were discoverer. The power to affect it being unquestionable, the only doubt that can arise is whether or not she has validly incumbered it. At first, the Court seems to have supposed that nothing could touch it but some real charge, as a mortgage or an instrument amounting to an execution of a power, where that view was supported by the nature of the settlement. But afterward her intention was more regarded, and the Court only required to be satisfied that she intended to deal with her separate property. When she appeared to have done so, the Court held her to have charged it, and made the trustees answer the demand thus created against it." The Chancellor, Lord Brougham, then proceeds to examine the question, whether this intention must be expressed in writing, saying: "If, in respect to her separate estate, the wife is, in equity, taken as a *femme sole*, and can charge it by instruments absolutely void at law, can there be any reason for holding that her liability, or more properly, her power of affecting the separate estate, shall only be exercised by a written instrument? Are we entitled to invent a rule, to add a new chapter to the Statute of Frauds, and to require writing when that act requires none? Is there any equity reaching written dealings with the property which extends not also to dealings in other ways, as by sale and delivery of goods? Shall necessary supplies for her maintenance not touch the estate, and yet money furnished to squander away at play be a charge on it, if fortified by a scrap of writing? No such distinction can be taken upon any conceivable principle."

But it must be borne in mind that while a Court of Equity is

Miller v. Newton.

thus liberal in sustaining the power of a married woman over her separate estate, yet they are equally careful in guarding her against imposition, and therefore all dealings with her affecting her separate estate must be free from fraud, reasonable in their terms, and it must appear that no unfair advantage has been taken of her. (*Jaques v. M. E. Church*, 17 Johns. 579; *Evans v. Llewellyn*, 2 Brown's C. C. 150.)

Applying these principles to the present case, we find that the complaint avers that she purchased the goods for the support of herself and family, and for the benefit and advantage of her separate estate, and that she directly and expressly agreed that she would pay for the same out of her separate estate, and that the amount should be a charge on her separate estate. These facts bring the case clearly within the established rules of equity upon this subject, and her separate estate is liable in equity for the payment of the plaintiff's demand.

The mere fact that this agreement is not in writing, can make no difference, as there is no statute or rule of law which requires that an agreement of this character, which is enforceable only in a Court of Equity, should be in writing.

The respondent refers to the cases of *Selover v. The American Russian Com. Co.* (7 Cal. 266), *Barrett v. Tewksbury* (9 Id. 13), and other decisions of this Court, founded upon the statute relating to conveyances of property by a married woman. Those cases relate to the power of a married woman to execute instruments conveying or incumbering her separate property, and the mode in which such conveyance or incumbrance must be executed and acknowledged to be binding upon her, and they therefore differ entirely from the case now before us, in which no such question is directly involved. The statutes upon this subject, and upon which those decisions were founded, do not in any way abrogate or impair the powers of a Court of Equity, over the rights and property of married women, or the long-established rules of those Courts upon this subject, upon which this case depends. While these statutes confer upon married women a power to dispose of their property, which they did not before possess, yet there is no expression of any legislative intention to thereby divest Courts of Equity of their long

established powers and jurisdiction. To effect such an object would require a clear expression of legislative will.

These statutes are a substitute for the ancient common law proceeding by fine and recovery, which was the only mode by which, at common law, a married woman could convey her real estate. (2 Kent's Com. 139.) Those proceedings were tedious and expensive, and the statutory mode is simple and equally effectual. The jurisdiction of Courts of Equity over the property of married women existed when a fine and recovery were the only modes of conveying their real property at common law; and they equally exist, notwithstanding this change in the mode of conveyance. In a Court of Equity the separate property of the wife can be disposed of under a judgment of a competent Court, for the payment of her just debts; and under the proceedings her rights and interests will be fully and carefully guarded and protected better than by the ancient common law mode, or that prescribed by the statute. By the statute, the husband is constituted her protector, by requiring him to join with her in executing the conveyance. Under the rules of equity, the Court acts as the guardian of her rights. The statute was designed to enable her to deal directly with her property, without being compelled to resort to a Court, either of common law or equity; and it cannot be held, by any reasonable implication, to have deprived Courts of Equity of their jurisdiction over cases where the statute might be ineffectual, or where they had long exercised authority.

The present case is an example of the necessity of maintaining the powers of the Court over this subject intact. The husband of the defendant, it seems, left the State or deserted her soon after their marriage; and thus she is powerless, even if willing, to execute a conveyance of or incumbrance upon her property in the mode required by the statute. With abundance of property, she cannot directly dispose of it, even to purchase the necessities of life; and unless a Court of Equity has the power to afford relief, she may suffer from want in the midst of abundance. The cause of action in this case, is founded in part upon supplies and necessities furnished her before her marriage, and the rest since. For those furnished before marriage, her separate property is clearly liable,

Miller v. Newton.

under Sec. 13 of the statute defining the rights of husband and wife, which is as follows: "The separate property of the husband shall not be liable for the debts of the wife contracted before the marriage, but the separate property of the wife shall be and continue liable for all such debts." This liability of the separate property can only be enforced in a suit in equity, where all interested can be made parties, the separate property ascertained, and a decree rendered directly against the property for the payment of the debt. The right of action in this case, so far as relates to that portion of the demand which accrued before the marriage, against the separate property of the wife, is clear and undoubted under the statute.

As to that part of the demand which accrued since the marriage, we have examined the rules of equity which relate to such liabilities, and it is the duty of the Court, and it has the power, to adjudicate the matter in accordance with those principles; and if the claim of the plaintiff is found to be of such a character as to entitle him to a remedy for relief against the separate property of the wife, such relief should be granted him. The fact that the wife now, after having obtained the necessities and supplies, and appropriated them to her own use, under a promise that her separate property should be held liable therefor, refused to aid in making that property liable, can make no difference. Fraud on the part of a married woman is as odious as when perpetrated by any other person. If the plaintiff and his assignors acted in good faith, relying on her promise in furnishing the goods, they are entitled to relief against her property, although they are not entitled to a personal judgment against her. It follows that the Court erred in sustaining the demurrer to the complaint.

The judgment is reversed, and the defendant is directed to answer the complaint within ten days after service of notice of the filing of the *remittitur* in the Court below.

COPE, J. delivered the following dissenting opinion:

I am of opinion that no charge can be created upon the separate property of a married woman, except in the mode pointed out by the statute. The statute (Wood's Dig. 488) provides, that "The

Miller v. Newton.

husband shall have the management and control of the separate property of the wife, during the continuance of the marriage; but no sale or other alienation of any part of such property can be made, nor any lien or incumbrance created thereon, unless by an instrument in writing, signed by the husband and wife, and acknowledged by her upon an examination separate and apart from her husband." Of what avail are these prohibitory provisions, if the wife, by simply contracting a debt to be paid out of her separate estate, can create a valid and binding charge upon that estate? I regard the statute as furnishing the only rule to be observed in such cases. The Legislature may not have acted wisely in adopting it, but so long as it stands, the Courts are bound by it, and have no power to set up a rule of their own in its place. The general equity rule, which allows a married woman to incumber her estate by a mere verbal agreement, is certainly in conflict with the statutory rule, which requires a writing. The object of the statute was to protect the wife, not only as against the husband, but as against her own improvident acts, and persons dealing with her must see that the forms necessary to give validity to her contracts are complied with. The statute is as obligatory in equity as at law, and the fact that in some cases its operation may be attended with hardship, is no reason for disregarding it. It is universally agreed that the rule in equity is founded upon the *jus disponendi* of the wife, and where the estate comes to her hands with conditions attached as to the manner of its alienation, equity will not interfere unless the conditions have been performed. In this case the estate was held by the wife, subject to the conditions imposed by the statute, and as these conditions were not complied with, I see no way in which the estate can be reached. The question is an important one, and as I differ with my associates upon it, I have felt it my duty to state the grounds of my opinion.

Fogarty v. Sawyer.

FOGARTY v. SAWYER.

UNDER the Act of 1850 (Stat. 1850, 114) relating to Notaries Public, the acknowledgment of a Notary taken under his private seal, was valid if it was stated in the acknowledgment that the Notary had not obtained a public seal.

A mortgage on real estate containing also a power of sale, if recorded in the Recorder's office of the county, in the proper book of record of mortgages, imparts constructive notice of its contents, both as a mortgage and a power of attorney, and it is unnecessary to record it in the book of record of powers of attorney.

Where a mortgage contains also a power of sale, and names the mortgagee as the attorney in fact to make the sale, the sale is not invalidated from the fact that the attorney employs the services of an auctioneer to make the sale for him.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The facts of this case which are not stated in the opinion of the Court, will be found in the former report of the same case (17 Cal. 589). The defendant recovered judgment and the plaintiff appealed.

E. A. Lawrence, for Appellant.

The first objection of appellant was, that the power of attorney under which Zimmerman acted, had not been proved. The Court will notice that the originals were not produced. (Prac. Act, Sec. 447.) The power is embraced in a mortgage from Markwart to Zimmerman, of which only a certified copy was introduced from the records. This instrument purports to have been acknowledged before James Van Ness, a Notary Public, under his private seal. This, we claim, did not entitle the instrument to be recorded.

The Act of 1850 concerning Notaries (Laws of 1850, 114, Sec. 89), requires the Notary to have an official seal; but until he can procure one, to use his private seal. About six weeks later the act concerning conveyances was passed. Sec. 5 says: "Such certificate (of acknowledgment) shall be, when granted by an officer who has a seal of office, under the hand and official seal of such officer."

Fogarty v. Sawyer.

"SEC. 18. A certificate of the acknowledgment of any conveyance, signed by the officer taking the same and under the seal of the officer, shall entitle such conveyance to be recorded."

This last act requires acknowledgments to be verified by an official seal, where the law has provided the officer with an official seal, and does not authorize a Notary to use his private seal, but negatives that right, at least as to acknowledgments. The six weeks intervening between the passage of the two acts may have been deemed sufficient by the Legislature to permit Notaries to procure seals. At any rate, that act as well as this Court, in the case of *Hastings v. Vaughn* (5 Cal. 318), require the official seal. (*Hinckley v. O'Farrell*, 4 Blackf. 185.) Every Notary is presumed in all counties to have a notarial seal. An acknowledgment of a Notary not attested by a seal, is invalid. (*Booth v. Cook*, 20 Ill. 129.)

Thus the mortgage being improperly admitted to record, the certified copy proved nothing, and the record conveyed no notice.

The power of attorney was not recorded as a power of attorney, but simply as a mortgage. The power to convey the land at public sale, is not a part of the mortgage, but a separate and independent instrument. (*Fogarty v. Sawyer*, 17 Cal. 589; *Alsop v. Carpenter*, 21 Id.) Thus, according to our Registry Act, it must be recorded as a power of attorney, in order to impart notice. (Wood's Dig. 103, Secs. 27, 28, 36, 24; Id. 607, Secs. 12-14.) Record of it as a mortgage is not notice. (*Dey v. Dunham*, 2 J. C. 188; same case on appeal, 15 J. R. 155; *James v. Morey*, 2 Cowen, 246.) Thereby filing it for record is not enough. It must be recorded, and when recorded the record has relation back to the time of filing the deed for record. (Wood's Dig. Art. 362, Sec. 25; Id. Art. 361, 363; *Jarvis v. Aikin*, 25 Vt., 2 Deane, 635.)

"Filing for record, and recording, are distinct acts, and the former is not equivalent to the latter under the statute." (*Scott v. Doe*, 1 Hemp. 275.) Hence, registry of a mortgage for \$3,000 as a mortgage for three hundred dollars, was held valid against a subsequent *bona fide* purchaser for only three hundred dollars. (*Buckman v. Frost*, 18 Johns. 544.) So a record of mortgage,

Fogarty v. Sawyer.

without recording signature of mortgagor, which was recorded afterward, held to be notice only from time of recording signature. (*Shephard v. Burkhalter*, 13 Geo. 443.) So, where the record misdescribed the name of the grantor (as McRinnie for McKennie), it is not sufficient to prove a compliance with the Registration Act. (*Jones v. Parks*, 22 Ala. 446.) So, recording a deed with defeasance back, as a deed instead of as a mortgage, above cited. (*Dey v. Dunham*, 2 J. C. 188; same case on appeal, 15 J. R. 155; *James v. Morey*, 2 Cowen, 246; *Chamberlain v. Bell*, 7 Cal. 292.)

G. F. & W. H. Sharp, for Respondent.

The mortgage was properly admitted to record. The sufficiency of the acknowledgment is apparent from the appellant's own brief. The Notary Public Act was passed March 27th, 1850, and the Conveyancing Act April 16th, 1850. Not six weeks intervening, as stated by appellant. Sec. 8 of the Notary Public Act allows the officer to use a private seal until an official seal can be procured. It does not appear when the officer was appointed a Notary; *non constat*, it was the day before he took the acknowledgment.

The mortgage was not required to be recorded as a power of attorney. At Common Law, a power to convey land was not required to be recorded at all. Our statute does not require it. It simply requires conveyances to be recorded to operate as notice to third persons coming in relation with the title.

"SEC. 24. Powers of attorney are not defined as conveyances to be recorded, but are expressly excluded by the statute itself."

"SEC. 36. An estate in the land is not created, aliened, mortgaged, or assigned, by force of a power of attorney itself. It is only the means as a power by which the same can be done."

If the recording of the mortgage as a power of attorney, was essential, it was done. Sec. 25 of the Conveyancing Act declares, that by the filing with the Recorder for record, notice is imparted to subsequent purchasers. By filing the instrument for record the mortgagee did all the law required of him. He had no power to transcribe the same in any book. If the appellant has been injured his remedy is against the Recorder. The cases cited by the appel-

Fogarty v. Sawyer.

lant are upon a statute different from ours; hence, wholly inapplicable.

CORRE, C. J. delivered the opinion of the Court—NORTON, J. and CROCKER, J. concurring.

This is an action to recover a fifty-vara lot, in the City of San Francisco. The parties deraign title from the same source—the plaintiff under a conveyance executed in June, 1854, and the defendant under a sale made in October, 1852, in pursuance of a power contained in a mortgage. The validity of this power, and its effect as authority for the sale, were determined on a former appeal. (17 Cal. 589.) The same questions are again presented, but we regard the former decision as conclusive. In addition to these, however, various questions are raised by the appellant, relating principally to the registration of the mortgage and certain alleged irregularities in the sale.

Instead of the original mortgage, the defendant read, in evidence, a certified copy from the records of the county, and it is objected that the certificate of acknowledgment was not sufficient to admit the mortgage to record. The point of the objection is, that it was given by a Notary Public under his private seal. It states, however, that the Notary had not obtained an official seal, and the statute then in force provided that, in such cases, a private seal might be used. (Stat. 1850, 114.) The objection is, therefore, covered by the statute, the effect of which was to give to the private seal of the Notary, when properly used in the business of his office, the force of an official seal. The point that the record of the mortgage was insufficient as a record of the power of sale, is not well taken. It is based upon the twelfth and thirteenth sections of the Act concerning County Recorders. The twelfth section provides, that it shall be the duty of the Recorders, upon the payment of their fees for the same, to record certain instruments, specifying in several subdivisions the instruments to be recorded. The first subdivision includes deeds, mortgages, powers of attorney to convey real estate, and leases. The thirteenth section provides, that “the several classes of instruments, mentioned in the several subdivisions of the preceding section, shall be recorded

Fogarty v. Sawyer.

in separate books." It is claimed that mortgages and powers of attorney belong to separate and distinct classes; and that a mortgage containing a power of sale must be recorded not only as a mortgage, but as a power of attorney. This, we think, is not the proper construction of the statute. We regard the classes as indicated by the subdivisions, each subdivision constituting a class. Of course, the instruments named in a particular subdivision may be recorded in separate books; but a separate record is not essential, either as notice or for purposes of evidence. It is admitted that the instrument in this case, considered as a mortgage, was recorded in the proper book; and, so far as the question of notice is concerned, the record was undoubtedly notice of what the instrument contained. Whether the record of a deed, executed in pursuance of an unrecorded power, will impart notice, it is not material to decide.

In respect to the sale, it is objected that there was no publication of notice, and that it was not conducted by the attorney named in the power. There is nothing in either of these objections. By the terms of the instrument, no publication was required; but if one were necessary, the evidence shows that it was made. The proof is not very definite; but considering the time that has elapsed, we regard it as sufficient. The sale was made under the direction of the mortgagee, who was the person empowered to make it. The fact that he employed the services of an auctioneer is no ground for saying that the sale was not conducted by himself. It appears that he was absent when the sale was made, but this alone is not sufficient to defeat the title.

Some additional points are taken, but we regard them as untenable.

The judgment is affirmed.

Patterson v. Keystone Mining Co.

PATTERSON v. KEYSTONE MINING COMPANY.

A *NOVA FIDES* parol sale of a mining claim, accompanied by a delivery of possession, is valid as against a subsequent sale of the same grantor, made by deed in writing duly acknowledged.

The possession of one claiming under a parol sale, or unrecorded bill of sale, in order to impart notice to a subsequent purchaser, need not be evidenced by an actual inclosure or anything equivalent thereto.

The case of *Atwood v. Priot* (17 Cal. 37) and *English v. Johnson* (Id. 107), as to possession of mining claims, affirmed.

APPEAL from the District Court, Sixteenth Judicial District, Calaveras County.

One Callahan with nineteen others, in August, 1861, located a copper-bearing ledge in Calaveras County, three thousand feet in length. The interest of Callahan in the claim was one-twentieth, and he paid assessments on his interest in August and September, 1860. One Blatchey was also a member of the company. In November, 1860, five of the original locators were incorporated, for the purpose of working the ledge, under the name of the "Keystone Company." Certificates of stock were issued by the corporation to the different claimants. Blatchey claimed the interest of Callahan by an alleged parol sale, made in October, 1860, and the corporation recognized and treated Blatchey as the owner. The corporation had been working the claim from the time of its formation up to the commencement of this suit. In June, 1861, Callahan, who had not attempted to exercise any control over the claim after October, 1860, executed to plaintiff, Patterson, a deed duly acknowledged, of an undivided one-twentieth of the claim. Patterson demanded of the corporation possession of the interest, was refused, and July 20th, 1861, commenced this action to recover possession. Plaintiff recovered judgment in the District Court, and defendants appealed.

William S. Wood, for Appellants.

H. O. Beatty, for Respondent.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action to recover the possession of the undivided one-twentieth of a mining claim. The plaintiff claimed title under a deed executed by one Callahan, one of the original locators of the claim, dated June 3d, 1861. The defendants claim title under Callahan, by virtue of an alleged sale by parol and delivery of possession, prior to the date of the plaintiff's deed. The Court instructed the jury "That the possession of the defendants under an unrecorded deed or bill of sale from Callahan, in order to constitute notice of this claim to the plaintiff so as to invalidate or defeat his title, must have been a *possessio pedis*, actual *bona fide* possession, consistent with defendants' title, and that this possession must be evidenced by an actual inclosure or something equivalent, as showing the extent and the fact of the defendants' dominion and control of the premises." The appellants assign this instruction as error. The rule of law defining what will constitute possession of a mining claim was fully and clearly laid down by this Court in the cases of *Atwood v. Fricot* (17 Cal. 37) and *English v. Johnson* (Id. 107). The instruction given in this case, clearly conflicts with the rule laid down in those cases. The validity of parol sales of mining claims has been fully established by this Court in the cases of: (*Jackson v. The Feather River Co.*, 14 Cal. 22; *Table Mountain Tunnel Co. v. Stranahan*, 20 Id. 198; *Gatewood v. McLaughlin*, 23 Id. 178.)

The judgment is therefore reversed, and the cause remanded for a new trial.

People v. Bailey.

THE PEOPLE v. BAILEY.

Does an indictment for the crime of embezzlement, which contains two counts, and charges the defendant in the first count with having embezzled the sum of three hundred and sixty dollars and fifty cents on the nineteenth day of November, 1861, and in the second count with having embezzled the sum of six hundred and thirty-two dollars and twenty-five cents on the first day of January, 1862, charge two distinct offenses? *Quere?*

Is the two hundred and forty-first section of the Criminal Practice Act, defining the crime of embezzlement, to be extended to cases where the clerk or servant receives money or property from third persons, for his master or employer, or is it confined to cases where the clerk or servant receives the money or property directly from the hands of his master or employer? *Quere?*

APPEAL from the Court of Sessions, City and County of San Francisco.

The facts are stated in the opinion of the Court.

F. M. Pixley, Attorney-General, for Appellant.

B. H. Lloyd, for Respondent.

The indictment charges the defendant with: 1st, embezzling three hundred and sixty dollars and fifty cents on the nineteenth of November, 1861; and, 2d, embezzling six hundred and thirty-two dollars and twenty-five cents on the first of January, 1862. It is admitted (as it appears on the face of the indictment), that these are two separate and distinct sums, and it was not intended to charge the same offense in different.

Sec. 241 of the Criminal Practice Act (Wood's Dig. 288, Art. 1537) reads: "The indictment shall charge but one offense, but it may set forth that offense in different forms and different counts." By Sec. 289, Wood's Digest, 292, Art. 1574, Sub. 3, the fact that more than one offense is charged in the indictment is made a ground of demurrer.

The indictment in this case is drawn after the English form. (See Arch. Cr. Pl. & Pr. 1st Ed. 446.) The English Statute (7 and 8 Geo. 4, Ch. 29, Sec. 48) provides, speaking of embezzlements: "For preventing the difficulties that have been experienced in the

prosecution of the last-mentioned offenses, it shall be lawful to charge in the indictment, and proceed against the offender for any number of distinct acts of embezzlement, not exceeding three, which may have been committed by him against the same master within the space of six calendar months from the first to the last of such act." (See Russell on Crimes, 7th Am. Ed. 167.)

It will thus be seen that our statute expressly prohibits what the English statute expressly allows. By their's the indictment is good; by ours, bad.

The indictment in this case was found under Sec. 70, Criminal Practice Act (Wood's Dig. 339, Art. 1930, Sec. 70): "If any clerk, apprentice, or servant, or other person, whether bond or hired, to whom any money, or goods, or chattels, or property, shall be intrusted by his master or employer, shall withdraw himself from his master or employer, and go away with the said money, goods, chattels, or property, or any part thereof, with the intent to steal the same and defraud his master or employer thereof, contrary to the trust or confidence in him reposed by his said master or employer; or, being in the service of his said master as employer, shall embezzle the said moneys, goods, chattels, or property, or any part thereof, or otherwise shall convert the same to his own use with like purpose to steal the same, every such person so offending shall be punished," etc.

The language of this section is peculiar, and on examination will be found to materially differ from the English and American statutes on the same subject.

The Massachusetts statute on the subject is as follows: "If any officer, agent, clerk, or servant of any incorporated company, or if any clerk, agent, or servant of any private person or of any co-partnership, except apprentices and other persons under the age of sixteen years, shall embezzle or fraudulently convert to his own use, or shall take or secrete with the intent to embezzle or fraudulently convert to his own use, without consent of his employer or master, any money or property of another which shall have come to his possession, or shall be under his care by virtue of his employment, he shall be deemed," etc.

The English statute and the statute of the other States are sim-

ilar to this, the language being nearly the same in every one of them, excepting one. They will be found collated in a note to 3 Arch. Cr. Pl. & Pr. 446, 2, to 447, 2.

If the clerk converted money which came into his possession by virtue of his employment, he was guilty of embezzlement; it mattered not from whom he received it; the only question was, did it come into his possession by virtue of his employment? if so, the conversion of it was embezzlement; and there are numberless decisions that an indictment charging the defendant with converting money which came into his possession by virtue of his employment was good. But all these, on examination, will be found to have been decided under the statute containing the provision above referred to.

Our statute does not say that the conversion by a clerk of money received by virtue of his employment is embezzlement. It specifies how he shall receive it, and from whom. It must be intrusted to him by his master, and so the indictment must allege. The averment in this case shows the money was not intrusted to defendant by his master, but by another.

CROCKER, J. delivered the opinion of the Court — NORRIS, J. concurring specially.

The indictment in this case charges the defendant with the crime of embezzlement: 1st, in embezzling the sum of three hundred and sixty dollars and fifty cents on the nineteenth day of November, 1861; 2d, in embezzling the sum of six hundred and thirty-two dollars and twenty-five cents on the first day of January, 1862. The defendant demurred to the indictment on several grounds; the Court sustained the demurrer and the plaintiff appeals.

One ground of the demurrer was, that the indictment charges two distinct offenses. Sec. 241 of the Criminal Practice Act provides as follows: "The indictment shall charge but one offense, but it may set forth that offense in different forms under different counts." Whether the indictment intended to state but one act of embezzlement, under different counts, varying the amount and time, or whether it intended to set forth two separate and distinct acts of embezzlement, does not appear. If the former be the case, then

a demurrer would not lie. If the latter, then the prosecuting attorney should be required at the trial to elect upon which charge he will proceed, and he will then be confined to that.

Another ground of demurrer is, that the indictment does not charge any public offense. Sec. 70 of the act respecting crimes and punishments provides that, "if any clerk, apprentice, or servant, or other person, whether bound or hired, to whom any money, or goods, or chattels, or property *shall be intrusted by his master or employer*, shall withdraw himself from his master or employer," etc., shall be punished in the manner prescribed by law for feloniously stealing property. The indictment charges that the defendant was employed by the proprietors of a daily newspaper, as their clerk and servant; and in the course of his duties as such and by virtue of said employment, he collected the moneys due his employers; and on the day named he received and took into his possession a certain sum of money, for and on their account, which he fraudulently and feloniously embezzled and converted to his own use, with the intent to steal the same. Upon examination, it will be found that our statute differs in a very important particular from the statutes of other States defining the crime of embezzlement. In other States it is generally extended to include all embezzlements or fraudulent conversions of money or property which shall have come to the possession of the servant "by virtue of his employment." But the statute of this State confines it to money or property *intrusted by his master or employer* to the servant, evidently intended to confine it to cases where the employé received the money directly from the employer. The indictment in this case follows a form founded upon the statutes of other States, and would doubtless be good under them. It is clear that it does not state an offense within the provisions of the statutes of this State, and the Court therefore committed no error in sustaining the demurrer.

The judgment is affirmed.

NORTON, J.—I think money received by a clerk who is intrusted by his employer with bills to collect, in the ordinary course of his business as a clerk, is money intrusted to him by his employer, and

Hodgkins v. Hook.

that our statute is in substance the same as other States upon this subject. But I also think that two offenses were charged in this indictment, and that for this reason the demurrer was properly sustained.

I therefore concur in the judgment of affirmance.

HODGKINS *et al.* v. HOOK *et al.*

Is an action brought by a vendee of personal property against a Sheriff, to recover possession of the same, where the Sheriff claims the property under an execution in favor of a creditor of the vendor, and attacks the sale for fraud. If the testimony is conflicting as to whether there was an actual and continued change of possession in the plaintiff after the sale to him, this question should be submitted to the jury. If, however, the facts are undisputed, it is a question of law, whether these facts constitute a continued and exclusive possession in the vendee.

Where, after a sale of personal property, the creditors of the vendor attack the same for fraud, and, on the trial, there is evidence that the vendee, after the sale and delivery, exercised some slight acts of ownership and control over the property, but this is not shown to have been done with the knowledge or consent of the vendor, the fact that the vendor does not offer any evidence explanatory of the vendee's acts, does not add anything to the weight of the evidence touching the vendee's connection with the property.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

The plaintiff recovered judgment in the District Court, and the defendants appealed. The other facts are stated in the opinion of the Court.

H. O. Beatty, for Appellants.

The change of possession required by the statute must not only be continued, but exclusive. This Court, in the case of *Vance v. Boynton* (8 Cal. 562), quote approvingly from Chitty on Contracts the following language (opinion of BURNETT, J., 8 Cal. 562): "It seems that the change of possession, necessary to rebut the inference of an intention to defraud creditors, must be substantial, *bona fide*, and exclusive; and, consequently, that the sale or assignment

Hodgkins v. Hook.

will be considered fraudulent and void, and the assignor's possession colorable, if the goods be left upon the premises of the assignor and in his apparent disposal or order, although the vendee or his servant enter upon the premises, and also be in possession of the goods."

Now, admitting this delivery was sufficient (and on that point we raise no question), that the change of possession was substantial and *bona fide*, it cannot be pretended it was exclusive. If the possession was not exclusively in Hodgkins; or, rather, if it was not wholly and completely out of Lyons, then this sale was void under Sec. 15 of the Statute of Frauds, which is as follows: "Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of things sold or assigned, shall be conclusive evidence of fraud as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith." (Wood's Dig. 1858, 107, Art. 403.) See the case of *Vance v. Boynton* (8 Cal. 554-562), and the other California cases cited in that opinion, as to the proper construction of this section, especially as to exclusive possession of vendee.

But, even if the change was continuous, is there not a fatal objection to this verdict? Sec. 11 of the Statute of Frauds reads: "All deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person." (Wood's Dig. 1858, 106, Art. 399.)

Hall & Scaniker, for Respondent.

A complete answer to appellants' position is found in the fact, that the jury passed upon the question of the delivery and continued change of possession; and this, too, it is to be presumed, under correct instructions upon their legal force and effect, if true, from the Court.

It was for the jury to determine what acts of control or owner-

Hodgkins v. Hook.

ship were exercised by Lyons, and whether with or without the knowledge, authority, or consent of the plaintiff. "What are the circumstances, is a question of fact for the jury." (*Vance v. Beynnton*, 8 Cal. 561.)

CROCKER, J. delivered the opinion of the Court — COPE, C. J. and NORTON, J. concurring.

This is an action against the Sheriff of San Joaquin County and others, to recover the possession of a number of cattle, horses, and other personal property, claimed by the plaintiff under a bill of sale executed to him by one Lyons, bearing date August 1st, 1861. The defendants justified the taking under a writ of attachment issued in favor of one Golding against said Lyons, and the question involved was the validity of the sale to the plaintiff. It seems that Lyons, in the summer of 1861, was the owner of a large ranch on the San Joaquin River, with about one thousand head of cattle, one hundred and fifty horses, a quantity of lumber, and other personal property, all of which he sold to one Johnson about July 1st, 1861. On the first of August, Lyons, Johnson, and the plaintiff made an arrangement by which the plaintiff paid Johnson \$6,000, and thereupon Johnson reconveyed all the property back to Lyons, and the latter thereupon conveyed the real estate to the plaintiff, for the consideration, as expressed in the deed, of \$2,000; and also executed to him a bill of sale of all the personal property for the consideration therein stated of \$4,000. The cattle and horses were pasturing on the ranch and the adjoining lands. The property was delivered to the plaintiff at the time of the sale; at least, no question is raised upon that point; but it is contended that the plaintiff did not retain the actual, continued, and exclusive possession of the property, but that Lyons exercised, to some extent, acts of ownership over it. It does not appear that either just before or at the time of the sale to the plaintiff, Lyons was residing upon the ranch, but it seems to have been occupied by one Congrado, a vaquero, who had charge of the stock. At the time of the sale, the plaintiff hired the same person to continue on the premises and take charge of the stock, which he did. Lyons did not reside on the premises after the sale, nor was he about there, except occasionally.

Hodgkins v. Hook.

The attachment of Golding was not levied on the property until May 21st, 1862. During the intermediate time there was some evidence, very slight in its character, that Lyons exercised acts of ownership over the property, by giving some directions to Congrado, and other acts; but it does not appear that this was done with the knowledge or consent of the plaintiff. We do not think the evidence on this point is sufficient to justify us in disturbing the verdict of the jury.

The evidence was of such a character as made it proper to submit to the jury the question, whether or not there was an actual and continued change of possession in the plaintiff after the sale to him. When the facts are undisputed, it is a question of law whether these facts constitute a continued and exclusive possession in the vendee. In this case, many of the suspicious circumstances are explained, and others have very little weight in the absence of proof of knowledge or consent on the part of the vendee. Some of the facts are similar to those in the case of *Montgomery v. Hunt* (5 Cal. 366), in which the sale was upheld by this Court.

It is also objected that the sale was void under the eleventh section of the Statute of Frauds. But there is no evidence that the sale to the plaintiff was made in trust for the use of Lyons. There was no proof of any private understanding between the parties to bring the case within the rule laid down in *Chenery v. Palmer* (6 Cal. 122). It is also urged, that the Court erred in refusing the following instruction asked by the defendant: "If the jury believe, from the evidence, that Lyons drove off and sold some of the cattle, and exercised other acts of ownership and control over the same after the alleged delivery to Hodgkins, and that it was in the power of Hodgkins to produce evidence to explain Lyons' connection with the property, and he failed to introduce such evidence, the facts are to be taken most strongly against the party having such evidence and failing to produce it." The matter referred to in this instruction occurred several months after the sale to the plaintiff, and there was no evidence that the alleged act was done with the knowledge or consent of the plaintiff; which latter fact is an important one when it is sought to affect the rights of the plaintiff by the acts of Lyons, and which is not referred to in the instruction. We are not aware of any principle of law which makes the weight of

In Matter of Romaine.

evidence depend upon any such circumstance as that relied upon in this instruction. The weight of the evidence referred to was certainly not increased by the fact that it was not rebutted, though it might have been lessened by explanatory evidence. The plaintiff may have considered that the circumstances of the case sufficiently explained the matter, without introducing evidence, if any he had, specially relating to that point.

The judgment is affirmed.

IN THE MATTER OF JAMES ROMAINE *et al.*

SEC. 2 of Art. 4 of the Constitution of the United States is a solemn compact between the States, to be enforced by State legislation, or by judicial action; and being a part of the supreme law of the land, it is a part of the law of each State; and State officers whose duty it is to adjudicate, or execute the laws, are governed by it, and State Courts of general original jurisdiction, exercising the usual powers of Common Law Courts, are fully competent to hear and determine all matters, and to issue all necessary writs for the arrest and transfer of fugitive criminals to the authorized agent of the State from which they fled, without any special legislation.

The Governor of this State has a right to issue a warrant for the arrest of persons found in this State, who have committed a crime in a Territory of the United States, and fled therefrom to this State, and to deliver such persons up to the agent of the Territory from which they fled, upon a proper application being made to him therefor.

The warrant of the Governor, in such case, should clearly state, that the person is charged in some Territory of the United States with treason, felony, or other crime: that he has fled from justice, and is found in this State, and that the executive authority of the Territory from which he fled, has demanded his delivery, to be removed to the Territory having jurisdiction of the crime.

THIS was an application to be discharged from arrest on *habeas corpus*.

On the second day of November, 1863, Hill Beachy and Thomas Farrell presented to the Governor of California the following requisition, and affidavit annexed, and demanded a warrant for the arrest of the petitioners:

In Matter of Romaine.

EXECUTIVE OFFICE, LEWISTON, IDAHO TERRITORY, }
United States of America, A. D., 1863. }

To his Excellency the Governor of British Columbia, or of the State of California:

Be it known, that on this twenty-third day of October, A. D., 1863, personally appeared before me, W. H. Wickersham, who presented to me an affidavit by him made, which is in due form of law, and which declares that a murder and highway robbery has been committed in this Territory; and Wm. Johnson, G. Clark, D. Smith, and F. Perkins, committed the same; and that they, the aforesaid Wm. Johnson, G. Clark, D. Smith, and F. Perkins, have fled from this Territory to British Columbia, or to the State of California; therefore, I request that the said fugitives be delivered up to Hill Beachy and Thomas Farrell, citizens of the United States and of Idaho Territory, whom I hereby appoint and constitute the proper authorities to receive the aforesaid fugitives, under the treaty between the United States and Great Britain, bearing date of August the ninth, 1842, so that the aforesaid fugitives may be tried in this Territory, in accordance with the laws of this Territory and of the United States.

WM. B. DANIELS,
Acting Governor of Idaho Territory, in the U. S. of America.

In witness whereof, I have hereunto set my hand and affixed the seal of Idaho Territory, at Lewiston, this twenty-third day of October, A. D., 1863, and of Independence of the United States the eighty-eighth.

WM. B. DANIELS,
Secretary of Idaho Territory.

TERRITORY OF IDAHO, }
County of Nez Perce. }

On this day personally appeared before me, W. H. Wickersham, who being duly sworn according to law, deposes and says, that Wm. Johnson, G. Clark, D. Smith, and F. Perkins, did, on or about the fifth day of October, A. D., 1863, wickedly and maliciously with malice aforethought, waylay, rob, and murder, one Lloyd Magruder

In Matter of Romaine.

and Charles Allen, citizens of the United States, on the trail, or road, leading from Virginia City to Lewiston, in said Territory, contrary to the laws made and provided, and against the peace and dignity of this Territory; and I therefore pray that a requisition issue to the Governor of British Columbia, or of the State of California, whither said parties are presumed to have fled; that the said Governor of British Columbia, or of the State of California, may order them to be delivered up for trial according to the laws of the United States, and of this Territory.

W. H. WICKERSHAM.

Subscribed and sworn to before me, this twenty-third day of October, A.D., 1863; and I hereby certify that the above-named W. H. Wickersham is a credible witness, and that he is worthy of belief; and I also certify, that as yet, the Supreme nor District Court of this Territory have not been organized, and that as yet no seal has been adopted for said Court.

ALLECK C. SMITH,
Associate Justice Supreme Court, I. T.

I, William B. Daniels, hereby certify that the above-named Alleck C. Smith, is duly appointed and qualified as an Associate Justice of the Supreme Court of Idaho Territory; and that as such, full faith and credit should be given to all his official acts; and that the above affidavit is in due form of law, and that full faith and credit should be given to the same.

In witness whereof, I have hereunto set my hand and affixed the seal of the Territory of Idaho, at Lewiston, this twenty-third day of October, A.D., 1863.

WM. B. DANIELS,
Secretary of Idaho Territory, U. S. A.

The Governor, on the demand, and the foregoing papers, issued his warrant for the arrest of the petitioners, of which the following is a copy:

In Matter of Romaine.

STATE OF CALIFORNIA, EXECUTIVE DEPARTMENT, }
 Sacramento, Nov. 2d, 1863. }

*The People of the State of California to any Sheriff, Constable,
 Marshal, or Police officer, in this State:*

Whereas, a requisition has been made upon me, as the Governor of the State of California, for the arrest and delivery to the proper person, of William Johnson, G. Clark, D. Smith, and F. Perkins, charged with the crime of murder and highway robbery, in the Territory of Idaho; and said requisition being issued in proper form, by William B. Daniels, acting Governor of the Territory aforesaid, you are therefore commanded, forthwith, to arrest the above-mentioned Wm. Johnson, G. Clark, D. Smith, and F. Perkins, and deliver them into the custody of Hill Beachy and Thomas Farrell, who have been appointed agents of the Territory of Idaho, to receive the said fugitives from justice, and to convey them to the said Territory of Idaho for trial.

In witness whereof I have hereunto set my hand and caused the great seal of State to be affixed, at my office, in Sacramento, California, this second day of November, in the year of our Lord, one thousand eight hundred and sixty-three.

LELAND STANFORD,
 Governor of California.

A. H. H. Tuttle, Sec'y of State.

The foregoing warrant was placed in the hands of J. W. Lees, Captain of Police, of San Francisco, by whom petitioners were arrested.

Officer Lees, in his return to the writ of *habeas corpus*, claimed to hold the petitioners by virtue of the foregoing warrant, and also set forth the requisition and affidavit on which the same was issued.

A. Campbell, for Petitioners.

J. W. Coffroth, for the People.

The application for discharge was heard before Justice ~~Cherokee~~, by whom the opinion was delivered.

The parties in this case were arrested and held in custody under a warrant issued by the Governor of this State, upon a requisition made by the acting Governor of Idaho Territory, alleging that they were charged with the crime of murder and highway robbery, committed in Idaho Territory, and that they fled from that Territory to this State. They have obtained a writ of *habeas corpus* to determine the validity of their arrest and imprisonment.

The first question raised by the counsel for the applicants is, that Congress had no power to pass the act relating to the rendition of fugitives from justice; and if they have, it is confined, under the provision in the National Constitution, to fugitives escaping from one "State" to another "State," and does not extend to fugitives fleeing from a "Territory." The clause of the National Constitution thus brought in question is as follows: "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." It will be noticed that Congress is not referred to in this clause, nor is any power over the matter conferred upon that body. In the same article in which it is found, several important subjects are treated of, over some of which power is conferred upon Congress, and in others not. Thus in regard to the public acts, records, and judicial proceedings of the States, the admission of new States, the disposal of the territory and other property of the United States, and the guaranty of a republican form of government to each State, full power over these subjects is directly conferred upon Congress; but as to all other matters in that article, including the clause in question, no power is conferred upon Congress. They stand as solemn compacts between the States, to be enforced by State legislation, or by judicial action. They are, to a great extent, a recognition of rights founded upon principles of international law, but which were, under that law, often deemed more a matter of comity, than of absolute right, except the provision respecting the rights of citizenship, which go beyond any rule of international law.

Upon this very subject of the surrender of fugitives from justice

In Matter of Romaine.

fleeing from one State or nation to another, under the rules of international law, it has been a question very fully and ably discussed by public writers, whether such surrender was a matter of right and duty, or merely of comity. (Story on Conflict of Laws, Secs. 626-628.) This was deemed too important a question to leave unsettled, and the framers of our National Constitution wisely inserted the clause referred to, making it no longer a matter of mere comity, subject to the pleasure of each State, but an absolute right and duty. This provision being a part of the supreme law of the land, it is a part of the law of each State, and State officers whose duty it is to adjudicate or execute the laws, are governed by it the same as by every other law in force. A Court of general original jurisdiction, exercising the usual powers of a Common Law Court, is fully competent to hear and determine all matters, and to issue all necessary writs for the arrest and transfer of the fugitive criminal to the authorized agent of the State from whence he fled. Where a right is established by law, such Courts can apply the appropriate remedy and issue the necessary writs without special legislation. It may be considered doubtful whether the transfer of this power from the Courts to the Governor of the State is an act of wisdom. Certainly Courts of Justice are more competent to adjudicate the difficult and perplexing questions which often arise in such cases, than the Governor.

The great object of the National Constitution was to create a national government, with adequate powers; and a secondary object was, by articles of solemn compact, to settle certain matters of right and duty between the States and between the citizens of the different States. In pursuance of its first and great purpose, it establishes a government, defines its sphere, prescribes its duties, and confers upon it certain powers. And in carrying out its secondary purpose, it contains certain articles of agreement between the States. These different ends of the Constitution are entirely distinct in their nature, and if all the articles of compact were stricken out, the government created by it would still exist. The clauses of compact confer no power upon the government, and the powers of the government cannot be exerted except by virtue of express provisions to enforce these matters of compact. The clause

In Matter of Romaine.

in question is purely a matter of compact or agreement between the States, and it confers no powers upon Congress over its subject matter. The great object of rules of construction is to ascertain the intention of the parties making the instrument. The simple fact that while in several clauses in the same article power over the matters therein are directly, and in express terms, conferred upon Congress, while in the clause under consideration, such power is carefully withheld and omitted, would seem to be conclusive as to the intention of those who adopted the Constitution.

If this was a new question, free from the political excitements which have grown out of the discussion of the subject of slavery, and the enforcement of the succeeding clause relating to fugitives from service, few would have disputed that this clause confers no power upon Congress over the subject, and that all Congressional legislation founded thereon is void. In the view I have taken of this case, it is not necessary to determine this question. The clause, by its terms, applies only to criminals fleeing from one "State" to another "State," and does not in express terms apply to those fleeing from a Territory to a State, which is the case now under consideration. This case is not directly provided for by the National Constitution, and we are therefore compelled to look elsewhere for the power to return the parties before us.

The State has passed a law upon this subject which is in the following terms: "A person charged in any State or Territory of the United States with treason, felony, or other crime, who shall flee from justice, and be found in the State, shall, on demand of the executive authority of the State or Territory from which he fled, be delivered up by the Governor of this State, to be removed to the State having jurisdiction of the crime." Succeeding sections provide for the arrest and detention of the fugitive until he can be arrested under the warrant of the Governor. Under this section the Governor had a right to issue a warrant for the arrest of the parties in this case, and their surrender to the agent appointed by the acting Governor of Idaho Territory, and their removal from the State, upon a proper application being made to him therefor. The power to issue the warrant depends upon the following facts: 1st, that the persons are charged in some State or Territory of the

De La Guerra v. Burton.

United States with treason, felony, or other crime; 2d, that they have fled from justice; 3d, that they are found in this State; and 4th, that the executive authority of the Territory from which they fled, had demanded their delivery, to be removed to the Territory having jurisdiction of the crime. Properly, these facts should be clearly stated in the warrant issued by the Governor, to show that it is issued in a case authorized by law. The warrant issued for the arrest and removal of these parties is defective in this respect, as it merely states that they are "charged with the crime of murder and highway robbery in the Territory of Idaho," and that a demand or requisition has been made upon the Governor of this State for their arrest and delivery, by the acting Governor of the Territory; but it omits to state that they have fled from justice or that they are found in this State. The return to the writ of *habeas corpus* of the officer who has them in custody sets forth, however, certified copies of the original affidavit, and the requisition of the acting Governor of Idaho Territory issued thereon, and upon which the warrant of the Governor of this State was issued. These papers supply these facts omitted in the warrant, and substantially show that the warrant was issued in a case within the provisions of the law of this State. The applicants for the writ have not attempted to controvert any of these facts, or to show any valid reason why the warrant should not be enforced against them.

For these reasons, their application to be discharged is denied, and they are ordered to be remanded to the custody of the officer having them in charge, to be removed from the State, in accordance with the warrant of the Governor.

DE LA GUERRA v. BURTON.

A JUDGE, who is related to either of the parties to an action, within the third degree of consanguinity, is incompetent to try an action between them.

APPEAL from the District Court, Second Judicial District, Santa Barbara County.

Ensminger v. McIntire.

Burton, the defendant, moved to change the place of trial on the ground that De La Guerra, the plaintiff, and Joaquin Carillo, the District Judge, were first cousins, and therefore within the third degree of consanguinity. The motion was denied and defendant appealed.

Eugene Liss, for Appellant.

Harmon & Hartley, for Respondent.

COPE, C. J. delivered the opinion of the Court—NORTON, J. and CROCKER, J. concurring.

It appears in this case, that the Judge who tried it is related to the plaintiff within the third degree of consanguinity. He was, therefore, incompetent to try it; and the judgment is reversed and the cause remanded for a new trial.

ENSMINGER *et al.* v. MCINTIRE *et al.*

One who claims public lands in this State for raising fruit trees or crops, cannot enjoin miners from digging up the same for mining purposes, unless he can show that his fruit trees were planted or crops sown before the land was located for mining.

When the plaintiff closes his evidence, if the Court is of opinion that it would not sustain a verdict in favor of plaintiff upon the testimony, a nonsuit should be granted.

APPEAL from the District Court, Eleventh Judicial District, El Dorado County.

The facts are stated in the opinion of the Court.

Hereford & Williams, for Appellants.

S. W. Sanderson, for Respondents.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

Mayo v. Marshall.

This is an action of trespass, with a prayer for an injunction to restrain the defendants, who are miners, from digging up ground in the possession of the plaintiffs. After the plaintiffs had introduced all their evidence the defendants moved for a nonsuit, which was granted, and a judgment was rendered accordingly, from which the plaintiffs appeal.

The evidence showed that the plaintiffs had had an inclosure near the place in controversy, raising grain therein for several years, and the fence had been moved out about one hundred feet toward the ravine where the mining was going on, and the ground in controversy thus included within the inclosure, sometime in 1859. In November, 1860, the plaintiffs planted some peach trees on the land, against the objections of one of the miners, and when the ground was worked by the defendants, they had a volunteer crop of wheat there, good for hay. The testimony was that five peach trees were destroyed by the mining, worth eighteen dollars per hundred, and thirty pounds of hay worth one-and-a-half cents per pound, making the damages amount in all to one dollar and thirty-five cents. The Court below might well have concluded, from the evidence, that the trees were not planted in good faith, for the purpose of raising an orchard, but rather as a means of stopping the mining. Nor did the plaintiffs show a priority of appropriation of the ground in controversy. There was so little evidence in support of the plaintiffs' claim, that the Court might well have held that it would not sustain a verdict in favor of the plaintiffs, in which case a nonsuit is proper. Under these circumstances we would not be justified in disturbing the judgment rendered in the Court below.

The judgment is therefore affirmed.

MAYO v. MARSHALL — BRADFORD, INTERVENOR.

WHEREAS an entire tract of land has been sold on a judgment recovered against the same, or the owner thereof for taxes, the owner of an undivided interest in the land cannot redeem his undivided portion from the sale, by a payment of his proportion of the judgment and costs.

Mayo v. Marshall.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

In 1858, John Skinker was the owner of the entire lot of land, and the same was assessed to him. On the twenty-third day of May, 1859, Skinker deeded an undivided half of the lot to Bradford, the intervenor. On the twelfth day of December, 1860, the People recovered judgment against Skinker for the taxes of 1858. On the thirteenth day of September, 1861, and after the sale on the judgment for the taxes, Bradford, the intervenor, paid the Sheriff one-half the amount for which the lot sold, for the redemption of his undivided one-half. The other facts are stated in the opinion of the Court.

P. L. Edwards, for Appellant.

L. Saunders, Jr., for Respondent.

CROCKER, J. delivered the opinion of the Court—NORRIS, J. concurring.

This was an application for a *mandamus* to compel the defendant, as Sheriff of Sacramento County, to execute to the plaintiff a deed, under and in pursuance of a sale on an execution issued on a judgment rendered for taxes. The defendant filed an answer denying some of the allegations of the complaint, and setting up the claims of one Bradford, who, as owner of the undivided half of the property, had redeemed said one-half from the sale. The plaintiff moved to strike out this answer; but no disposition appears to have been made of this motion. Bradford filed an intervention opposing the claim of plaintiff to a deed for the undivided half owned by him, on the ground that he had redeemed the same from the sale. The plaintiff demurred to the intervention, which was sustained; and the Court rendered a judgment against the defendant and the intervenor, that the defendant execute a deed as prayed for; from which, this appeal is taken.

The answer of the defendant did not deny any of the material facts stated in the complaint; and the defense set up in the answer of the defendant and in the intervention, raises the single question

Hobbs v. Duff.

whether a payment of one-half of the amount due to a purchaser at execution sale, by the owner of the undivided half of the property, operates as a redemption of that undivided interest. This question has already been determined by this Court, in the case of *The People ex rel. v. McEwen* (*ante*, 54), in which it was held, that such payment was not a redemption.

The judgment is therefore affirmed.

HOBBS *et al.* v. DUFF *et al.*

A DECREE, rendered in an action on a bond, and to foreclose a mortgage given to secure the bond, which, after reciting the amount found due on the bond, directed that the mortgaged premises be sold, and out of the proceeds, the costs and the amount found due on the bond and accruing interest be paid, and that if there was a surplus, the Sheriff pay such surplus into Court, but that if the proceeds were insufficient to pay the debt, interest and costs, the Sheriff should report the amount of such deficiency or balance, and that, therefor, the plaintiff have execution against the defendants, merges the original debt in such judgment, at least so far as to make it a certain and liquidated demand, existing at the date when the amount of balance was ascertained, by the report of the Sheriff, sufficient as a foundation of a right of action or set-off.

It is not necessary that the demand sought to be used as a set-off, should be in the form of a personal judgment.

Where A appeals from a judgment against him, and B becomes his surety on the appeal bond; and A, to secure B for his liability on the appeal bond, assigns to B a liquidated demand held by A against third parties, the liability of B on the appeal bond is a sufficient consideration to support the assignment made to him by A.

The purchaser of a judgment, although he buys in good faith and for a valuable consideration, takes the same subject to any right of set-off existing between the parties at the time of his purchase.

An assignee of a judgment is deemed to have notice of all matters disclosed by the record and proceedings in the action in which the judgment was rendered, and where that judgment or the proceedings therein disclose an equitable right of set-off existing in favor of the defendants against the plaintiff, the assignee cannot claim to be a *bona fide* purchaser.

Where the parties to two judgments are not the same, a Court of Common Law jurisdiction cannot set off one against the other; but a Court of Equity will look beyond the nominal to the real parties in interest, and adjudicate the rights of the parties accordingly.

Robbs v. Duff.

A Court of Equity will not permit a *cestui que trust* who is insolvent, to enforce and collect through his trustee, a judgment against a party who holds a just and valid demand against the *cestui que trust*, which he has no means of enforcing or collecting if a set-off is denied.

Where, in an action at law, the defendants in their answer set up and claim a set-off to plaintiff's demand; and on the trial of the action, the record shows that the Court excluded all evidence of the demand sought to be set off, and gave judgment for plaintiff, the judgment in the action at law cannot be pleaded or claimed as an estoppel, in an action afterwards brought by the defendants in a Court of Equity to enforce the set-off.

The jurisdiction of a Court of Equity in relation to set-offs, is more extensive than that of Common Law Courts; and where the defendant in one of the judgments is insolvent, and the plaintiff in the other is not the real party in interest, but a trustee for the insolvent defendants in the other judgment, a Court of Equity will decree a set-off.

In equity, the right of set-off depends, not on the Statutes of Set-Off, but upon the right and the equitable jurisdiction of a Court of Chancery over its suitors.

A party does not lose his right to bring an action for a demand, which he might have pleaded as a set-off in a former action, but neglected to do.

An action brought in a Court of Equity to enforce a set-off of one judgment against another, is "an action upon a judgment or decree" within the meaning of Sec. 17 of the Statute of Limitations, and may be brought at any time within five years of the date of the judgment or decree.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

April 14th, 1857, Alfred K. Fisher brought an action in the District Court for Humboldt County against James T. Ryan, James R. Duff, and ten others named. The action was brought to foreclose a mortgage made by the defendants in said suit to A. S. Tobias, to secure their bond to him—which said bond and mortgage had come to said Fisher by assignment. The bond and mortgage were executed November 3d, 1854.

Decree for plaintiff in the suit, September 15th, 1857.

Order of sale issued to Sheriff September 15th, 1857, who reported, October 10th, 1857, a sale of the mortgaged premises at public auction, application of the proceeds, and a deficiency or balance of \$17,248.89.

February 23d, 1856, Fisher entered into a written contract with William R. Duff, by which, in consideration of a certain sum of money to be paid to him, he agreed to convey to William R. Duff

Hobbs v. Duff.

all the mortgaged property, if, upon foreclosure and sale, he became the purchaser and acquired the title.

At the Sheriff's sale Fisher became the purchaser, but refused to carry out his contract with W. R. Duff, and on the ninth day of May, 1858, assigned the property and balance due on the decree to Richard F. Knox and Franklin Knox.

July 20th, 1858, W. R. Duff brought an action in the Eighth District Court against Fisher, and the Knoxes, and others, to enforce a specific performance of the contract made with him by Fisher, alleging that the Knoxes bought the property with full knowledge of the contract and with intent to defraud, etc.

June 17th, 1859, W. R. Duff recovered judgment against Fisher and the Knoxes, awarding a specific performance and a money judgment for \$13,566.99.

From this judgment the Knoxes appealed to the Supreme Court; and the plaintiffs in this suit, Caleb S. Hobbs, Stephen D. Gilmore, G. W. Arms, L. Stephens, E. S. Goddard, and James Clark, executed an appeal bond on behalf of the Knoxes, staying the judgment. The appeal bond ran to William R. Duff as obligee, and bore date July 25th, 1859. The judgment from which the Knoxes appealed was affirmed in the Supreme Court in 1860. The case is found reported in 15 Cal. 375.

William R. Duff then brought an action against the present plaintiffs on the appeal bond, and recovered judgment against them August 23d, 1861, for \$16,900.

On the tenth day of May, 1860, and soon after the judgment in the case of *W. R. Duff v. Fisher et al.*, for specific performance, had been affirmed in the Supreme Court, the Knoxes assigned to Goddard, one of the present plaintiffs, the balance due on the decree which Fisher had assigned to them; and said assignment was made by the Knoxes to secure Goddard and his coplaintiffs for their liability on the appeal bond; and Goddard then assigned to his coplaintiffs an undivided half of this balance.

The present plaintiffs appealed from the judgment against them on the appeal bond, and the judgment was affirmed in the Supreme Court March 7th, 1862. The case is reported in 19 Cal. 646, and an examination of it will explain the leading facts in this case.

At the commencement of the present action, Hobbs, Gilmore, Armes, Stephens, Goddard, and Clark, the present plaintiffs, who were the Knoxes' sureties on the appeal bond, were the owners, by assignment, of the balance due on the decree in favor of Fisher against James T. Ryan, James R. Duff, and ten others. Isaac Josephi was the owner, by assignment, of the judgment recovered on the appeal bond by William R. Duff against the present plaintiffs; Duff had assigned this judgment to one Sharp, who had assigned it to Josephi.

The present action was brought to enjoin Josephi and his codefendants, Ryan, the two Duffs, and others, from issuing an execution on and attempting to enforce the collection of the judgment on the appeal bond against the plaintiffs, and to obtain a decree setting off the amount of the Duff judgment against plaintiffs, against the same amount of the unsatisfied balance of the decree held by plaintiffs against James T. Ryan, James R. Duff, and ten others.

The complaint, among other things, averred:

That on the twenty-third of February, 1856, Alfred K. Fisher entered into a contract with said James T. Ryan and James R. Duff (defendants herein), but by the especial request of the said James T. and James R. the name of William R. Duff (another of the defendants herein) was inserted in the contract as written, as the party contracting with said Fisher, instead of the real parties, James T. Ryan and James R. Duff.

That the said contract was so made running to William R. Duff with the intent and purpose, on the part of said James T. and James R., to delay, postpone, defeat, and defraud their creditors, to which said intent and purpose the said William R. Duff was party and privy.

That the action for specific performance and accounting, and the money judgment for the \$13,566.99, and the appeal bond given by the plaintiff, and the action on the appeal bond, and the judgment thereon—were brought and procured by James T. Ryan and James R. Duff, to whom the said contract, and the said appeal bond, and the said several actions belonged in full ownership, and to whom the said several judgments now and ever have belonged by a like ownership and title. And that William R. Duff never

Hobbs v. Duff.

had, and has not now, any rights or interests in said contract, appeal bond, actions, or judgments, except as a mere naked trustee of the aforesaid real owners thereof.

That Ryan and James R. Duff so the real owners of said judgment against these plaintiffs on the said appeal bond, and so debtors, as aforesaid, in the foreclosure decree and balance, so belonging to these plaintiffs by assignment, as aforesaid, are, together with the ten other debtors in said balance, utterly insolvent; and unless the said balance so belonging to the plaintiffs herein, and the said judgment against the plaintiffs, so belonging to said Ryan and James R. Duff, as aforesaid, can be opposed to and set off against each other, the plaintiff will be wholly remediless.

Then follows the appropriate prayer.

The motion for a preliminary injunction was heard in the Court below upon the complaint; answer of defendant Josephi, and replication thereto; affidavits in support of the complaint, and other affidavits, filed on behalf of defendant Josephi. The Court below granted the preliminary injunction, and from this order the defendant Josephi appealed.

The other facts appear in the opinion.

Patterson, Wallace & Stow, for Appellant.

The foundation of the case set up by the respondents is, that they have become and are the assignees of a certain judgment, rendered in favor of one Fisher against one James T. Ryan, and James R. Duff, and others. We submit, that no such judgment is shown to have been rendered. The supposed judgment is to the following effect:

The Court ascertains, in the suit of Fisher against Ryan and James R. Duff, that there is a certain sum due on the bond and mortgage, directs that the mortgaged property be sold to pay this amount. Directs that, if the sale of the mortgaged property shall not produce enough to pay the sum ascertained to be due, the Sheriff shall report the amount of the deficiency, and that execution issue against Ryan, James R. Duff, etc., for the deficiency.

As held by this Court, in the case of *Rollins v. Forbes* (10 Cal.

Hobbs v. Duff.

300), it was competent for Fisher, in that suit, to have pursued either one of two distinct courses in enforcing his rights, viz.: He might take a personal judgment for the amount due, with a direction for the sale of the mortgaged property, and the application of the proceeds of the sale to the credit of the judgment; and upon the judgment so rendered, he might then take out execution for the unpaid balance, without further application to the Court. Or, he might, as he did do in this case, obtain a decree adjudging the amount due upon the personal obligation and directing a sale of the premises, and the application of the proceeds to the payment of the judgment; in which latter case (as clearly appears from *Bollins v. Forbes and Wife, supra*) further action of the Court will be necessary; i. e., the proposition being, that personal judgment must be rendered. Whether before or after the sale of the mortgaged premises, makes no practical difference; but it must be rendered at some time.

It is true that this decree awards execution for the unsatisfied balance which may remain; but an award of execution does not constitute a judgment. (*Phillipson v. Mangles*, 11 East, 516.)

In *Chapin v. Broder* (16 Cal. 422) the decree contained a statement of the amount due, but it was notwithstanding held, that there was no personal judgment for the amount—that the matter was contingent, even though there, as here, was an award of execution.

A final decree for money must specify the sum—not leave it to be ascertained by a Sheriff or Commissioner's report. (*Clark v. Bell*, 4 Dana, 16.)

Assuming, however, that there was a judgment rendered in favor of Fisher, and against James T. Ryan, James R. Duff, and the "Humboldt Lumber Manufacturing Company," which might be the subject of assignment, we submit, that the record in this cause discloses such a state of facts, as makes it unfit for a Court of Equity to help the complainants to a set-off.

This unsatisfied balance of the Fisher decree first passed from Fisher to the Knoxes by formal assignment.

The complainants introduce the affidavit of one of the Knoxes, and it affirmatively appears by that affidavit, that the Knoxes have

merely made a present of this Fisher balance to the complainants, by way of enabling them to set it up against the judgment on the appeal undertaking, if they can. In the pleadings, the plaintiffs say they paid "valuable consideration," "divers good and sufficient considerations;" but nowhere allege or prove any amount whatever paid by them, or either of them, for this Fisher balance. The record shows that the Knoxes committed a fraud in becoming the assignees of this balance; that Goddard paid the Knoxes nothing for it, and then divided it with his cocomplainants upon the same terms. It is now held by the complainants, not as *bona fide* assignees, who have paid value for it, and who have rights to be protected in reference to it, but in trust, for the use and benefit of the Knoxes. If the set-off can be sustained, the Knoxes will be released from paying their sureties, the complainants, anything. If the set-off is not sustained, the Knoxes will have to pay the W. R. Duff judgment.

In *Perkins v. Parker* (1 Mass. 117) it is held, that to enable a party to avail himself of the aid of a Court of Equity, as an assignee, he must hold the formal evidence of the assignment to him, "and this must appear to have been made, not merely upon a consideration expressing a formal value, but upon a good and adequate consideration." "And it is essential (say the Court) that the nature and amount of this consideration should be averred and proved by the party claiming the aid of this Court to enforce it as an equitable right; especially, when the interests of a third person, who is no party to the consideration of the assignment, is to be affected by it."

And upon page 126, Strong, J. says: "I have no doubt that the law will protect the equitable interests of an assignee of a chose in action. But to create the equitable interest, the assignment ought to be made for a good and adequate consideration, such as money paid, or a precedent debt discharged, etc., and the instrument assigned delivered over to the assignee; and these several facts ought to be shown in the pleadings. But what is the case before the Court? The replication says that, 'for value received the note was assigned.' (The phrases used in the complaint in the case at bar are, that Fisher sold to the Knoxes, 'for value received,' and

the Knoxes 'sold and assigned' to Goddard, and Goddard to the other complainants, 'on divers meritorious and valuable considerations.') It is true that 'value received' is *prima facie* evidence of a valuable consideration. What is a valuable consideration? A peppercorn; and for aught that appears by the pleadings in this case, there was no greater consideration than that for the supposed assignment," etc.

And again, in *Gilman v. Van Slyck* (7 Cow. 469) upon application to the Court to set off one judgment against another, the Court say: "It is not competent for a party thus to buy a judgment conditionally for the purpose of setting it off. He is bound to become the absolute proprietor for that purpose. He must purchase and incur the risk of set-off himself; not come, as here, in the light of a mere agent."

In the case at bar there is not even a conditional purchase by complainants.

In *Satterlee v. Ten Eyck* (7 Cow. 480) it appeared that one Aiken obtained a judgment against Southwick, and indemnified Ten Eyck, the Sheriff, to obtain a levy on property as Southwick's property, which was claimed by the Satterlees. The latter sued the Sheriff, Ten Eyck, for the trespass, and recovered judgment against him and Aiken, then purchased from one Turner a judgment, which Turner had obtained against the Satterlees, and got the assignment made out in the name of Ten Eyck. And a motion being made in the name of Ten Eyck to set off one judgment against the other, the Court refused it, saying that the party must be really the assignee — not the mere agent or trustee of another. He must be the absolute owner, holding the beneficial control, or there could be no set-off.

Aiken was there, through the agency of Ten Eyck, attempting to do the same thing that the Knoxes are attempting here through the agency of the complainants, viz.: to save himself from being ultimately compelled to pay the judgment.

The case was afterwards brought before the Court of Chancery of the State of New York (1 Paige's Ch. 298) and the set-off was again denied there. In the case at bar, it is nowhere pretended in the record, that the Knoxes are not amply able to repay

Hobbs v. Duff.

the complainants, their sureties on the appeal bond, the whole amount that they may be compelled to pay as sureties.

These complainants are estopped in this suit to aver that James T. Ryan and James R. Duff are the real parties in interest in the money due from them on the judgment on the appeal bond, because; In the suit that Wm. R. Duff instituted against the now complainant Goddard, it was in like manner adjudged that Ryan and James R. Duff had no interest on the side of W. R. Duff in the matters out of which these matters have grown; and it is not pretended that they have since acquired any such interest.

Fisher, the remote assignor of these complainants, would be estopped by the record in the suit of *Duff v. Fisher and Knoxes*.

Knoxes are estopped by the record of the same suit. Complainant Goddard litigated this precise question with William R. Duff.

The rule is that verdicts and judgments are conclusive against parties and privies in estate. The complainants, as assignees, are privies of their assignors, immediate and remote.

"If a party, after the verdict and judgment against him, assign his interest, the assignee is bound by the verdict." (2 Phillips on Ev. 15, note 260; *Payner v. Coles*, 1 Mumf. 373; *Church v. Leavenworth*, 4 Day, 274.)

And in the action on the appeal bond by Wm. R. Duff against these complainants, it was expressly averred by these complainants, defendants in that suit, that Ryan and J. R. Duff were the real parties in interest in the money now in suit, and the verdict and judgment were against them.

And there is no difference in the rule of set-off at law and in equity. (*Elder v. Laswell*, 2 Blackf. 349; *Van Buren v. Van Gaesback*, 4 Cow. 498.)

Mutual debts without mutual credits are no ground in equity for set-off, even in case of insolvency. *French v. Garver*, (7 Porter, Ala. 555.)

This complaint, though in the name of the present plaintiff, is in reality an attempt on the part of the Knoxes to avail themselves of the fruits of the fraudulent assignment made to them by Fisher—for it will be observed, that it is nowhere pretended in the record, that the Knoxes are insolvent, nor that if these then complainants

Hobbs v. Duff.

are compelled, as sureties of the Knoxes, to pay this judgment, they will not be able to force payment out of their principals, the Knoxes; and it is apparent from the record that the Knoxes assigned the unsatisfied balance of the Fisher decree to complainant Goddard, without consideration, and that he in turn has divided it among his cocomplainants as a shield to protect the Knoxes from the William R. Duff judgment. The result is, that if the complainant's case shall fail, the Knoxes will have ultimately to pay the W. R. Duff judgment; but if the complainant's case shall succeed, the Knoxes are aided by a Court of Equity to avail themselves of the fruits of the fraudulent assignment made by Fisher to them—an assignment declared and adjudged, as we have seen in the case of William R. Duff against Fisher and the Knoxes, to have been made fraudulently, and for the purpose of swindling the creditors of said Fisher, of whom William R. Duff was one.

Shafters & Gould, for Respondents.

Counsel state, that "the foundation of the case set up by the respondents is, that they have become and are the assignees of a certain judgment rendered in favor of one Fisher against James T. Ryan, James R. Duff, and others," and "submit that no such judgment has been rendered."

We do not conceive that it is at all necessary for the plaintiffs to establish, that their offset has taken the form of a personal judgment. Other claims than personal judgments may be set off in equity. "The Court of Chancery was possessed of the doctrine of set-off, as grounded upon principles of equity, long before the law interfered." (2 Story's Eq. Sec. 1432.)

Lord Mansfield has expressed his views on the subject in the following language: "Natural equity says, that cross demands should compensate each other by deducting the less from the greater." In *Lindsay et al. v. Jackson et al.* (2 Paige, 581), the complainants filed their bill for the purpose of enforcing an acceptance as a set-off, and prevailed—the defendants holding promissory notes against the plaintiffs, under-due. The defendants were insolvent.

In *Bigelow v. Folger* (2 Met. 255) the defendant was allowed to set off a promissory note not due when the suit was commenced.

Hobbs v. Duff.

The plaintiff was insolvent. In *Striker's case* (1 Bland. 79) a claim for rents and profits was set off in equity against a claim for improvements. In *Decatur Railroad v. Rhodes* (8 Ala. 206) a claim for money paid was allowed as an equitable set-off. *Stennet v. The Branch Bank at Mobile* (9 Id. 120) held, that "upon a bill filed for an equitable set-off, the right does not depend upon the question, whether both demands have been liquidated by judgment or decree." In *Stephens v. Fowler* (9 Paige, 280) a debt not in judgment was allowed to be set off. In *Blake et als. v. Langdon et al.* (19 Vt. 485), the equitable set-off was not in judgment. In *Naglee v. Palmer et al.* (7 Cal. 543), the offsets had not passed into judgment—they had been merely filed and reported upon. The foregoing authorities clearly establish, that every description of counter-claim, if liquidated, can be made the subject of equitable set-off.

Now, in the foreclosure suit of *A. K. Fisher v. The Humboldt Lumber Manufacturing Co., James T. Ryan, and James B. Duff et als.*, there was a decree or judgment past all doubt. It is adjudged that there was due on the bond and mortgage \$33,820—and this adjudication is admitted by counsel in terms. And it was further adjudged that the lands mortgaged should be sold for its payment. Part has in fact been paid in the mode designated, and part in fact remains unpaid. Now the complaint does not say that the decree is a "personal judgment," a "money judgment," or any other kind of judgment. It simply calls it "a judgment"—sets it out in *hæc verba*, and leaves the question of its effect to be determined by the Court. Nor does the complaint allege that the plaintiffs have a personal judgment, or any judgment, for the alleged balance constituting their set-off. The allegation is that there was a "judgment and decree for \$33,820, as due upon the bond and mortgage." And the allegation is true, even if the judgment was *in rem*, or *quasi in rem*. The complaint alleges further that there is "a balance due and unpaid on that judgment, amounting to \$17,248.89 and interest." And is not that allegation true also? Cannot an "unpaid balance" be predicated of a judgment *in rem* or *quasi in rem*, as well as of a promissory note, or bond, or judgment *in personam*? (20 Ala. 825; 27 Id. 428; 8 Geo. 354; 3 Port. 35.)

We shall assume, then, that what we have alleged is true — that is, the fact of “a balance of a decree unpaid.” Admit, now, that there is no subsisting personal judgment for that balance, does it follow that we have no remedy for its recovery? Is it true that we can do nothing until we have a personal judgment to start with? If so, then, having no personal judgment, we cannot start at all. The objection obviously assumes that nothing can be relied on as the foundation of an equitable offset except a personal judgment; whereas, the cases cited establish that every description of contract and record claim due in law or equity, may be so presented. Assuming that our balance has not as yet taken on the form of a personal judgment, can it not be made to take on that form in this proceeding?

By the settled practice of the American Chancery, an unsatisfied balance due on a foreclosure decree containing no provision for the payment of a deficiency, may, on the ground that it is equitably due from the party, be subjected to the form of a personal judgment by a petition, or, more properly perhaps, by supplemental bill; and it follows that if the party from whom such balance is equitably due should sue the party to whom it is equitably due upon a bond or other contract claim, the defendant could tender his equitable counter-claim in offset, and in that behalf might set out the decree as it was entered, admit part payment according to the method of the judgment, characterize his equitable counter-claim as “an unsatisfied balance equitably due upon the decree,” and seek a judgment from the Court upon that question.

The complaint does not attempt, in form, to make a case of “debt” upon an existing personal judgment. It sets forth a detail of facts instead, and they show all the conditions of a valid personal claim upon our debtors *in personam*, and that is sufficient for our purpose.

But the complaint and the exhibits annexed do show a personal judgment against James T. Ryan, James R. Duff, and the ten other persons parties to the foreclosure in question. To find out what was adjudged, we must go to the record of the judgment as it was actually made up. The decree recites “that the Court, on the twelfth day of September, 1857, referred the matter to Lewis

Hobbs v. Duff.

Wood, Esq., Clerk of this Court, to compute, ascertain, and report to this Court the amount of principal and interest due the said plaintiff on the bond and mortgage set forth in the complaint; and the said referee having this day made his report, showing that there is this day due on the said bond and mortgage the sum of \$33,820; and on reading and filing his said report, and on motion of Thomas Hanna, attorney of said plaintiff, it is ordered by the Court that the said report be confirmed."

The decree then proceeds in common form to "adjudge and decree" that the mortgaged premises be sold; and to "adjudge and decree" that out of the proceeds certain special charges shall be paid; and then to "adjudge and decree" that out of the same proceeds the "said sum of \$33,820 shall be paid, with interest thereon, or so much of said sum as the residue of the proceeds will pay; and then to "adjudge and decree," if there should be a surplus, that the Sheriff shall pay it into Court; and then to "adjudge and decree" that "if the proceeds be insufficient to pay the amount of said debt, interest and cost, the Sheriff shall report the amount of such deficiency or balance; and then, finally to "adjudge and decree" that "therefor the plaintiff have execution" against the debtors, naming them by name.

This was a proper decree, as this Court has already repeatedly decided; but no matter how erroneous it may be, it cannot be attacked collaterally. For all the purposes of this case, it is to be treated as a valid and final judgment upon all the points adjudged by it.

The right, and the extent of the right, having been ascertained by the report of the Referee, as by the verdict of a jury, the decree, in view of the facts so found, takes up the subject of relief, and "decrees and adjudges" upon it under three distinct aspects:

1st. The mortgage property shall be sold, and the proceeds be applied in satisfaction of the debt.

2d. But there may be a surplus; and if there be, then let it be paid into Court, there to remain subject to the Court's order.

3d. But there also may be a deficiency. Should there be one, let the Sheriff report it and the amount of it, and then on this, the last of the three alternative aspects, the decree adjudges "that the

plaintiff have execution therefor against the debtors in the suit by name."

Courts of Equity do not administer justice "by halves." They aim to exhaust the cases with which they deal. Their decrees for relief are not confined in their range to facts that have formed themselves into actual combinations, existing at the time the Chancellor utters his judgment, but they project themselves into the future; and anticipating other, and all other combinations of facts that may arise by legal possibility, proceed to adjudge in advance the legal consequences that shall attend upon them when they actually occur. It is mainly in the fact that its decrees can be thus molded, that the excellency of the chancery jurisdiction consists.

Among other possible predicaments, the Chancellor, in the foreclosure case, foresaw that there might be a "balance" unsatisfied by the proceeds of the sale—the existence and amount of which might be made manifest by the Sheriff's return—as in returns upon execution at common law—and acting in advance upon such possible predicament, he in so many words "adjudges and decrees that the plaintiff have execution therefor against the defendants" by name. Here is a judgment at least. The language not only imports it, but demonstrates it. It is not a judgment *in rem*, and it remains that it must be a judgment that the "balance," when ascertained in the manner pointed out by the decree, should be paid by the debtors out of their estates at large. This is a contingent judgment *in personam*, or it is nothing, and words have lost their meaning. The form of words used in the utterance of this judgment, as well as the power of the Court to render the judgment itself, are fully vindicated by the two hundred and forty-sixth section of the Practice Act:

"The Court shall have power by its judgment to direct a sale of the property, or any part of it—the application of the proceeds to the payment of the amount due on the mortgage, and execution for the balance."

It is of no moment that the report of the Sheriff was not "confirmed" by the Court, for the decree does not require it. Perhaps it ought to have required it, but it is quite certain that it

Hobbs v. Duff.

does not. It is of no moment that an order was not procured for execution, for the decree in terms doomed the defendants to execution as a sequence following instantaneously upon the filing of the report, and in that particular it followed the mode pointed out in the two hundred and forty-sixth section of the Practice Act.

But all the questions arising under the objection in hand have been settled by this Court in *Rollins v. Forbes and Wife* (10 Cal. 299) and *Rowe v. Table Mt. M. Co.* (Id. 441).

The case of *Chapin v. Broder* (16 Id. 408) is not opposed to, but agrees with and illustrates the doctrine of the foregoing cases. The counsel contesting the judgment lien asserted in that case, admitted in their argument "that the decree in favor of Moss became a lien from the time of the Sheriff's return, and the filing of his report of sale showing that there was a deficiency," but insisted that "until then the judgment was contingent, and no execution could issue." The whole of the reasoning in the opinion shows that this view was adopted by the Court. They say that the "judgment is in abeyance until the contingency (named in the decree) is determined." And how determined here except in the mode and manner in which the decree has adjudged it shall be determined, viz: by the filing of the officer's return showing the existence of a deficiency, and its amount?

The Court further says: "It (such contingent judgment) may become a valid and perfect judgment; but until the amount to be recovered is ascertained and fixed, no effect can be given to it as a lien."

In all the New York cases in which it has been held that execution could not issue for a balance reported by the Master until after the report had been confirmed, the decree in terms made such confirmation necessary. In our statutes there is no such provision.

But this question is no longer an open one, for in *Rollins v. Forbes and Wife* (10 Cal. 299) it was held, that where a personal judgment was in fact involved in the decree rendered in the foreclosure, and the avails of the sale had been credited by the officer making the sale and reporting a balance, "no further action of the Court would be necessary to ascertain the deficiency for which execution might issue." The only question open on this record is:

Hobbs v. Duff.

Does the Fisher decree involve such personal judgment? (5 Gill & Johns. 52.)

As a result we submit, that the plaintiff in *A. K. Fisher v. Ryan and Duff et al.*, had a contingent judgment *in personam* as soon as the decree was entered, and that judgment became an absolute judgment *in personam* as soon as the contingency transpired.

After confirming the Master's report, the decree, in the language of counsel, "adjudges the amount due on the personal obligation." What personal obligation? Certainly not the mortgage, for that acts merely upon the land. The only personal obligation disclosed by the papers, is the personal obligation evidenced by the bond which the mortgage was given to secure. The Court, then, "adjudged" the amount "due" upon the bond. But as "due" from whom? The only answer that can be given is, "due from the parties by whom the bond is signed." The decree, then, establishes by judgment that those parties were personally indebted to Fisher in the sum of \$38,820, by reason of the bond, and that result, so affecting the obligors personally, is *res judicata*. The residue of the decree, in effect, adjudges that the already adjudged personal indebtedness shall be paid, and primarily casts the burden upon the lands mortgaged, and that resource coming short, and the amount of the deficit being ascertained by the report of a sworn public officer, execution therefor is to issue against the persons from whom that deficit, and a still larger sum originally, had, in the language of counsel, been "adjudged" to be "due" on the "personal obligation" evidenced by the bond.

Counsel state, that in *Chapin v. Broder* (16 Cal. 422), it was held there was no personal judgment. The decree in that case was the same as the Fisher decree. It was held that the decree in the first instance contained no such personal judgment as was necessary in order to work out the result of the "lien" on lands extraneous to the mortgage; but on looking into the facts of that case, the Court will see that the very point upon which the judgment of the Court below was affirmed was, that the balance, when reported by the Sheriff, became a judgment lien the moment the report was filed. If that case was rightly decided, then Fisher had a perfected personal judgment the moment that the Sheriff's

Hobbs v. Duff.

report was filed in the Clerk's office of the County of Humboldt. The result is that we are in the right in this matter, if *Chapin v. Broder* was rightly decided.

In commenting upon the case of *Clark v. Bell* (4 Dana, 16), counsel rely upon it as authority to show that "a final decree for money must specify the sum — not leave it to be ascertained by the Sheriff or Commissioner's report." It is sufficient to say that the decree here, and on the admission of counsel, too, does "adjudge the amount due upon the personal obligation." It does not, then, run into the vice of committing any question involving the exercise of judicial power or discretion to the Sheriff for solution. The Sheriff is required to sell and report, both of which acts are purely ministerial and clearly within the scope of his official duties. If counsel mean to contend that there can be no contingent judgment *in personam*, they are met by: (*Chapin v. Broder*, 16 Cal. 422; *McCarthy v. Graham*, 8 Paige, 480; *Rollins v. Forbes et ux.*, 10 Cal. 229; 10 Paige, 117.)

But counsel say, that "it appears by the affidavit of one of the Knoxes, at page 68 of the Transcript, that the Knoxes have merely made a present to the complainants of the Fisher balance, by way of enabling them to set it up against the judgment on the appeal undertaking, if they can."

Answer.—The affidavit referred to shows that the balance due on the Fisher decree was not a gift or "present" by the Knoxes to the complainant, in the sense in which counsel evidently use the term; but, on the contrary, that the assignment was made by them on a valuable and highly meritorious consideration, viz.: to secure the complainants against their liability on the appeal bond, given by them at the request of the Knoxes, in the suit for specific performance (*W. R. Duff v. Fisher et al.*)

It is said that the plaintiffs hold the Fisher "balance in trust for the Knoxes." The answer is, that the record shows that the trust is not a naked trust, but a trust coupled with an interest; and no trust at all except such as all sureties are affected with who take securities from their principals.

It is said, further, "if the set-off can be sustained, the Knoxes will be released from paying their sureties anything." The answer

Hobbs v. Duff.

to that, if any answer is required, is, that they will be so released for the reason that, by assigning to the plaintiffs the balance due them on the Fisher judgment; they have, in advance, put their sureties in funds wherewith to liquidate their liabilities, evidenced by the judgment upon the appeal bond. No one can complain, except Josephi, should the offset be allowed; but he took his assignment of the judgment on the appeal bond long after our equitable right to offset had vested. Josephi took his assignment subject to the vested equity of the plaintiffs to oppose their balance to it. (Practice Act, Sec. 5; *Gay v. Gay*, 10 Paige, 389; *Barber v. Spencer*, 11 Id. 517; *Wright v. Levy*, 12 Cal. 257.) As to the necessity of a written assignment, see *Ford v. Stewart* (19 Johns. 342), in which it was held, that "a judgment may be assigned by parol, or writing without seal." Same point in *Prescott v. Hall* (17 Johns. 284).

In *Ensign v. Kellogg et al.* (4 Pick. 1), the assignees of a bond sued for specific performance: held, that the obligors could not question the validity of such assignment on the ground that it was without consideration: that is a matter between the creditors of the obligee and the complainant.

Josephi is no "creditor" of our assignors, undertaking to set aside our assignment on the ground that it was made for the purpose of defrauding him, as a creditor, and driving us up to prove that we paid a full and adequate consideration for the "balance" assigned; nor did he become interested as a "third person" until after the judgment on the appeal bond had been finally affirmed in this Court, March 7th, 1862. Sharp assigned to Josephi March 10th, 1862, and William R. Duff the trustee of our debtors, assigned to Sharp on the same day.

Again, the fallacy of the argument that the complaint will not support the injunction, for the reason that the character and amount of the consideration paid by the plaintiffs for an assignment to them of the balance due on the Fisher decree are not circumstantially stated, will more fully appear from the following considerations:

In the case of *Gilman v. Van Slyck et al.* (7 Cow. 469), cited by counsel, it was held, "that a judgment purchased by a party with a view to set it off, and with condition that if he fails to obtain

the set-off on motion, the assignment shall be void; and accompanied with a stipulation that the assignee shall be indemnified against the costs of the motion, cannot be set off." That case differs from this in every governing particular. Here, there was no such condition, nor was there any such stipulation. The assignment was absolute for all the purposes of indemnity to the sureties for whose benefit it was given.

As to *Satterlee v. Ten Eyck* (7 Cow. 480), we make out a case under the law of offsets as there expounded. The plaintiffs are not the "mere agents or trustees" of their assignors, but are the "absolute owners" of the balance which they assert, "holding the beneficial control" thereof in the largest measure that the law of pledges will admit of. Further on it is said by counsel, "that it is nowhere pretended in the record that the Knoxes are not amply able to repay the complainants, their sureties on the appeal bond, the whole amount that they may be compelled to pay as sureties." To this we submit the following replies:

According to all the cases, our right to offset in equity turns upon the insolvency of the parties who owe us the "balance," and it cannot be made to hinge upon the insolvency of the parties from whom we derived our title to that balance.

In *Walker v. Sedgwick* (8 Cal. 405), it was held as follows: "Insolvency may exist in a thousand cases where its existence cannot be proved at the time; and who would not prefer setting off his claim against that of another, rather than first pay the money out of his own pocket, and then risk getting it again from the pocket of his adversary?" The point decided in this case is identical in effect with that now under discussion.

The principles upon which judgments are held conclusive upon the parties, require that the rule should apply only to that which was directly in issue, and not to everything which was incidentally brought into the controversy during the trial. And it is only to the material allegations of one party that the other can be called upon to answer; it is only upon such that an issue can properly be formed, to which alone testimony can be regularly adduced; and upon such an issue only is judgment to be rendered. A record, therefore, is not held conclusive as to the truth of any allegations which

Hobbs v. Duff.

were not material nor traversable; but as to things material and traversable, it is conclusive and final. (1 Greenl. Ev. Sec. 528.)

As a second estoppel, counsel insist "that in the suit William R. Duff instituted against the plaintiff Goddard, it was in like manner adjudged that Ryan and James R. Duff had no interest on the side of William R. Duff in the matters out of which these matters have grown, and it is not pretended that they have since acquired any such interest."

To this objection we submit the following answer: Of the six plaintiffs in this action, one only of their number was party to the suit named in the statement of the objection, viz.: Goddard. That suit was commenced August 17th, 1860. All of the plaintiffs became jointly interested in the offset now presented on the nineteenth of June previous; and it follows that inasmuch as Hobbs, Gilmore, Armes, Stephens, and Clark, were interested in the offset before, and at the time the suit referred to was brought, and were not made parties to it, that no judgment rendered in the suit could by possibility estop them. Nor would Goddard himself be estopped by the judgment in any subsequent litigation involving the same subject matter in which he and his coöwners were made defendants jointly. (2 Cowen & Hill's Notes, 2; *Baring v. Fanning*, 1 Paine, 549; *Chapman v. Chapman*, 1 Mumf. 398.)

The third estoppel relied on, is stated by counsel as follows: "In the suit upon the appeal bond where the same matters were set up which are now set forth in the complaint, it was determined that William R. Duff was the owner of the money now in controversy." By "the money now in controversy," counsel doubtless mean the money due on the judgment on the appeal bond. That was an action at law by William R. Duff against the present plaintiffs, upon the appeal bond.

It is true that the offset now relied on was presented in that suit upon the same allegations substantially as those contained in the present complaint. But by referring to the statement on new trial in that case, it appears that the defendants' evidence to prove that the appeal bond in suit belonged to James T. Ryan and James R. Duff, was excluded by the Court below, and that the question of fact was neither determined nor investigated. The new trial asked

Hobbs v. Duff.

red by Sec. 19 of the Statute of Limitations. "An action for relief not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued." (*Lord v. Morris*, 19 Cal.) The judgment, plaintiff seeks to set off, was rendered September 17th, 1857. This action was commenced March, 1862, more than four years after, and more than six years after Fisher, plaintiffs' assignor, discovered that Wm. R. Duff was trustee of James T. Ryan and another.

Shafter & Gould, in reply.

The legal proposition seems to be as follows: If A (A. K. Fisher) having a mortgage on lands of B (James T. Ryan and James R. Duff), the mortgage standing as security for B's own debt, makes a contract with B (here nominally with Wm. R. Duff as the naked trustee of J. T. Ryan and J. R. Duff) that he (A) will convey to B the mortgaged lands if he (A) should become the owner of them under proceedings in foreclosure; A, in the event of his becoming the owner of the lands in the manner named, would be bound to convey them to B free from all lien for an unpaid balance of the mortgage, should there happen to be one. That conclusion may be safely admitted, for it is difficult to see how the purchaser, A, could have any lien on his own land for a balance due to himself. But after the title had vested in B by conveyance from A, why could not A collect his unpaid balance due to him from B, by levying it upon the particular land conveyed? Of what importance would it be to B, whether that particular land should be seized or some other property constituting a portion of his general estate, for the payment of an admitted debt? Or if A (here these plaintiffs in effect) was indebted to B (here James T. Ryan and James R. Duff in effect) in any money claim from book account up to final judgment (here the judgment on the appeal bond, in effect), why could not A (these plaintiffs in effect) offset his money "balance" against the adversary money claim due from his debtor? Dropping here the hypothetical case, the argument of counsel suggests no other reason than this: Fisher had to be compelled by proceedings to fulfill his agreement to convey the mills and the steam tug, and damages were assessed by a Court,

Hobbs v. Duff.

instead of being amicably assessed by the parties. Conceding that we have a personal judgment for our "balance;" conceding that that balance has come to us honestly and on sufficient consideration; conceding further, that the judgment on the appeal bond to which our offset is now opposed, was the property of James T. Ryan and James R. Duff at the time when the plaintiffs so became owners of the "balance;" conceding, in short, every point of fact which we claim, the hopeless insolvency of our debtors inclusive, counsel maintains that the plaintiffs cannot offset, for the reason that Fisher was contumacious in the matter of fulfilling his contract to convey, and that thereby he forfeited his right to offset; and that the bar was not limited to him, but affects "his heirs, administrators, and assigns, forever." For this conclusion no case is cited and no principle is adduced. The case from 11 Gill & Johns. 314, has not, as we conceive, any bearing upon the point. But another objection is made by counsel, under title fourth, not taken in the leading brief; it is, that Fisher should have pleaded in offset the balance of his foreclosure decree, in the suit for specific performance of his contract to convey the mills and tug; and that not having done so, neither he nor his assigns can bring an original action to enforce the offset. The case cited from 11 Cal. 212, has obviously no bearing on this proposition, neither has the case cited from 4 Johns. 510, nor the case from 1 Id. 97. It is perfectly well settled that a party having an offset at law may present it in a suit against him at law, or forbear to do so in his election, and without prejudice to any of his legal or equitable remedies. This point is so thoroughly established by the authorities that it cannot be considered an open question. (Barb. on Set-off, 21.) In this matter equity doubtless "follows the law."

But again: Fisher could not have offset his "balance" in the suit of *W. R. Duff v. Fisher and Knozes* for specific performance and account, without the help of the "equitable circumstance" furnished now by the insolvency of the parties from whom that balance was due. If he had attempted it, he would have grounded on the shoal of "mutuality." Now, it nowhere appears in this record that those parties were insolvent at the time when the suit was brought or while it was pending. How then, can

Hobbs v. Duff.

counsel say that Fisher could have pleaded his balance in offset in the suit referred to? But counsel further along, refers to the suit of *Wm. R. Duff v. Goddard and Sheriff Van Ness* (to enjoin the threatened sale of the Humboldt mill on an execution for our "balance"), and argues that because that suit settled the title to the saw-mill, it in effect settled the title to the money judgment on the appeal bond. This position we do not propose to review a second time, and refer to it now for the purpose of correcting an error of fact into which counsel has inadvertently fallen. There was no decree forbidding Goddard to sell the "balance" of the Fisher decree now raised as an offset. He was enjoined to refrain from selling the mill, which we take to be a different thing altogether.

Again, it is asserted that Goddard assigned an interest in the set-off to his cosureties and coplaintiffs, after the decree in the *quia timet* suit referred to. That is a mistake; for as we have already shown by the record, the plaintiffs became joint owners of the set-off forty days before the *quia timet* suit was brought. Counsel, under the fourth head in his brief, contends that we are estopped from asserting our offset by the "undertaking on appeal." The proposition is not illustrated by any comment, and it would be idle for us to conjecture the grounds upon which it was advanced by counsel, and then proceed to answer the grounds so conjectured. We do not deny the bond, nor any of its recitals; and the entire validity of the judgment rendered upon it against us is admitted in the very theory of this action. Counsel further insists that plaintiffs are estopped by the contract on which the suit for specific performance was based, from saying that our debtors Ryan and Duff were the beneficial owners of it; but no reasons for this opinion are given or suggested, except as it is said that Fisher contracted with Wm. R. Duff. The answer is, that we do not deny now anything which that contract provides for, or asserts, or manifests. Among other things, the paper demonstrates that the contract, as written, runs to W. R. Duff, but it does not show, nor undertake to show, who the persons were at whose instance or for whose benefit the contract was in fact made. The difficulty relied on by counsel was considered and disposed of judicially in the case of *Barrett v.*

Hobbs v. Duff.

Barrett (8 Pick. 342), and in *Naglee v. Palmer* (7 Cal. 543). Under the fifth head of the brief, counsel defend on the ground of the Statute of Limitations. It is true that this action was commenced more than four years after the rendition of our judgment, but it is also true that it was less than five years by seven months. The statute runs from the date of the judgment, past all doubt, and that was October 10th, 1857; the date of the Sheriff's return showing the amount of the unsatisfied balance that we now seek to have offset against the judgment on the appeal bond. The case, then, in our view of the matter, comes to this: The plaintiffs are at law the absolute owners of a claim against J. T. Ryan and James R. Duff of the amount of about \$55,000, and they are the equitable owners thereof, as sureties, for all the purposes of indemnity. We seek to offset it against a judgment now the property of Josephi, but which belonged to our debtors at the time when we took our claim by assignment. We are not estopped from proving that the adversary judgment was the property of our debtors at the time named, by any record that has been produced, for in none of them is that question even alluded to, except one (the action on the appeal bond), and in that record it appears that the question, for technical reasons, was not tried. The suit failed for the reason, as this Court held, that the offset could not be enforced in a Court of Law.

CROCKER, J. delivered the opinion of the Court — CORN, C. J. concurring.

This is an appeal from an order granting an injunction, in an action in the nature of a suit in equity, for a decree setting off a certain demand owned by the plaintiffs, against a demand owned by Josephi, one of the defendants.

The record discloses these facts, that on the fifteenth day of September, 1857, one Fisher obtained a decree for the foreclosure of a mortgage upon certain real and personal property in the District Court of Humboldt County, against one Ryan, J. R. Duff and several others; that the mortgaged property was duly sold under the decree; and after the application of the proceeds upon the amount of the mortgage debt found due by the decree, there was a defi-

ciency or balance of \$17,248.89; that May 9th, 1858, Fisher assigned this balance, due on the decree, to R. & F. Knox, and May 10th, 1860, they assigned it to one Goddard, who, on the nineteenth day of June, 1860, assigned the undivided half to his associate plaintiffs in this action. This is the demand the plaintiffs claim the right to use and apply as a set-off — the sum due thereon with interest amounting to \$53,977.63, at the commencement of this action.

The complaint states, that on the twenty-third day of February, 1856, Fisher entered into a contract with the said Ryan and J. R. Duff, two of the defendants in the decree of foreclosure, for the conveyance of the mortgaged property, should he acquire the title to it; but that Ryan and J. R. Duff, for the purpose of defrauding their creditors, had the contract made in the name of W. R. Duff, instead of their own, the latter being privy to the fraud; that an action was brought thereon, in the name of W. R. Duff, against Fisher, the Knoxes and others, to compel a specific performance, and an account of the rents and profits, in which a final decree was rendered in favor of W. R. Duff against the defendants, for a specific performance of the contract, and for damages in the sum of \$13,566.99; that the Knoxes appealed from this judgment to this Court, and the plaintiffs in the present suit became their sureties on the appeal bond; that the judgment was affirmed on appeal, and W. R. Duff brought an action on the appeal bond, in which he recovered judgment against the plaintiffs in this action, on the twenty-third day of August, 1861, for \$16,900, and they aver that Ryan and J. R. Duff procured all these actions, and proceedings to be had, in the name of W. R. Duff, who acted as a mere naked trustee for them, they being the real owners of the judgment against the plaintiffs. W. R. Duff assigned this judgment on the tenth day of March, 1862, to one Sharp, who, on the twelfth day of March, 1862, assigned it to the defendant Josephi. It is this judgment that the plaintiffs seek to have set off and satisfied, by having the amount thereof credited on the larger judgment held by them. The injunction is to restrain the defendants from enforcing this judgment against the plaintiffs.

The first point raised by the appellants is, that the decree assigned to the plaintiffs is not a money judgment, and therefore does not

Hobbs v. Dall.

form a proper foundation of an action for a set-off. The decree is rendered in a form in very common use in the Courts of this State. It recites that the Court referred the case to the Clerk of the Court, to compute and report the amount of principal and interest due on the bond and mortgage; that the referee had reported due thereon the sum of \$33,820, and then "it is ordered by the Court that the said report be confirmed." It then proceeds and decrees, that the mortgaged premises be sold; that out of the proceeds certain charges be paid, and the "said sum of \$33,820 shall be paid," with interest thereon; that if there be a surplus, the Sheriff shall pay such surplus into Court; that if the proceeds should be insufficient to pay the said debt, interest and cost, the Sheriff shall report the amount of such deficiency or balance, and that "therefor the plaintiff have execution" against the defendants. The Sheriff, after the sale, duly reported the balance due as before stated. This decree appears to be in strict accordance with Sec. 246 of the Practice Act, as it stood at the date of the judgment, by which it was provided, that the "Court shall have power, by its judgment, to direct a sale of the property, or any part of it; the application of the proceeds to the payment of the amount due on the mortgage, lien, or incumbrance, with costs, and execution for the balance." The right of the plaintiff, in foreclosure suits, to a personal judgment for the amount of the debt, under this section, was established by the decisions of this Court in: (*Rollins v. Forbes*, 10 Cal. 299; *Rowe v. Table Mountain Water Co.*, Id. 441; *Rowland v. Lethy*, 14 Id. 156; *Cormerais v. Genella*, 22 Id. 116.) But in those cases there seems to have been a direct decree, that the defendants pay, or that the plaintiff recover the amount found due—which is not found in the decree we are now considering. In this respect it is like the decree passed upon in *Chapin v. Broder* (16 Cal. 403). In that case the judgment had been docketed at the date of its rendition; and the question was at what time the lien of the judgment attached upon the lands in controversy; and it was held, that until the amount of the deficiency had been ascertained after a sale, the amount of the judgment was uncertain and indefinite; and that no effect could be given to it, beyond a sale, so long as this uncertainty continued. The question before us is,

Hobbs v. Duff.

whether, in such a decree, there is a judgment for the amount of the deficiency when it has been duly ascertained by a report of the Sheriff, with the usual qualities of a judgment at law, or a decree in equity for the payment of money? That question was not directly decided in *Chapin v. Broder*; but the language used by the Court would seem to imply, that such was their opinion; and that the docketing of such a judgment would make it a valid lien on the property of the defendants, from the time the deficiency was duly ascertained—but could not date prior to that time. The fact that the statute does not require, in such cases, a direct personal decree for the payment of the money, and yet authorizes an execution to issue for the balance, would give a decree, rendered in accordance with its provisions, one of the highest and most important attributes of a money judgment—the foundation of an execution to enforce its collection; and a sale of property, under such an execution, would certainly convey a valid title.

But it is unnecessary for us to determine what is the character and quality of such a judgment, further than as it may apply to the present case. We think it clear that the original debt is merged in such a judgment, at least so far as to make it a certain and liquidated demand, existing at the date when the amount was ascertained, sufficient as a foundation of a right of action or set-off. The principle is well settled, that it is not necessary that the demand sought to be used as a set-off should be in the form of a judgment.

It appears from the record, that prior to the suit for a specific performance, Fisher had conveyed the mortgaged property which he had purchased, to the Knoxes, and they were therefore made parties to the action, it being alleged that the sale was fraudulent and void, and that the Knoxes were therefore bound by Fisher's contract to convey. This issue was found in favor of the plaintiffs in that action; and the decree, therefore, was rendered against the Knoxes. The appellants contend that the assignment of the judgment by Fisher to the Knoxes was without consideration, and fraudulent, and that the decree in the action for a specific performance was an adjudication to that effect, binding upon the plaintiffs, and vitiating the judgment in their hands. It is a sufficient answer to this, to say that the assignment of this judgment by Fisher to the

Hobbs v. Duff.

Knoxes formed no part of the matters in controversy in that action, and no judgment was entered affecting it in any way. It is also urged, that this assignment of the judgment by the Knoxes to the plaintiffs was made without any consideration. It appears from the record, that it was made for the purpose of securing the plaintiffs against their liability on the appeal bond, which they executed as sureties for and at the request of the Knoxes. This is clearly a sufficient consideration to support the assignment. It is both a valuable and adequate consideration.

The assignment is not conditional, as was the case in *Gilman v. Van Slyck* (7 Cow. 469). The Knoxes are the principals, as to the liability of the plaintiffs to William R. Duff, and it was their duty, as such principals, to secure and protect their sureties. The assignment of the balance due on the judgment for that purpose was proper and valid, and should be sustained accordingly. It is urged, that the Knoxes are attempting to save themselves from their liability upon the money judgment rendered in the action for specific performance, through the complainants, by means of their assignment. If such should prove to be the case, we do not see what difference it can make as to the rights of the parties in this action. If the Knoxes have a just demand, which is an equitable set-off to the judgment held against them by William R. Duff, what rule of equity is violated by allowing them, or their sureties for them, to maintain an action for that purpose? If William R. Duff is not the real owner of the judgment against the Knoxes, but is the mere trustee for Ryan and J. R. Duff, who are the beneficial owners, he is not injured in any way by the set-off; and the latter are not injured, for the judgment is applied in payment of an equal amount justly due from them, which is the object sought to be accomplished by a set-off. Indeed, we are not sure that if the Knoxes had not assigned the judgment to the plaintiffs, but still held it, the latter could apply to a Court of Equity to compel a set-off, to relieve them from the payment of their liability. That, however, is a question not before us. It is sufficient for the purposes of the present case, to say, that the assignment was for a proper and valid purpose, and made upon a good and sufficient consideration.

It is also urged, that Josephi purchased the judgment against the

Hobbs v. Duff.

plaintiffs in good faith, and for a good and valuable consideration, and is therefore entitled to protection against the claim to set-off. This judgment, which was rendered August 23d, 1860, was assigned by Wm. R. Duff to one Sharp, March 10th, 1862, and Sharp assigned the same to Josephi, March 12th, 1862. But the judgment claimed as a set-off by the plaintiffs was assigned to their principals, the Knoxes, May 9th, 1858, and was assigned by them to Goddard, May 10th, 1860, and by him to the other plaintiffs June 19th, 1860; so that the right of set-off claimed by the plaintiffs existed at the date of the judgment against them, and the subsequent assignees of that judgment took the same subject to the right of set-off. (Pr. Act, Sec. 5; *McCabe v. Grey*, 20 Cal. 509; *Wright v. Levy*, 12 Id. 257.) But Josephi cannot justly claim that he is a purchaser without notice of this claim of set-off asserted by the plaintiffs. As assignee of the judgment, he is deemed to have notice of all matters disclosed by the record and proceedings in the action in which the judgment was rendered. The record in that action discloses the fact of this claim of set-off, which the plaintiffs in this action attempted to use as a defense to that action; but the Court in that case ruled it out as a defense, on the ground that that action was strictly at law, and the defense did not come within the provisions of Sec. 47 of the Practice Act. (*Duff v. Hobbs*, 19 Cal. 646.) The Court in that case, however, did not hold that the plaintiffs had no remedy in equity. The defendant Josephi, therefore, had full notice of the equitable claim of set-off of the plaintiff, and he cannot, therefore, claim the rights of a *bona fide* purchaser in this action.

The appellants also contend that the complaint is defective, as it does not allege that the Knoxes are insolvent, or that they are not able to repay to the plaintiffs the amount they may be compelled to pay as sureties. It is the insolvency of Ryan and J. R. Duff, the persons who owe the debt claimed by the plaintiffs as a set-off, and not that of the Knoxes, that is the material question upon this point. Their insolvency is averred, and does not seem to be disputed. It is the fact that they are the real owners of the judgment against the plaintiffs; that they are insolvent, and therefore the only means of collecting the judgment due from them to the plaintiffs is by the

set-off, that forms one of the chief grounds for the interference of a Court of Equity. The parties named in the record of these two judgments are not the same, and therefore a Court of Common Law jurisdiction cannot make the set-off; but a Court of Equity will look beyond the nominal to the real parties in interest, and adjudicate the rights of the parties accordingly. The interposition of a trustee will not prevent a Court of Equity from reaching his *cestuis que trusts*, when all the parties are before it, and compel them and the trustee to allow a set-off, even though such relief could not be granted by a Common Law Court. A Court of Equity will not permit *cestuis que trusts*, who are insolvent, to enforce and collect, through their trustee, a judgment against parties who hold a just and valid demand against them, which they have no means of enforcing or collecting if a set-off is denied. (*Walker v. Sedgwick*, 8 Cal. 405; *Russell v. Conway*, 11 Id. 98; *Naglee v. Palmer*, 7 Id. 543; *Howard v. Shores*, 20 Id. 277.)

The next point of the appellants is, that the plaintiffs are estopped from showing that Ryan and J. R. Duff are the real owners of the money due on the judgment against them, by the judgment in the action for a specific performance brought by Wm. R. Duff against Fisher and the Knoxes. An examination of the record in that case shows, that no question of that kind was raised by the pleadings, and no judicial determination of the point raised in this action was had in that. The plaintiffs in this action could not be barred from setting up this fact as the foundation of their right of action, unless it was clearly shown that the same matter was in issue in the former action and adjudicated by the Court therein. No such adjudication being shown, the plaintiffs are not estopped by the decree in that case.

It appears, that after the assignment of the judgment in the foreclosure suit by the Knoxes to Goddard, the latter issued execution thereon and had it levied upon a mill in Humboldt County. Wm. R. Duff brought suit against him and the Sheriff to enjoin the sale, on the ground that he was the owner of the mill, and that the execution defendants, Ryan, J. R. Duff, and others, had no interest in it. Goddard answered, denying these averments of the complaint, and alleging that the execution defendants were the

Hobbs v. Duff.

beneficial owners of the mill. The action does not appear to have been defended by Goddard any further than filing the answer, and the plaintiff recovered judgment therein; and the appellants insist that the plaintiffs are also estopped by this judgment from showing that Wm. R. Duff is the trustee of Ryan and J. R. Duff, of the judgment against the plaintiffs, or that they are the real owners thereof. The subject matter of that action was the mill, and not the debt due or the judgment rendered on the appeal bond. The two are entirely separate and distinct matters, and a judgment settling the question, as to the ownership of the mill, cannot in any way determine the question as to who is the real owner of this judgment against the plaintiffs. This point is therefore untenable.

But, it is insisted, that they are also estopped from showing the same facts by the judgment rendered against them on the appeal bond, because in that action they set up the same matters alleged in this suit, as a ground of set-off or counter claim. The record, however, shows that the Court in that action excluded all evidence tending to show that Ryan and J. R. Duff were the real owners of the amount due on the appeal bond, and the action of the Court below was sustained by this Court for the reasons before stated. (*Duff v. Hobbs*, 19 Cal. 646.) It was then held that these matters could not be adjudicated in that action. The record shows that they were not adjudicated, and it follows that the judgment therein cannot be pleaded or claimed as an estoppel in this action. Although a Court of Law declines to determine a question of set-off, yet it is not *res judicata*, so as to preclude an inquiry in a Court of Equity. (*Hackett v. Connett*, 2 Edw. Ch. 78.)

The next position is, that the rules of set-off are the same in equity as at law. It is true, that Courts of Law and Equity follow the same general doctrines on the subject of set-off; but where some equity intervenes, independent of the fact of mutual unconnected debts, Courts of Equity will take jurisdiction, and determine the matter upon the principles of natural equity. And when the law could not give a proper remedy, as in case of the insolvency of one of the parties, equity will afford relief. (*Barb. on Set-Off*, 190; *Lindsay v. Jackson*, 2 Paige, 581.) The demands in this case are judgments, and the aid of a Court of Equity is

Hobbs v. Duff.

invoked because the defendants in one of the judgments are insolvent, and the plaintiff in the other is not the real party in interest, but a trustee for the insolvent defendants in the other judgments. Each of these facts forms a ground for applying to a Court of Equity, and entitles the plaintiffs to equitable relief. On a complaint filed to set off one judgment or decree against another, the jurisdiction of a Court of Chancery is more extensive than that of Common Law Courts. In equity, a set-off in such cases is a matter of right, and not of discretion, and it depends, not upon the Statutes of Set-Off, but upon the equitable jurisdiction of the Court over its suitors. (Barb. on Set-Off, 194.) And the set-off will be allowed as between the real parties in interest, regardless of a nominal party. (*O'Conner v. Murphy*, 1 H. Blackstone, 657.) A person who holds a claim as a trustee, cannot have it set off against a demand due from him in his own right. (*Fair v. McIver*, 16 East, 130.) And upon the same principle, we think it clear that a set-off should be made in equity as between the real parties in interest, even though one of the judgments is in the name of a trustee who holds for the use and benefit of such real parties. (*Wolf v. Beales*, 6 S. & R. 242; Barb. on Set-Off, 61, 71-73.) In other words, the Court will decree a set-off as between the real owners or persons beneficially interested in the several demands. (*Russell v. Conway*, 11 Cal. 93.)

Another position taken by the appellants is, that Fisher should have pleaded the balance due on the judgment of foreclosure, as a set-off against the damages in the action brought by Wm. R. Duff against him and the Knoxes for a specific performance; and not having done so, the plaintiffs claiming under him are estopped or barred from maintaining this action. If he had so pleaded it in that suit, it would probably have been held, that the Court could not entertain the defense or allow the set-off in that action, on the same grounds that it was ruled out in the subsequent action of *Duff v. Hobbs* (19 Cal. 646). But independent of that, it is clear that a party does not lose his right to bring a separate action for a demand which he might have pleaded as a set-off, but neglected to do. (Barb. on Set-Off, 21.)

It is also insisted that the action is barred by the Statute of

Fowler v. Harbin.

Limitations, it having been commenced on the seventeenth day of March, 1862, and the judgment which the plaintiffs seek to set off having been rendered September 17th, 1857. This is substantially "an action upon a judgment or decree," and is therefore governed by Sec. 17 instead of Sec. 19 of the Statute of Limitations, as claimed by the appellants. The action having been brought within five years from the date of the decree, it is not barred by the statute. We have thus examined all the questions raised by the appellants, and find no error in the action of the Court below.

The order granting the injunction is therefore affirmed.

FOWLER *et al.* v. HARBIN *et al.*

WHEN the transcript does not contain any statement on appeal, or grounds of appeal, and no assignments of error or brief are filed in the Supreme Court, the appeal will be dismissed on motion.

The facts are stated in the opinion of the Court.

Whitman and Curry for Respondent.

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

This is an action to foreclose a mortgage. A decree was originally rendered against the mortgagor alone, and the property was purchased at the sale under the decree by one Boggs, who, having discovered that the mortgagee had conveyed the premises to other persons before the commencement of the foreclosure suit, brought an action against the plaintiffs to recover back the purchase money paid by him. That action came before this Court on appeal, and will be found reported under the name of *Boggs v. Hargrave* (16 Cal. 559), in which it was held that he had no right of action. Boggs then applied to the Court in this action to set aside the judgment and decree of foreclosure, and for leave to file a supplemental complaint, setting forth the facts, and making new parties of subsequent purchasers and incumbrancers. Leave was granted,

People v. Colmera.

and he accordingly filed his supplemental complaint, making numerous new parties defendants. The new parties appeared, or were duly served and defaulted, and a new decree of foreclosure was finally rendered, from which the defendants appeal. No statement on appeal, or grounds of appeal, appear in the record, nor have any assignments of error been filed in this Court, nor have the appellants filed any brief in the case. The respondents have filed a motion to dismiss the appeal on these grounds.

The motion is sustained, and the appeal is ordered to be dismissed.

THE PEOPLE v. COLMERE.

Where one charged with crime has been arrested and held to answer for the offense before the impanelling of the grand jury by which an indictment is found against him, he cannot move to set aside the indictment on the ground that the grand jurors who found the same had formed and expressed an opinion that he was guilty of the offense charged, prior to their being impaneled.

Quere? Does that provision of the Criminal Practice Act which provides, that the trial jury shall "at each adjournment of the Court" be admonished by the Court, that it is their duty not to converse among themselves, or with any one else, on any subject connected with the trial, or to form or express any opinion thereon until the case is finally submitted to them, apply to a temporary recess?

If, during the trial of a criminal action, the Court, before an adjournment, neglect to charge the jury, as required by Sec. 394 of the Criminal Practice Act, the judgment for that reason will not be reversed, unless it is shown, that the defendant sustained some injury thereby, by the jurors conversing among themselves or with others on subjects connected with the trial, or by forming or expressing an opinion thereon, during the adjournment.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Alexander Campbell and S. H. Dwinelle, for Appellant.

[No brief on file.]

CROCKER, J. delivered the opinion of the Court — NORTON, J. concurring.

The defendant was indicted for the crime of murder, and was convicted of murder in the first degree. After the indictment was found, and when he was called upon to plead to it, he moved to set it aside on the alleged ground that the grand jurors, who found the indictment, had formed and expressed an opinion that he was guilty of the offense charged, prior to their being impaneled; and that prior to the finding of the indictment he had not been held to answer for the offense. He offered witnesses to prove the alleged bias of the grand jurors, but the prosecution interposed proof of the fact that he had been held to answer to the charge before the impanneling of the grand jury, and objected to all evidence upon the subject. This objection was sustained by the Court below, and the evidence offered by the defendant was accordingly excluded, and this is now assigned as error.

The record shows, that he was duly held to answer to the crime charged in the indictment on the tenth day of April, 1862; that the grand jury who found the indictment were impaneled on the twenty-ninth day of April, and the indictment was found on the thirtieth day of May, 1862. The case, therefore, comes clearly within the one hundred and eighty-ninth section of the Criminal Practice Act, which is as follows: "A person held to answer to a charge for a public offense can take advantage of any objection to the panel, or to an individual grand juror, in no other mode than that by challenge, as prescribed in the preceding section." The preceding sections provide specifically the mode, manner, and causes of such challenges to the panel and to individual jurors. It was the duty of the defendant to exercise this right of challenge in the mode and manner prescribed by the Criminal Practice Act, and having failed to do so, he could not, under the provisions of Sec. 189, claim the right to interpose objections which would have been a proper ground of challenge at any other time or in any other mode. The objections raised in the present case are included within the grounds of challenge specified in the act. It follows, that there was no error in this action of the Court. (*People v. Beattie*, 14 Cal. 571; *People v. Arnold*, 15 Id. 479.)

It appears that on the third day of the trial, after several adjournments had been had, at which the jury had been duly admonished

Camden v. Vail.

of their duty, as required by Sec. 394 of the Criminal Practice Act, the Court took a short recess about the middle of the day, and the jury commenced retiring without the usual charge. Nine were, however, called back immediately, and were duly admonished—but the other three were not present thereat, and the defendant excepted to the charging of a portion of the jurors in the absence of the others. This action of the Court is also assigned as error. Sec. 394 provides, that the jury shall, “at each adjournment of the Court,” be admonished by the Court, that it is their duty not to converse among themselves, or with any one else, on any subject connected with the trial, or to form or express any opinion thereon, until the case is finally submitted to them. It is doubtful whether this applies to a mere temporary recess, where there is no actual adjournment of the Court. No attempt was made to show that any injury to the defendant resulted from this action of the Court, and we think it clearly comes within the rule laid down by this Court, in cases of a similar character, that they form no just ground for ordering a new trial. (*People v. Boggs*, 20 Cal. 432; *People v. Symonds*, 22 Id. 348.) This objection is, therefore, overruled. After a careful examination of the whole case we find no irregularity or error which will justify this Court in granting a new trial.

The judgment is, therefore, affirmed, and the Court below is directed to fix a time for carrying the judgment into execution.

CAMDEN v. VAIL *et al.*

A MORTGAGE, executed by a married woman on real estate, without the signature of her husband, is void and cannot be enforced.

The equitable lien which a vendor of real estate, after an absolute conveyance, has, for the unpaid purchase money, is waived by the taking of a mortgage to secure the same, although the mortgage is void and cannot be enforced.

APPEAL from the District Court, Ninth Judicial District, County of Shasta.

On the first day of October, 1860, J. H. Robinson sold to E. M. C. Vail a hotel at Shasta, and executed and delivered to her a

Camden v. Vail.

deed therefor. She was at the time the wife of the defendant in this action, G. S. C. Vail. For a part of the purchase money, she executed to him the mortgage to foreclose which this action is brought. The Court below rendered the usual decree for a sale of the mortgaged premises. The defendants G. C. S. Vail and Crosby appealed.

Garter and Crocker & Robinson, for Appellants.

The mortgage was the separate contract of the wife, and the husband cannot be sued upon it. (*George v. Ransom*, 15 Cal. 322; *Meyer v. Kinzer & Wife*, 12 Id. 247.) The property was her separate estate. (*Morrison v. Wilson & Wife*, 13 Cal. 494.) And the wife could not mortgage the property so as to create a lien upon it for herself or for her husband. (*Harrison v. Brown*, 16 Cal. 287.)

But the case of *Meyer v. Kinzer & Wife* (12 Cal. 247) entirely refutes the idea that the wife was the agent of the husband (Vail) in the purchase and mortgaging of the estate in question. The wife took the deed in her own name, mortgaged it in her own name as her act and deed, and acknowledged it as her own deed.

But without the proper showing by the pleadings, or proof on the trial, that the wife bought the property with her own separate means, under the other circumstances of this case, the law would not sustain the theory of an agency, but would establish a community in the property between the husband and the wife. (*Meyer v. Kinzer & Wife*, 12 Cal. 247; *Harrison v. Brown*, 16 Id. 287.)

And if the property mortgaged was the common property of the husband and the wife, then the wife could not dispose of it in any manner. (Wood's Dig. 487; Act of April, 1850, Secs. 2-9.)

If the property was the separate estate of the wife, she failed to comply with the law, and the mortgage is of no effect. In such case, the husband must join with the wife in the deed. (Wood's Dig. 488, Sec. 6.)

W. H. Rhodes, for Respondent.

We contend that this hotel property, having been deeded to defendant Vail's wife during the coverture, is common property,

Camden v. Vail.

liable to his debts and subject to his sole disposition. All property acquired by either spouse after marriage, except such as may be acquired either by gift, grant, or devise, is common property, and subject to the exclusive control of the husband, no matter in whose name the title is vested. The fact that the title was taken in the wife's name raises no presumption even of separate estate. (Schmidt's Civil L., 12, Arts. 43, 51, 63; *Tryon v. Sutton*, 18 Cal. 490; *Pixley v. Huggins*, 15 Id. 127; *Meyer v. Kinzer*, 12 Id. 247; *Kohner v. Ashenauer*, 17 Id. 581.)

All the papers executed at the same time are to be construed together and in law are but one instrument. Hence, the estate passed to the husband, and the wife's note and mortgage are to be taken as executed by him. (*Ingoldsby v. Juan*, 12 Cal. 577; 4 Kent's Com. 173, 6th Ed.; *Lassen v. Vance*, 8 Cal. 271.)

COPE, J. delivered the opinion of the Court — FIELD, C. J. and NORTON, J. concurring.

This is an action to foreclose a mortgage, which the complaint avers was given by the defendant Vail "in the name and under the signature and seal" of his wife. It is averred that Vail purchased the mortgaged property of one Robinson, taking the conveyance in the name of his wife, and that the mortgage was given to secure the payment of a portion of the purchase money. The plaintiff claims by assignment from Robinson, and alleges that the property has been conveyed by Vail and wife to the defendant Crosby, but that the conveyance was fraudulent and without consideration. The only answer in the case is that of Vail, which denies any connection on his part with the purchase or the mortgage, and avers that the purchase was made and the mortgage given by his wife on her own account. Crosby, by failing to answer admits the matters charged, so far as he is concerned, and the facts are found by the Court in accordance with the allegations of the complaint.

The first point made is, that Mrs. Vail is a necessary party; but in the view we take of the case this point is not material, as we are of opinion that the mortgage cannot be enforced. It is unnecessary to go into the question of the effect of the conveyance from Robinson; for whatever its effect may have been, it is evident that

Ricketson v. Compton.

the mortgage is inoperative. So far as Mrs. Vail is concerned, it is admitted that she had no power to execute it in her own behalf, and it is clear that its execution cannot be regarded as the act of her husband. The averment that it was made by him states that it was made in her name and that the signature and seal are hers, and the mortgage purports throughout to be her act and deed. It is not pretended that he signed it, using her name in place of his own, and the certificate of acknowledgment shows that it was in fact signed by her. To say that he made it, is to say that which cannot by any possibility be so.

The right of the plaintiff to enforce a vendor's lien is settled by the case of *Baum v. Grigsby* (21 Cal. 172).

Judgment reversed and cause remanded.

The above case was decided at the April Term, 1863, before Mr. Justice CHOCKER went on to the bench. A rehearing was granted, and the decision on the rehearing was rendered by the new Court, after the amendments to the Constitution went into effect, at the January Term, 1864. The opinion on the rehearing does not conflict with the law as here laid down, and will be published in the 24th volume of Cal. Reports.—RMR.

BARTON RICKETSON v. MANUEL TORRES, EXECUTOR OF WM. A. RICHARDSON, DECEASED, SAMUEL R. THROCKMORTON, CHARLES SPENCER COMPTON, DONALD DAVIDSON, BENJAMIN DAVIDSON, WILLIAM HOOD, J. MORA MOSS, CHARLES MEYER, WILLIAM BENNETT, ALEXANDER MATTHISON, DAVID JARDINE, JOSEPH JARDINE, ALEXANDER G. DALLAS, ALEXANDER C. MACLANE, WALKER COMSTOCK.

When a notice of appeal to the Supreme Court is signed by an attorney of the Court, the presumption is that he had authority to take such action.

The fact that an appellant has resided out of the State several years, is no ground for denying him the right to appeal from a judgment rendered against him. It is no proper ground for a motion to dismiss an appeal, that it is sham and frivolous. An appeal is a matter of right, and cannot be defeated because the appeal may be groundless.

When a party is made a defendant in an action, and a decree taken against him,

Ricketson v. Compton.

from which he appeals, the appeal will not be dismissed because he has no interest in the subject matter of the suit, and ought not to have been made a party.

When an appeal is taken from a judgment, and the judgment is reversed by the Supreme Court, with directions to the Court below to enter a judgment in accordance with the opinion, and the Court below renders judgment accordingly, from which a second appeal is taken, the second appeal will not be dismissed, on motion, for said reasons, but they may be good grounds for affirming the judgment.

No appeal lies from an order entering a default; and where a default for not answering is entered several years before final judgment, the defendant may still appeal from the final judgment at any time within one year from its rendition, and have the question, whether the default was properly entered or not, adjudicated upon the appeal from the judgment.

APPEAL from the District Court of the Seventh Judicial District, Marin County.

The principal facts of this case will be found reported in the case of *Ricketson v. Richardson* (19 Cal. 330).

After the reversal of the judgment the case was retried in the Court below, and on the fifth day of March, 1862, a decree was rendered in favor of plaintiff. This decree commences as follows:

"This cause having been duly brought on upon the motion of Gregory Yale, attorney for the plaintiff for a decree in pursuance of the opinion and decision of the Supreme Court of the State at the October Term thereof, 1861, as certified in the mandate or *remittitur* from the said Court heretofore filed in this cause, reversing the decree of this Court in this cause at the July Term, 1861, and directing a decree to be entered up in pursuance of the principles of said opinion and decision, and due notice of said motion having been given and default having been heretofore entered against all the defendants who have not answered, and due proof of filing of notice of the pendency and object of this action in the office of the Recorder of the County of Marin, and of the recording of the same in said Recorder's office: and it appearing to the Court, from the affidavit of S. W. Daggett, that there is due to the plaintiff, on the third day of March, 1862, for principal and interest upon the debt and mortgage mentioned and set forth in the complaint, the sum of forty-three thousand eight hundred and forty-five dollars and seventy-one cents (\$43,845.71), which sum

Ricketson v. Compton.

is to draw and bear interest at the rate of three and one-half per cent. per month from the date hereof until paid." The decree then directed a sale of the mortgaged property and the application of the proceeds, etc., in the usual form.

There was no personal judgment against any of the defendants except Manuel Torres, executor of Richardson. As to the other defendants, the decree barred and foreclosed them from all equity of redemption, and claim of, in, and to the mortgaged premises, and every part thereof, from and after the delivery of the Sheriff's deed. From this decree the defendant Charles S. Compton alone appealed. Compton had not been served personally with summons, but service was had on him by publication of summons. The notice of appeal was served on the thirteenth day of February, 1863.

The following is a copy of the notice of appeal:

"In the District Court of the Seventh Judicial District of the State of California, in and for the County of Marin.

"BARTON RICKETSON v. W. A. RICHARDSON *et als.* — You will please take notice that Charles S. Compton, one of the defendants in the above entitled action, hereby appeals to the Supreme Court of this State from the decree therein made and entered in the said District Court, on the fifth day of March, A. D. 1862, in favor of said Barton Ricketson against said defendant, and from the whole thereof.

"Dated San Francisco, this twelfth day of February, A. D. 1863.

"HALL McALLISTER,

"Attorney for Appellant."

The only averments in the complaint concerning the appellant Compton were: "That he had, or claimed to have, some interest in or claim upon the mortgaged premises, which interest or claim was adverse to the plaintiff's, or subsequent and subject thereto."

The respondent, Ricketson, moved to dismiss the appeal upon the following notice:

Supreme Court, State of California.

Barton Ricketson, plaintiff, v. William A. Richardson, Manuel Torres, his executor, Samuel Throckmorton, Charles Spencer Compton, Donald Davidson, Benjamin Davidson, William Hood, Robert Walkinshaw, *et al.*

Take notice, that a motion will be made in this Court to dismiss the appeal taken by Charles S. Compton, one of the defendants, on the twelfth day of February last from the decree of the Seventh Judicial District Court, County of Marin, entered on the fifth day of March, 1862, in favor of the plaintiff.

And that the grounds of the said motion will be:

1. That the defendant Compton did not take the appeal.
2. That you have no authority to use his name in taking the appeal.
3. That he has been absent from the State some seven or eight years and has left no one with authority to take such an appeal.
4. That the said appeal is sham and frivolous, and intended to delay the execution of the decree appealed from, and to embarrass the title of the purchaser at the sale under said decree.
5. That the said Compton has no interest in said decree, or to the premises foreclosed by it, immediate or proximate.
6. That the said Compton was an unnecessary party to said foreclosure suit, having no interest in the premises at the commencement of the action on the eighteenth day of February, 1856.
7. That the said Compton, prior to said action, had assigned all the interest which he held as mortgagee of the said Richardson to said defendants Benjamin Davidson, Hood, and Walkinshaw, who were active partners to the said action, and litigated the same.
8. That the said Compton, prior to said action, had conveyed all his right, title, and interest to said premises to the said Hood, one of the defendants, an actual party and litigant.
9. That the said Compton and the said Donald Davidson, as copartners and tenants in common, had assigned the mortgages which they held on said rancho prior to the said action, and conveyed all their right, title, and interest to the premises absolutely and unconditionally.

Ricketson v. Compton.

10. That all the claim and interest in and to said mortgaged premises ever held or claimed by the said Compton, or by the said Compton and Davidson, have been in and by said foreclosure action and the decree therein, and by the decree in this Court, fully and finally adjudicated, as represented by their said assigns.

11. That an appeal was prosecuted to this Court by the defendants in said cause from the decree of the March Term, 1861, and that decree reversed, and that of March, 1862, entered as the decree of this Court under the mandate from this Court.

12. That no appeal could be taken from the decree of March, 1862.

13. That an appeal was actually taken by the defendants from said decree of March 5th, 1862, and the decree affirmed in all respects by this Court.

14. That the said Compton, as an individual defendant, cannot now take another appeal from said decree of the fifth of March, 1862, and especially as all the interest which he ever had, or claimed in said mortgaged premises, was fully litigated and adjudicated by his assigns.

15. That on the twenty-fourth day of November, 1857, at a regular term of the District Court of the County of Marin, a default was taken against the said Compton for want of an answer, after due proof of service by publication, and that the said decree of default still remains of record and of force in said Court, and never has been appealed from, and which said default was final as to the said Compton, at that date, and has been ever since.

16. And upon other and divers good and sufficient grounds.

Gregory Yale, for Respondent Ricketson.

On the hearing of the motion to dismiss the appeal, respondent introduced the entire transcript on the first appeal, and also the decree from which the second appeal was taken.

Respondent also offered the following affidavit:

Seventh Judicial District, County of Marin: Barton Ricketson, v. Wm. A. Richardson et al.:— City and County of San Francisco, State of California, ss.—Ed. F. Stone, being duly sworn, deposes

Ricketson v. Compton.

and says: that he is the agent for the plaintiff in this case, and is a member of the firm of Morgan, Stone & Co., trading in San Francisco; that the plaintiff resides in the City of New Bedford, Massachusetts, and is now absent from this State; that he was acquainted with the firm of Compton & Davidson, composed of Charles Spencer Compton and Donald Davidson, when in business in 1853-54 in San Francisco; that said firm became insolvent, and was dissolved in 1854 or 1855; that the said Compton left the State in 1855, and has not since returned; that the said Davidson left the State in 1855 or 1856, and returned in 1858, and is now in San Francisco; that the said Compton & Davidson were the agents of the said William A. Richardson, and succeeded William P. Avis in that capacity, and were acting under a power of attorney revoked in 1855; that they held mortgages from Richardson and from Richardson and wife, on the Saucelito and Albion ranches and on other property, and had judgments against Richardson subsequently, included in said mortgages; that money was borrowed by them from Benj. Davidson and his partner in business, Julius May, of San Francisco, on their individual note, and on short time without security, and they also borrowed money from Robert Walkinshaw, now deceased, and represented in this case by his son-in-law and executor, John Young; that they also borrowed money from William Hood, a defendant in this case; that long after the maturity of the note to Davidson & May, and when they became insolvent, the said Compton & Davidson assigned certain portions of said mortgages to the said B. Davidson in consideration of said debt, and obtained an actual and absolute release of said debt; and that they also made assignments to the said Walkinshaw and Hood, and an absolute deed of all their interest in said property to said Hood, and obtained releases also from them in consideration of said loans. To all which the said D. Davidson has substantially testified in this case, and this affiant refers to the deposition of the said Davidson and exhibits thereto, and the deposition of the said Benjamin Davidson — all contained in the statement on appeal in this case — for greater particularity, and as fully verifying this statement.

And this affiant further says: that he is informed and believes

Ricketson v. Compton.

that at the time the said Compton left this State, he left a general power of attorney with one A. J. Macpherson, now in San Francisco, having reference to the late commercial transactions of the said Compton as an individual member of said firm, and having no reference to the agency of the said Richardson which had then been revoked, or to any interest in the mortgaged premises; that at the time he left, he claimed none, and does not now claim any; that the said Davidson does not claim any interest and did not answer though personally served; and that the said power of attorney has long since been considered and treated by the said Macpherson and the said Compton as abrogated and annulled. But this affiant is informed and believes that the said Macpherson now moves this appeal in the name of said Compton, under the pretense of authority under said power and in behalf of the defendant Throckmorton and other parties, conspiring to defeat this plaintiff and to prevent him from the collection of his judgment. This affiant further says: that the said Macpherson was a witness for the said Throckmorton in this case, at the November Term, 1859, and gave his deposition early in December, and which deposition is hereby referred to as contained in the transcript on appeal; that at that term a default was regularly taken against the said Compton, and is still of record; that the said Macpherson did not pretend to act for the said Compton at the time, nor has he interposed any defense, or attempted to open said default; that the assignees of the said Compton & Davidson have been actual parties to this suit in all its stages since 1856 to 1863, and have litigated with the plaintiff on all questions in the case. And this affiant is informed and believes, and so insists, that this appeal is a sham or false appeal, intended and calculated to vex, hinder, and harass the plaintiff, in the collection of his mortgage debt; and that the said Macpherson is the tool or instrument used by the said Throckmorton, Parrott, May, Hood, and others, for that purpose.

ED. F. STONE.

Subscribed and sworn to before me this thirtieth day of March, 1863. [L.S.] F. J. THIBAUT, Notary Public.

The Appellant introduced in reply the following affidavit:

Ricketson v. Compton.

In the Supreme Court, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco. } ss.

Barton Ricketson, Plaintiff, v. *William A. Richardson et al.*,
Defendants.

Alexander W. Macpherson, of aforesaid city and county, being duly sworn, deposes and says: That on the day of A. D. 1855, Charles S. Compton, one of the above-named defendants, and appellant herein, executed and delivered to deponent his (Compton's) certain general power of attorney. That under and by virtue of said power, deponent has from said date been acting, and does still act, as attorney in fact of said Compton; that said power of attorney has never been revoked, and is now in full force, and that deponent has never treated said power of attorney as abrogated or annulled, but considers the same as in full force and effect. That under said power of attorney, deponent employed Hall McAllister, an attorney at law, residing in the City and County of San Francisco, for and on behalf of the said Charles S. Compton, to prosecute an appeal in this cause.

In regard to the interest of the said Charles S. Compton in the premises, deponent states, that one William A. Richardson and wife executed to the said Compton and one Donald Davidson, three several mortgages upon the property set forth and described in the complaint; one dated October 13th, 1853, another February 1st, 1854, and the third, March 21st, 1854, which said three several mortgages are particularly referred to and described in the plaintiff's brief, on motion to dismiss herein. That said mortgages were made to secure various large sums of money advanced by appellant and said Davidson to said Richardson and wife. That subsequently thereto, said Compton, to secure certain money borrowed by him from one Benjamin Davidson, and one Robert Walkinshaw, assigned said mortgages to said Benjamin Davidson, and said Robert Walkinshaw.

That subsequent to said assignments, and to secure one William Hood for moneys due him by said Compton, said Compton assigned

Ricketson v. Compton.

to said Hood the balance of his interest in aforesaid three mortgages from Richardson and wife, by two assignments, the one dated November 31st, 1854, and the other July 26th, 1856, which said assignments are particularly referred to in plaintiff's brief on motion to dismiss herein. Deponent states, on information and belief, that said Compton has never executed a deed transferring absolutely his interest in said mortgages from Richardson and wife to said William Hood, but that any and every deed, of whatever kind or nature, made by said Compton to said Hood, were executed to secure the aforesaid sums of money due by said Compton to said Hood, specially reserving to himself (said Compton), the overplus arising from the sale of said mortgaged premises after the payment of all of said assignments to Davidson, Walkinshaw, and Hood.

Deponent further says, that if the aforesaid mortgages of Richardson and wife were paid, said Compton would receive a sum of money more than sufficient to pay all the above-named assignments to Davidson, Walkinshaw, and Hood, and have left a large amount of money; and that said Compton has a valuable interest in the event and issue of this suit.

A. W. MACPHERSON.

Subscribed and sworn to before me, this twenty-first day of April, 1863.

[L. s.]

GEO. T. KNOX, Notary Public.

Gregory Yale, for Respondent.

[No brief on file.]

Hall McAllister, for Appellant.

The motion in this case, made by the counsel for respondent, is one extraordinary in its nature, and almost without precedent. It is a motion to dismiss an appeal taken by Mr. Compton, appellant, based upon sixteen grounds. Surely in number, but only in number, formidable. For among them we see nothing stated upon which a motion of this character can be based, with any hope of success.

It is not alleged that the appeal was not taken in time; that any of the requisite steps for perfecting an appeal, in serving notices, filing papers, giving undertakings, etc. (see Practice Act, § 346, Rule III, of this Court), have been omitted.

It is stated — 1st, that Compton did not take the appeal; 2d, that you (we) have no authority to use his (Compton's) name; 3d, that Compton has been absent from the State some seven or eight years, and has left no one with authority to take such appeal.

These may be dismissed by saying, that they are matters which do not appear in the transcript; they are facts *dehors* the record, and are attempted to be shown by respondent on affidavit; but the counter affidavit, which we file herein in opposition to the motion, is in full and direct denial of these statements, and upon that we can safely rest.

The fourth ground is, "that the said appeal is sham and frivolous, and intends to delay the execution of the decree appealed from, and to embarrass the title of the purchaser at the sale under such deed. For argument's sake, let this be admitted to be true; how does it affect this appeal? What ground does it furnish the respondent to move for dismissal? What has this Court to do with the intention of appellant? Appeals are not matters of grace, but of right. No statute authorizes an appeal on motion to be dismissed because frivolous or sham, as in the case of a motion to strike out pleadings.

Says Cowen, J. in *Dey v. Walton* (2 Hill, 405): "It is insisted, however, that the facts stated show the appeal to be frivolous, intended merely to awe the complainant into a settlement, and, indeed, that the appeal has been waived. With the ground of frivolousness, we of course have nothing to do at this stage of the cause. An appeal either from an interlocutory or final decree, is a matter of right on making the deposit, or giving the security required by the statute. * * * Nor have we any right to inquire into the intent with which the appeal was brought."

If, on the final hearing and determination of this appeal, it shall appear that the "same was made for delay, the Court may add to the costs such damages as may be just." (Practice Act, Sec. 345.) It is here that respondent may find relief, not in the method he has chosen.

 Ricketson v. Compton.

Charles S. Compton has had a decree of Court entered against him by which his rights and interests are sought to be forever terminated and adjudged. The consequence is, he appeals to the Court, and on the hearing of the appeal, will show that the Court below had no jurisdiction as against him. He has a right to this, and to urge that this appeal is, in its nature, frivolous—in itself, of all things most frivolous. (*Schloss v. White*, 16 C. 65.)

Of course, the question on the merits is not to be argued here so long as it does not clearly and affirmatively appear that there is no merit in the appeal, the Court will grant no motion to dismiss. (Vide *Rogers v. Hosack*, 5 Hill, 522, 523.)

The fifth, sixth, seventh, eighth, and ninth grounds upon which the motion is to rest, are all to the same effect, though stated in different phraseology, to wit: That this appellant, Compton, is not a necessary party to the action, and that he has not now, nor did he have at the commencement of the suit, any interest therein. Nothing of this, but quite the contrary, appears by the record. It is attempted to be shown by the affidavit of Stone. The affidavit on behalf of Compton, however, denies all this; shows affirmatively that he has an interest, and what that interest is—its kind and quality; this is sufficient, and more than sufficient. But how can it be alleged by this respondent (plaintiff) that Compton has no interest in the action—is not a necessary party to the suit? Look at the record answer. Over and over again, it appears that Compton has been treated as a necessary party, and a party interested. The complaint so treats him; the affidavit for publication of summons so regards him. It is there deposed, under oath, "that a good cause of action exists against all of said defendants; and that they are all, as deponent is informed and believes, necessary parties to said action."

The order of publication of summons affirms: "It appearing that a cause of action as described in the complaint exists against said defendants," one of whom is Compton, "and that they are necessary parties thereto," etc. In short, from the beginning to the end, Compton has been a declared and recognized party; and certainly is now, so far as the respondent can cause him to be.

Ricketson v. Compton.

The respondent is anxious to dismiss this appeal for the reason, that Compton is not a necessary party, and because he is not interested in the subject matter of the action; but no such anxiety has been manifested, for these reasons, to dismiss the suit as against Compton.

The tenth, eleventh, twelfth, thirteenth, and fourteenth grounds, in so far as we can gather anything from them, proceed upon the idea that the entire matter is now adjudicated; that, therefore, no appeal can be taken.

If it were *res adjudicata*, how does it prevent an appeal?

We come back to what we have already advanced, that no motion to dismiss can be made upon such ground.

If between two parties a judgment is rendered, and the law is most clear and plain, so that there exists no doubt in regard to it, cannot that judgment be appealed from? It may be, that it is only for delay—only to gain a compromise—only to vex, harass, perhaps from malicious motives. These facts appearing, the Court may affirm the judgment with damages; but we have yet to learn, that they can dismiss it without hearing. (*Dey v. Walton*, 2 Hill, 405; *Pinkham v. Wemple*, 12 Cal. 449; 1 Labatt's Cal. Dig. 128, title 13, where all the cases are collated.)

We have to say, in conclusion, that the very fact, that so many grounds are made upon which to predicate a motion of dismissal, defeats it. Some of them are questions of law; some of them questions of fact; and yet others, mixed questions of law and fact.

Now, even in a motion to strike out a demurrer or answer, as frivolous, sham, intended to delay, etc., which is expressly provided for by statute, these facts must clearly and of themselves appear. If any argument is required, that of itself denies the motion, for the merits cannot be heard at such stage of the case.

If a practice is to be adopted of dismissing appeals on motion, where no express provision of the statute warrants it, it will doubtless conform in this respect to the law in regard to motions to strike out pleadings, and not permit the entire case to be reviewed, both as to law and facts.

We refer, particularly, to *Rogers v. Hosack* (5 Hill, 522). Chief Justice Nelson therein says: "By the fifty-second rule of the Su-

made a party, the plaintiff ought not to have made him a party, and he should have dismissed the case as to him. But the plaintiff cannot hold a judgment against him, and at the same time deny him the right to appeal from that judgment. By admitting that the appellant had no interest in the subject matter, and that he ought not to have been a party, the respondent virtually admits that he is not entitled to any judgment against him, which would of itself form a good ground for the appeal.

The respondent also contends, that the appeal to this Court, in which the Court below was directed to enter a decree in accordance with the opinion of this Court, was taken by the defendants; that no appeal could be taken from the decree thus entered by the order of this Court; that an appeal was taken by the defendants from such decree, on which the decree was affirmed; and that this defendant cannot, therefore, take this appeal. These facts, if true, may form good grounds for affirming the judgment of the Court below — but they are no proper basis for a motion to dismiss the appeal. All these questions are proper to be considered in adjudicating the questions raised by the appeal; but cannot properly be brought before us in this mode.

I is also urged, that a default was duly entered against this defendant, in 1857; and that no appeal was ever taken from that default; and that, therefore, no appeal lies from the final judgment. We are not aware that any appeal lies from an order entering a default against a party; but even if the statute provided for such an appeal, the defendant, by failing to take such an appeal, does not lose or waive his right of appeal from the final judgment. Whether that default was properly entered, or not, is a question which he has a right to have adjudicated upon an appeal from the final judgment. These are all the grounds of the motion to dismiss; and none of them being sufficient, the motion to dismiss is overruled. No briefs being on file upon the merits of the appeal we do not pass upon it, but reserve it for future consideration.

EXTRA ANNOTATION
TO
PRECEDING VOLUME

MM

VOLUME XXIII.

By CHARLES T. BOONE.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

23 Cal. 11-15. KELLY v. TAYLOR.

Mining Claim.—When location is made by notice and marking of boundaries, witness may be asked if location made included the ground in dispute, p. 14.

Cited as authority in *Myers v. Spooner*, 55 Cal. 262, holding that defendants were not bound by the mistake of the recorder in copying the notice in the book of records.

Same.—Estoppel in pais applies to mining ground, as to other real estate claimed under a similar kind of title, p. 15.

Approved as authority in *Raynor v. Drew*, 72 Cal. 313; *Yunker v. Nichols*, 1 Colo. 563; and *Shreve v. Copper Bell Min. Co.*, 11 Mont. 327; and cited to the ruling stated, in *McClintock v. Bryden*, 63 Am. Dec. 106, note, discussing subject of mining claims at length.

General Citation.—*McCartney v. Tyrer*, 94 Va. 203.

23 Cal. 16-39. GRATTAN v. WIGGINS.

Defense of Statute of Limitations is a personal privilege of the debtor, which he may assert or waive at his option, p. 25.

Approved as authority in *Clayton v. Henley*, 32 Gratt. 72. Cited in *Harrison v. McCormick*, 122 Cal. 653, discussing effect of dismissal as to one defendant for bar of statute; *Corbey v. Rogers*, 152 Ind. 171, and *Stubblefield v. McAuliff*, 20 Wash. 448, noted under *Lord v. Morris*, 18 Cal. 482.

Same.—Must be set up in some form by demurrer or answer, or will be deemed waived, p. 25.

Approved in *McGehee v. Blackwood*, 28 Ark. 30; *Kelley v. Kriess*, 68 Cal. 213; and *Kraft v. Greathouse*, 1 Idaho, 258.

Same.—May be pleaded by subsequent purchaser or encumbrancer of mortgaged premises in bar of any action for the sale of the property, p. 25.

Affirmed in *Coster v. Brown*, 23 Cal. 143; and cited to the ruling stated, in *Ward v. Waterman*, 85 Cal. 507; *Schmucker v. Sibert*, 18 Kan. 110; S. C. 26 Am. Rep. 769; *Baldwin v. Boyd*, 18 Neb. 449; and *Nix v. Cardwell*, 2 Posey, 268. Rule denied under Georgia statute, in *Saenz v. Nightingale*, 4 Woods, 490; S. C. 48 Fed. Rep. 712. Cited to the ruling stated, in 82 Am. Dec. 757, note.

Mortgage.—Nature of, discussed, p. 29.

Cited in *Sidney Stevens etc. Co. v. South Ogden etc. Co.*, 20 Utah, 276; noted under *Dutton v. Warschauer*, 21 Cal. 609.

Mortgage.—Provision (Practice Act of 1851, sec. 260) that "a mortgage of real property shall not be deemed a conveyance," etc., held applicable to all mortgages, as well those executed before as after its passage, p. 29.

Approved and applied in *Skinner v. Buck*, 29 Cal. 255, a similar case.

Same.—Right of mortgagee to foreclose, and of mortgagor to redeem, are reciprocal, and the right of action of both is barred at the same time, p. 35.

Affirmed in *Arrington v. Liscom*, 34 Cal. 369, 372; *Taylor v. McClain*, 60 Cal. 652; *Henderson v. Grammar*, 66 Cal. 336; and *Allen v. Allen*, 95 Cal. 197. Approved as authority in *King v. Meighen*, 20 Minn. 267; and rule admitted in *Green v. Turner*, 38 Iowa, 116, but held inapplicable in the particular case.

Same.—Mortgagee may, by agreement, fix the rights or assignees of notes secured by one mortgage, p. 30.

Approved as authority in *Noyes v. White*, 9 Kan. 645.

Same.—In the absence of such agreement, the proceeds should be applied pro rata in part payment of the several notes, p. 30.

Affirmed in *Redman v. Purrington*, 65 Cal. 272; and approved as authority in *Penzel v. Brookmire*, 51 Ark. 105; S. C. 14 Am. St. Rep. 24; *Nashville Trust Co. v. Smythe*, 94 Tenn. 513; S. C. 45 Am. St. Rep. 754.

Adverse Possession for the period specified in the statute of limitations in effect confers title, p. 34.

Approved in *Simson v. Eckstein*, 22 Cal. 595; and *Arrington v. Liscom*, 34 Cal. 370, 381; S. C. 94 Am. Dec. 725, 733.

Statute of Limitations applies to suits in equity equally with actions at law, p. 34.

Cited as authority in *Norris v. Haggin*, 12 Sawy. 52; S. C. 28 Fed. Rep. 279; and so in 65 Am. Dec. 545, note; and 82 Am. Dec. 758, note. So in 70 Am. Dec. 739, note, as authority that equity, in refusing relief on the ground of delay, will allow a much shorter time than that fixed by the statute to operate as a bar.

Estate of Decedent.—Debt due to intestate is personalty, and the administrator has the sole right to maintain an action therefor, p. 29.

Affirmed in Robertson v. Burrell, 110 Cal. 576.

General Citations.—In *Empire Land etc. Co. v. Engley*, 18 Colo. 392, approving construction of statute (p. 39) relative to filing of notice of *lis pendens*; *McKeen v. Sultenfuss*, 61 Tex. 330; holding that when the debt is barred the security is also barred; *Gest v. Packwood*, 14 Sawy. 142; S. C. 39 Fed. Rep. 533, that mortgage is incident of debt it is given to secure; *Bradley v. Snyder*, 58 Am. Dec. 571, note, as authority that a foreclosure and sale for an installment due exhausts the lien of the mortgage; 68 Am. Dec. 345, note, treating of estoppel by silence; 79 Am. Dec. 192, note, that quitclaim deed does not pass after-acquired title; and 81 Am. Dec. 148, note, that the rights of parties to foreclosure suit are cut off by the decree.

23 Cal. 40-48. **DONNER v. PALMER**. S. C. 31 Cal. 500; and 51 Cal. 629, in the latter of which the history of the case is given, pp. 631, et seq.

Verdict.—Impeachment of, by affidavit of jurors, statute construed, p. 46.

Referred to in *Territory v. Taylor*, 1 Dak. Ter. 467, denying the admissibility of such evidence in the particular case.

•Same.—If obtained by resorting to chance, will be set aside, p. 48.

Cited as authority in *Wright v. Abbott*, 160 Mass. 397; S. C. 39 Am. St. Rep. 500; also in 1 Am. Dec. 38, note; 35 Am. Dec. 259; note; and 63 Am. Dec. 80, note. Examined and distinguished in *Boyes v. California Stage Co.*, 25 Cal. 477. So in *Marquette etc. R. R. Co. v. Probate Judge*, 53 Mich. 223, case of commissioners in proceedings to condemn land.

23 Cal. 48-50. **CHAPMAN v. THORNBURG**.

Writ of Assistance.—Power to hear application for, considered, p. 50.

Cited as authority to the proposition that prior to the act of 1861, judges had no power to issue writs of assistance to place the purchaser of property in possession under a decree of foreclosure; in *Wilson v. Polk*, 51 Am. Dec. 154, note, treating of writs of assistance.

23 Cal. 51. **PEOPLE v. GASSAWAY**.

Larceny.—Recent possession of stolen property, unexplained, is not *prima facie* evidence that the possessor is guilty of larceny, p. 51.

Cited in *People v. Swasey*, 6 Utah, 93, noted under *People v. Ah Ki*, 20 Cal. 178; note 70 Am. Dec. 447.

23 Cal. 54-58. **PEOPLE v. McEWEN**.

Redemption by tenant in common of lands sold for taxes, p. 57.

Affirmed in *Mayo v. Marshall*, 23 Cal. 595, holding that after a sale under a judgment for taxes the owner of an undivided interest cannot redeem his portion from the sale by the payment of his proportion of the judgment and costs; *Rich v. Palmer*, 6 Or. 340, on point that redemption laws should be construed liberally.

Taxation.—Legislature has power to enact laws authorizing the collection of delinquent taxes, p. 58.

Cited as authority to the ruling stated, in *People v. Seymour*, 76 Am. Dec. 537, note.

23 Cal. 58-61. TEBBS v. WEATHERWAX.

Appeal.—Findings of fact of court below will not be disturbed when evidence is conflicting, p. 60.

Cited as authority in *Caulfield v. Boyle*, 2 Dak. Ter. 467.

Same.—Party acquiescing in admission of incompetent evidence is not in a position to complain of the court, p. 60.

Cited as authority in *Frauenthal v. Bridgeman*, 50 Ark. 350; *Williams v. Hawley*, 144 Cal. 102, noted *McCloud v. O'Neal*, 16 Cal. 393; *Eaves v. Vial*, 98 Va. 140, applying rule to admission of oral testimony as to matter within statute of frauds.

23 Cal. 61-63. MALSON v. VAUGHN.

Setoff.—Demands, to be set off in an action before a justice of the peace, must be within the jurisdiction of the justice, p. 63.

Approved as authority in *Romer v. Smith*, 4 Colo. App. 496.

23 Cal. 63-65. SMITH v. JOHNSON.

Sureties.—On promissory note, remedy against principal, p. 64.

Cited as authority in *Frevert v. Henry*, 14 Nev. 197, holding that where a surety pays a promissory note, and has it assigned to him, he may maintain assumpsit for the amount paid, but cannot sue upon the note. Cited in *Merchants' Nat. Bank v. McAnulty*, 89 Tex. 129, discussing effect of release of one of several makers of note.

Interest.—Contracts for, in excess of the legal rate, must be in writing, p. 64.

Cited as authority, construing a similar statute, in *Wenzer v. Taylor*, 39 Kan. 758.

23 Cal. 65-70. MARSHALL v. FERGUSON.

Growing Crops.—Contracts for sale of, the product of periodical planting and cultivation, are not within the statute of frauds, and need not be in writing, p. 69.

Affirmed as the settled doctrine, in *Davis v. McFarlane*, 37 Cal. 636,

S. C. 99 Am. Dec. 342; and *Vulicevich v. Skinner*, 77 Cal. 240. Cited as authority to the ruling stated, in *Smook v. Smook*, 37 Mo. App. 64; and *Kimball v. Sattley*, 55 Vt. 291. Cited in *Cook v. Steel*, 42 Tex. 59, holding that cotton planted is subject to mortgage regardless of its growth toward maturity; and in 59 Am. Dec. 107, note to the ruling stated.

Delivery.—Agreement to pay a fixed sum in grain if not fulfilled by the delivery of the grain at the time fixed, becomes a debt payable in money, p. 69.

Cited in 46 Am. Rep. 308, note, where the cases bearing on the subject are collected.

Objections to evidence should be taken at the time the evidence is introduced, p. 70.

Cited in *Brace v. Double*, 3 S. Dak. 419; and *Mining Co. v. Mining Co.*, 5 Utah, 634; *Stockton etc. Co. v. Glens etc. Co.*, 121 Cal. 173, holding insufficiency of complaint waived by failure to object to testimony offered thereunder.

23 Cal. 70-75. **RILEY v. PEHL.**

Husband and Wife.—Where property is conveyed to the wife, and the deed shows upon its face a consideration paid, it becomes the common property of both husband and wife, p. 74.

Doctrine approved in *Schuyler v. Broughton*, 70 Cal. 283; and *Charau-leau v. Woffenden*, 1 Ariz. Ter. 273; and cited to the ruling stated, in 86 Am. Dec. 637, note; and 96 Am. Dec. 423, note.

Same.—Homestead may be established upon common property of husband and wife, p. 74.

Cited as authority in 68 Am. Dec. 309, note; and 70 Am. Dec. 346, note. So in 87 Am. Dec. 273, note, as authority that a deed to a purchaser of a homestead at execution sale is such a cloud upon the claimant's title as a court of equity will remove.

23 Cal. 75-78. **CASTLE v. BADER.**

Pleading.—Facts and circumstances constituting alleged fraud must be set forth, p. 77.

Affirmed in *Goodwin v. Goodwin*, 59 Cal. 562 (case charging a fraud brought about by false representations and improper and undue influence); *Albertoli v. Branham*, 80 Cal. 633; S. C. 13 Am. St. Rep. 202; and *Water Works v. San Francisco*, 82 Cal. 321, in dissenting opinion of Thornton, J. *Claffin Co. v. Simon*, 18 Utah, 160; *Ladd v. Judson*, 66 Am. St. Rep. 286, note, noted under *Kinder v. Macy*, 7 Cal. 206; *Aigeltinger v. Einstein*, 143 Cal. 611, 613, discussing right of attaching creditor to file creditor's bill. Approved in *Whitley v. Murphy*, 5 Oreg. 333; S. C. 20 Am. Rep. 745, bill in equity for relief on ground of fraudulent and illegal taxation. Cited in 16 Am. St. Rep. 184, note.

Notes Cal. Rep.—74

Same.—Requisites of complaint in action by creditor to cancel and set aside a judgment, rendered against his debtor, on the ground that it is fraudulent, p. 78.

Cited as authority in 65 Am. Dec. 521, note; and 90 Am. Dec. 288, note.

23 Cal. 78-82. GAVITT v. DOUB.

Pleadings.—Court may allow amendment of so as to supply a defect even after commencement of trial, p. 80.

Cited as authority in *Buddee v. Spangler*, 12 Colo. 223, holding it to be discretionary in the court to allow amendment of answer, though the facts contained therein were known to defendant before filing a former amended answer.

Amendments of sheriff's returns are liberally allowed by the courts so as to make them conform to the true state of facts, pp. 81, 82, affirming *Borland v. O'Neal*, 22 Cal. 504.

Ruling affirmed in *People v. Goldenson*, 76 Cal. 345; and approved in *Irons v. Manufacturing Co.*, 61 Iowa, 408; *Richards v. Ladd*, 6 Sawy. 46 (with or without notice); and *Telegraph Cable v. Fleischner*, 66 Fed. Rep. 906, holding that return may be amended after sheriff has gone out of office, and after an action has been commenced against him. Cited in *Malone v. Samuel*, 13 Am. Dec. 173, 177, note, discussing amendment of returns to writs.

23 Cal. 82-85. REAL DEL MONTE MINING CO. v. POND MINING CO.

Injunction.—Will be dissolved on motion, where granted without notice, and an answer is afterward filed denying all the equities of the complaint, p. 84.

Approved as authority in *Grant County v. Mortgage Co.*, 3 S. Dak. 394.

Same.—Application for by plaintiff should be made promptly, and not delayed until large expenditures have been made by defendant, p. 84.

Referred to in *Lux v. Haggin*, 69 Cal. 280; and cited to the ruling stated, in 63 Am. Dec. 106, note.

Question of defendant's solvency is often an important element in passing upon an application for an injunction pending the litigation, p. 85.

Cited as authority in *Bigelow v. Los Angeles*, 85 Cal. 618; *Copper King v. Wabash etc. Co.*, 114 Fed. 992, noted under *Hicks v. Compton*, 18 Cal. 206.

General Citations.—In *Paige v. Akins*, 112 Cal. 412, that discretion in granting of injunctions should be exercised in favor of the party most likely to be injured; *McGregor v. Mining Co.*, 14 Utah, 52; S. C. 60 Am.

St. Rep. 887, that an injunction will not be granted when the remedy at law is adequate; and in *Bailey v. Bond*, 77 Fed. Rep. 410, defining the term "working a mine."

23 Cal. 85-93. **SEAVER v. FITZGERALD.**

Summons.—In justice's court, if required to be published, may be made returnable more than ten days from its date, p. 90.

Affirmed in *Hisler v. Carr*, 34 Cal. 646.

Variance.—Where judgment is against D. C. Seaver, while the name in the published summons is "D. C. Seavers," the variance is immaterial, p. 92.

Cited as authority in *Lane v. Inness*, 43 Minn. 143, holding that a slight error in the name of the defendant in a published summons is not fatal to jurisdiction.

23 Cal. 94-101. **MULFORD v. ESTUDILLO.** S. C. 17 Cal. 618; 32 Cal. 131.

Sureties.—Are released by levy upon property sufficient to satisfy the judgment against their principal, and their liability cannot be revived by release of the property from the levy, p. 100.

Approved as authority in *Day v. Ramey*, 40 Ohio St. 449; and *Hyde v. Rogers*, 59 Wis. 160, 162. Distinguished in *Murray v. Meade*, 5 Wash. St. 696, in which case the surety was held not to stand in the position of a volunteer in paying the judgment and costs, but was subrogated to the plaintiff's rights. Questioned in *Trapnell v. Richardson*, 58 Am. Dec. 358, note, collecting and collating the authorities bearing upon the question.

Pleading.—Where such levy is set forth in the answer as a defense, it is new matter, and is deemed admitted, unless a replication is filed denying the same, p. 100.

Cited as authority in *Bull v. Coe*, 77 Cal. 62, S. C. 11 Am. St. Rep. 240, holding that the release of a surety by discharge of the principal is new matter, and must be pleaded.

23 Cal. 101-103. **BURNS v. MCKENZIE.**

Partnership.—Admissions by partner, after dissolution of firm, are not competent evidence to charge the other partner, p. 102.

Cited in 18 Am. Dec. 515, note; 51 Am. Dec. 330, note; and 40 Am. St. Rep. 567, note, where the matter is fully discussed.

23 Cal. 103-105. **DAWLEY v. HOVIOUS.**

Motion for new trial on the ground that the verdict is contrary to the evidence, will be denied, if the statement does not show that it embodies all the evidence given on the trial, pp. 104, 105.

Ricketson v. Compton.

made a party, the plaintiff ought not to have made him a party and he should have dismissed the case as to him. But the plaintiff cannot hold a judgment against him, and at the same time deny him the right to appeal from that judgment. By admitting that the appellant had no interest in the subject matter, and that he ought not to have been a party, the respondent virtually admits that he is not entitled to any judgment against him, which would of itself form a good ground for the appeal.

The respondent also contends, that the appeal to this Court, in which the Court below was directed to enter a decree in accordance with the opinion of this Court, was taken by the defendants; that no appeal could be taken from the decree thus entered by the order of this Court; that an appeal was taken by the defendants from such decree, on which the decree was affirmed; and that this defendant cannot, therefore, take this appeal. These facts, if true, may form good grounds for affirming the judgment of the Court below — but they are no proper basis for a motion to dismiss the appeal. All these questions are proper to be considered in adjudicating the questions raised by the appeal; but cannot properly be brought before us in this mode.

It is also urged, that a default was duly entered against the defendant, in 1857; and that no appeal was ever taken from the default; and that, therefore, no appeal lies from the final judgment. We are not aware that any appeal lies from an order entering a default against a party; but even if the statute provided for such an appeal, the defendant, by failing to take such an appeal, does not lose or waive his right of appeal from the final judgment. Whether that default was properly entered, or not, is a question which he has a right to have adjudicated upon an appeal from the final judgment. These are all the grounds of the motion to dismiss; and none of them being sufficient, the motion to dismiss is overruled. No briefs being on file upon the merits of the appeal, we do not pass upon it, but reserve it for future consideration.

EXTRA ANNOTATION

TO

PRECEDING VOLUME

Approved in *Nevada Bank v. Dresbach*, 63 Cal. 325, holding that an affidavit of merits is indispensable as the basis of the motion. So, to same effect, in *Collins v. Scott*, 100 Cal. 452, an action to vacate decree of foreclosure on ground of fraud. Cited with approval in dissenting opinion of Murphy, J., in *Horton v. New Pass Co.* 21 Nev. 192. a similar case. So in *Carr v. Dawes*, 46 Mo. App. 359, holding that courts do not regard technical defenses with favor. Cited to the ruling stated, in 73 Am. Dec. 645, note; 58 Am. Dec. 397, note, that neglect of attorney is no ground for relief; *Enright v. Grant*, 5 Utah, 344, that opening default is a matter resting in the discretion of the court; so, to same effect, in *Jensen v. Barbour*, 12 Mont. 575. Referred to in *Bell v. Thomas*, 7 S. Dak. 205, in which case judgment was set aside on service of a meritorious answer by the defendant. And so, in *Reidy v. Scott*, 53 Cal. 74, in which the principal case is distinguished.

Taxation.—Description of property in assessment may be general, p. 129.

Cited in *Lahman v. Hatch*, 124 Cal. 4, as to "improvements on land."

Same.—When a complaint contains the substantial averments of a cause of action, though defective in form and certainty, the defect is cured by a verdict or default, p. 130.

Ruling approved in *Alexander v. McDow*, 108 Cal. 29.

23 Cal. 136-138. ZOLLER v. McDONALD.

Appeal.—Order of county court dismissing appeal from justice's court is a final judgment, from which an appeal may be taken to the supreme court, p. 136.

Approved as authority in *Holter Lumber Co. v. Insurance Co.*, 18 Mont. 286; *Nevada Cent. R. R. Co. v. District Court*, 21 Nev. 412; and *Mouser v. Palmer*, 2 S. Dak. 468; cited in *State v. Booth*, 21 Utah, 93 noted under *Dowling v. Polack*, 18 Cal. 626. But denied in *In re Weber*, 4 N. Dak. 126, *Bartholomew, C. J.*, dissenting, p. 133. Cited to the ruling stated in 60 Am. Dec. 430, note.

Undertaking on appeal which complies substantially with the statute, is sufficient, p. 137.

Approved as authority in *Stapleton v. Pease*, 2 Mont. 509. Cited in *State v. Cal. Mg. Co.*, 13 Nev. 212, holding bond sufficient under local statutes.

23 Cal. 138-140. PEOPLE v. PARK.

Taxation.—Property of an intangible nature, such as debts, and the like, are assessable in the county where the owner resides, p. 140.

Affirmed in *People v. Eastman*, 25 Cal. 603; *People v. Whartenby*, 38 Cal. 467 (taxation of money at interest); *San Francisco v. Lux*, 64 Cal. 483, 484 (of money belonging to estate of decedent). Cited in *Estate of*

Fair, 128 Cal. 612, as to bonds of foreign railroad corporations, though in the possession of agents outside the state of domicile; *Comptoir etc. v. Board etc.*, 52 La. Ann. 1329, noted under *Falkner v. Hunt*, 16 Cal. 167. Ruling approved in *Boyd v. Selma*, 96 Ala. 149, 152; *City Council v. Dunbar*, 60 Ga. 393 (bonds); and *Johnson v. Oregon City*, 2 Oreg. 330. Cited to the ruling stated, in 56 Am. Dec. 529, note, where the cases are collected. Harmonized in *People v. Home Ins. Co.*, 29 Cal. 546, question of taxation of bonds of this state belonging to a foreign insurance company.

23 Cal. 142-143. **COSTER v. BROWN.**

Statute of Limitations.—When debt is barred by, the mortgage given to secure it is also barred, p. 142.

Cited as authority in *Henderson v. Grammar*, 66 Cal. 336; and *Schmucker v. Sibert*, 18 Kan. 110; S. C. 26 Am. Rep. 768.

Same.—Subsequent purchaser from mortgagor may plead the statute as a defense to an action to foreclose the mortgage, p. 143.

Cited as authority and the doctrine approved in *Ward v. Waterman*, 86 Cal. 507; *Day v. Baldwin*, 34 Iowa, 384; *Smith v. Ford*, 48 Wis. 161; *Schmucker v. Sibert*, 18 Kan. 110; S. C. 26 Am. Rep. 768; *Nix v. Cardwell*, 2 Posey, 268; and 82 Am. Dec. 757, note. Denied in *Saenger v. Nightingale*, 4 Woods, 490, S. C. 48 Fed. Rep. 712, a decision influenced by the peculiar provisions of the Georgia statute.

23 Cal. 144-149. **MCNEIL v. BORLAND.**

Mechanic's Lien.—Proceeding to enforce, under law of 1861, is a special case, within the meaning of that term as used in the constitution, p. 148.

Affirmed in *Van Winkle v. Stow*, 23 Cal. 458, fully describing the nature of the proceeding. And referred to with respect to modes of enforcing liens of mechanics, in *Dickson v. Corbett*, 10 Nev. 441; *Mareau v. Stanley*, 5 Colo. App. 339; and 63 Am. Dec. 78 note.

23 Cal. 150-152. **PEOPLE v. LINN.**

Evidence.—Strict proof of identity of coin stolen is not required if the jury are satisfied, p. 151.

Cited as authority in *Porter v. State*, 26 Fla. 58; and *State v. McNulty*, 26 Kan. 536.

23 Cal. 152-156. **NEELY v. NAGLEE.**

Agency.—Representations of agent, made at time of transaction which is within the scope of his authority, is evidence against the principal, p. 155.

Cited in 12 Am. Dec. 326, note, where qualifications of the rule are given.

23 Cal. 156-158. PEOPLE v. GAUNT.

Granting or refusing of continuances rests in the sound discretion of the court to whom the application is made, p. 157.

Approved in *People v. Jenkins*, 56 Cal. 6; *Black v. Appolonio*, 1 Mont. 345; and *State v. O'Neil*, 13 Oreg. 185; *People v. Breen*, 130 Cal. 77; *People v. Totman*, 135 Cal. 134, and *State v. Fiester*, 32 Or. 260, holding discretion not abused on refusal under facts stated.

Challenge to Jurors.—Nonprejudicial error, p. 158.

Approved in *People v. Durrant*, 116 Cal. 196, holding that if the judge errs in disallowing a challenge for cause, and the defendant thereafter excuses the obnoxious juror under a peremptory challenge, and the jury is completed without the exhaustion by the defense of all its peremptory challenges, the error of the court will not be reviewed, because no injury could have resulted to the defendant. So, to the same effect, in *State v. Raymond*, 11 Nev. 108. Cited in *State v. Fourchy*, 51 La. Ann. 244, noted under *People v. Gatewood*, 20 Cal. 146.

23 Cal. 158-160. PEOPLE v. EBNER.

Criminal Practice.—If indictment be for misdemeanor, defendant may appear and plead by attorney, and the trial may be had in his absence, p. 160.

Approved in *People v. Budd*, 57 Cal. 351; and cited in *Warren v. State*, 68 Am. Dec. 220, 221, noting that such is the rule by statute, in California.

Same.—In such case the court has no power to enter the defendant's default and declare his recognizance forfeited, p. 160.

Cited in *People v. Budd*, 57 Cal. 352; and 68 Am. Dec. 224, note

23 Cal. 160-161. ELLIS v. HULL.

Appeal.—Dismissal of operates as an affirmance of judgment, and renders the sureties liable on the undertaking, p. 161.

Affirmed in *Chase v. Beraud*, 29 Cal. 139; and cited as authority to the ruling stated in *Tholheimer v. Crow*, 13 Colo. 403; *State v. Biesman*, 12 Mont. 18; and *Duntermann v. Storey*, 40 Neb. 453. Cited as sustaining the right to an independent suit upon an appeal bond, in *Trent v. Rhomberg*, 66 Tex. 251; and cited to the ruling stated, in *Howell v. Alma Milling Co.*, 38 Am. St. Rep. 708, note, discussing subject of liability of sureties on appeal bonds. Referred to in statement of case, in *Long v. Neville*, 36 Cal. 457; S. C. 95 Am. Dec. 200.

23 Cal. 161-164. PEOPLE v. LEET.

Description of Tract of land by name is sufficient, in an assessment for taxes, p. 162.

Cited as authority in *Driggers v. Cassady*, 71 Ala. 535; and *Phelan v. Poyoreno*, 74 Cal. 455, holding such description sufficient if the land can be identified by such name.

23 Cal. 165-170. GREWELL v. WALDEN.

Pleading.—It is the ultimate and not the probative facts, which should be averred, p. 169.

Cited in *Thomas v. Desmond*, 63 Cal. 427, and holding a complaint demurrable if it merely states the evidence; so, to same effect, in 76 Am. Dec. 498, note.

General Citations.—In *Wenzel v. Schultz*, 100 Cal. 255, holding that in an action to enforce a vendor's lien, under a denial in the answer that the plaintiff ever owned the land, it is proper to show that the deed to plaintiff was a mortgage, and hence did not convey the title.

23 Cal. 173-178. FRANKLIN v. STATE BOARD OF EXAMINERS.

Legislative Questions.—Over questions purely legislative the courts have no supervision or control, p. 175.

Affirmed in *People v. Pacheco*, 27 Cal. 222, asserting the power of the legislature over taxation and appropriations. Cited, and principle of the decision approved, in *Hovey v. Foster*, 118 Ind. 507; and *Carr v. State*, 127 Ind. 209; S. C. 22 Am. St. Rep. 628.

23 Cal. 178-179. GATEWOOD v. McLAUGHLIN.

Mining Claim.—Sale by parol by one in possession of, accompanied by a transfer of possession, transfers the title, p. 178.

Affirmed in *Patterson v. Keystone Min. Co.* 23 Cal. 576; but cited in S. C. again, 30 Cal. 363, holding that since the passage of the act of 1860, amended in 1863, title of mining claims can be passed only by instruments in writing. So, in *Hardenbergh v. Bacon*, 33 Cal. 381, in which case it is held that the ruling has no bearing when the interest held in the mining ground is considered as real estate; and so, in *Hopkins v. Noyes*, 4 Mont. 558, holding that a mining claim can only be transferred by deed. Cited, reviewing the decisions, in 63 Am. Dec. 107, note.

23 Cal. 179-180. ZEIGLER v. WELLS, FARGO & CO. 83 Am. Dec. 87.

Damages.—Where property sued for is a chose in action, defendant may reduce the damages by proof of the insolvency of the maker of the instrument, p. 180.

Cited as authority in *First Nat. Bank v. Dickson*, 5 Dak. Ter. 289, case of conversion of certificate of deposit. Cited in *Patterson v. Plummer*, 10 N. Dak. 101, noted under *Survey v. Wells*, 5 Cal. 124.

23 Cal. 181-184. **PEOPLE v. TODD.**

Taxation.—Validity of tax assessment in the particular case, considered, pp. 182, 183.

Referred to with approval, in *Henderson v. State*, 58 Ind. 248; and *Cross v. Milwaukee*, 19 Wis. 517. Cited in *People v. Seymour*, 76 Am. Dec. 533, note, as sustaining the proposition that courts have no power to go behind assessments legalized and confirmed by an act of the legislature to inquire into alleged errors and irregularities in the assessment.

Same.—Complaint in the action to recover unpaid taxes sustained as sufficient, pp. 183, 184.

Approved as authority in *Parker v. Jacksonville*, 37 Fla. 353. Distinguished in *State v. Mining Co.*, 14 Nev. 242, and holding that taxes due to state on the proceeds of mines for the different quarters of each year, cannot be united in the same cause of action. Cited as authority that a statute may legally provide for the recovery of costs as well as the tax itself, in 76 Am. Dec. 537, note.

23 Cal. 185-193. **HAYES v. WELLS, FARGO & CO.** 83 Am. Dec. 89.

Common Carriers are not liable for inclosed articles of special value unless informed of such value, p. 190.

Cited as authority in *Way v. Chicago etc. Ry. Co.* 64 Iowa, 52, S. C. 52 Am. Rep. 434, holding that one who is injured by the negligence of a railway company while fraudulently using another's ticket, has no remedy against the company; note to *Bullard v. Express Co.*, 61 Am. St. Rep. 360, 362, 373, 374, 377, 384, on duties of express companies.

Same.—Liability of, generally considered, pp. 188-193.

Cited in 86 Am. Dec. 426, note, liability for loss of or injury to goods; 87 Am. Dec. 260, note; and 96 Am. Dec. 211, note, that express companies are common carriers; 96 Am. Dec. 456, note; and 99 Am. Dec. 586, note, as to degree of care required of common carriers; 93 Am. Dec. 73, note, defining term "common carrier;" 4 Am. St. Rep. 628, note; and 37 Am. St. Rep. 247, note, liability in respect to delivery of goods; 23 Am. St. Rep. 597, note, that fraud of shipper will defeat his right to recover; and 57 Am. St. Rep. 38, note, that plaintiff is not entitled to recover where he has brought injury on himself, or has been guilty of negligence which in any way concurs in causing loss or damage.

23 Cal. 193-196. **PRESTON v. KEYS.**

Instructions.—It is not error to refuse an instruction asked, which assumes a certain fact to exist, respecting which evidence has been introduced before the jury, p. 195.

Cited as authority to the ruling stated, in *Bradley v. Lee*, 38 Cal. 70. So, in *Williamson v. Tobey*, 86 Cal. 498, holding that if a requested in-

struction contains several propositions, one of which is erroneous, the court may refuse the whole instruction.

New Trial.—Order denying, will not be reversed where the evidence is conflicting, p. 196.

Cited in *Caulfield v. Bogle*, 2 Dak. Ter. 467, holding that the finding of the court below will not be disturbed where the evidence is conflicting.

23 Cal. 196-198. McCARTY v. FREMONT.

Pleading.—Different causes of action united in one complaint should be separately stated, p. 197.

Referred to in *Lamb v. Harbaugh*, 105 Cal. 690, holding that a complaint alleging such circumstances of aggravation as will entitle the plaintiff to punitive damages in an action for trespass to land must plead those circumstances in such a manner that there will be no ambiguity or uncertainty in determining that they are set forth solely for the purpose of establishing such claim, and, if they are pleaded in such manner as would be proper in an action brought to recover damages other than those for the trespass, the complaint will for that reason be subject to a demurrer for misjoinder of causes of action.

Trespasser.—Owner of property may remove, with use of such force as is necessary, p. 198.

Cited in *Maher v. Wilson*, 139 Cal. 518, 519, applying rule to action for wrongful arrest, and awarding nominal damages only.

22 Cal. 198-208. SKILLMAN v. LACHMAN. 83 Am. Dec. 96.

One Rule Peculiar to Mining Partnership is, that each owner has a right to sell and convey his interest, and such sale does not dissolve the partnership, p. 203.

Affirmed in *Duryea v. Burt*, 28 Cal. 578; *McConnell v. Denver*, 35 Cal. 369, 370, 372; S. C. 95 Am. Dec. 108, 109, 110 (treating of power of member of ditch company); cited in *Cavanaugh v. Salisbury*, 22 Utah, 472, discussing powers of member of mail carrying partnership; *Childers v. Neely*, 47 W. Va. 72, 74, 77, further discussing right of such partner to lien on property for his advances; *Mining Co. v. Bank*, 95 Fed. 39, quoting *Kahn v. Smelting Co.*, 102 U. S. 645; note to *Breaux v. Le Blanc*, 69 Am. St. Rep. 413, on partnership dissolution; *Jones v. Clark*, 42 Cal. 194 (power of superintendent to bind mining partnership); *Decker v. Howell*, 42 Cal. 642 (in mining partnerships the *delectus personae* does not exist); *Stuart v. Adams*, 89 Cal. 369 (liability of members of.) Cited with approval as to nature of mining partnerships, in *Charles v. Eshleman*, 5 Colo. 112; *Manville v. Parks*, 7 Colo. 133, 135; *Meagher v. Reed*, 14 Colo. 354; *Kahn v. Smelting Co.*, 2 Utah, 218; S. C. reversed, 102 U. S. 645, 646; *Southmayd v. Southmayd*, 4 Mont. 113;

Congdon v. Olds, 18 Mont. 490, 491; Thomas v. Hurst, 73 Fed. Rep. 374; and Bissell v. Foss, 114 U. S. 260. Cited, powers of mining partners, in 83 Am. Dec. 107, note; 28 Am. St. Rep. 489, note; 99 Am. Dec. 521, note.

Jurisdiction.—Of supreme court, is determined by amount in dispute, p. 202.

Cited in Sanborn v. Contra Costa County, 60 Cal. 427; Dashiell v. Slingerland, 60 Cal. 659 (amount sued for exclusive of interest is the test of jurisdiction); and Arnold v. County Court, 38 W. Va. 145. So, to same effect, in 94 Am. Dec. 336, note; and 98 Am. Dec. 584, note.

23 Cal. 208-219. TIBBETTS v. MOORE.

Mechanic's Lien.—Description of mill by name and place of location is sufficient, p. 212.

Affirmed in Fredinnick v. Mining Co., 72 Cal. 81. So, in Sibling v. Kerkow, 82 Cal. 46, holding, in an action to foreclose a mechanic's lien on a building that the failure of the court to define the exact amount or extent of the land necessary for the building did not invalidate the decree; Cary etc. Co. v. McCarty, 10 Colo. App. 211, holding notice sufficient as to description. So, to same effect, in Vantilburgh v. Black, 2 Mont. 377; Kezartee v. Marks, 15 Oreg. 537; Osborn v. Logus, 28 Oreg. 315; Mellor v. Valentine, 3 Colo. 264; North Star Iron Works Co. v. Strong, 33 Minn. 6; Putnam v. Ross, 46 Mo. 339; Cole v. Mineral etc. Assn., 3 S. Dak. 275; and Drexel v. Richards, 46 Neb. 738.

Same.—Where notice of lien states that the materials were furnished to A & Co. when in fact they were furnished to A, this does not invalidate the lien, p. 215.

Cited as authority in Presbyterian Church v. Santy, 52 Kan. 465, a similar case.

Priority of Liens, and effect of agreement, considered, p. 218.

Cited in Harkey v. Cain, 69 Tex. 150; and Sword v. Low, 122 Ill. 497; Bennett v. Beadle, 142 Cal. 243, construing section 813, Code of Civil Procedure; Edwards etc. Co. v. Rank, 57 Neb. 328, 73 Am. St. Rep. 517, sustaining chattel mortgage on engine as against mechanic's lien, although affixed to the freehold. So, in 38 Am. Dec. 376, note, as authority for the rule that fixtures placed on mortgaged premises are regarded as permanently annexed to the freehold and inure to the benefit of the mortgagee.

23 Cal. 219-222. ANTOINE CO. v. RIDGE COMPANY.

Mining Claim.—Parol transfer with delivery of possession is sufficient to prove transfer of title to, p. 222.

Cited in 63 Am. Dec. 107, note.

Costs.—Clerk may insert amount of, within two days after they shall

have been taxed or ascertained, in a blank left in the judgment for that purpose, p. 222.

Cited as authority in *Orr v. Haskell*, 2 Mont. 353.

23 Cal. 223-224. BANKS v. MARSHALL.

Promissory Note.—Right of action on is not lost if surrendered through mistake, p. 224.

Cited as authority to the ruling stated, in *Thompson v. Avery*, 11 Utah, 225.

23 Cal. 225. EVERETT v. HYDRAULIC FLUME TUNNEL COMPANY.

Dam.—Owner of is bound to exercise of ordinary care, but is not liable for accident which a prudent man could not avoid, p. 225.

Approved as authority in *Hannaher v. St. Paul etc. R. R. Co.*, 5 Dak. Ter. 22; *Jones v. Robertson*, 116 Ill. 554; S. C. 56 Am. Rep. 792; *Losee v. Buchanan*, 51 N. Y. 487; S. C. 10 Am. Rep. 632; *Penna. Coal Co. v. Sanderson*, 113 Pa. St. 153; and *Central Trust Co. v. Wabash etc. R. R. Co.*, 57 Fed. Rep. 448. Cited, bearing on liability of dam owner, in 57 Am. Dec. 691, note; and 56 Am. Rep. 97 note.

23 Cal. 226-227. BOLES v. JOHNSTON. 83 Am. Dec. 111.

Court of equity will not set aside a sheriff's sale and a deed executed under it in a collateral action commenced for that purpose, p. 226.

Cited as authority in *Mentzer v. Ellison*, 7 Colo. App. 331, dissenting opinion of Reed P. J.; Approved in *Woody v. Jameson*, 5 Idaho, 469, mode of setting aside judicial sale wrongfully made, prior to making of sheriff's deed, is by motion in principal action on notice to adverse party and purchaser; 15 Am. Dec. 92, note; 92 Am. Dec. 415, note; and 26 Am. St. Rep. 800, note.

23 Cal. 227-232. SCHILLING v. HOLMES.

Landlord and Tenant.—Under-tenant, who takes a lease and receives possession from the tenant, becomes the tenant of the landlord, subject to all the duties and liabilities of a tenant to the landlord, p. 229.

Cited as authority in *Sexton v. Chicago Storage Co.* 129 Ill. 328; S. C. 16 Am. St. Rep. 277; *Craig v. Summers*, 47 Minn. 193, discussing question as to what constitutes an assignment of a lease; and 91 Am. Dec. 563, note, treating of implied renewal and continuance of leases, and terms for which deemed renewed.

23 Cal. 232-233. LADD v. RUGGLES.

Foreclosure.—When personal judgment is entered without foreclosure

the right to a foreclosure and sale of the mortgaged property is waived, p. 233.

Cited in *Bacon v. Raybould*, 4 Utah, 360; and *First Nat. Bank v. Williams*, 2 Idaho, 627. Referred to in *Barbieri v. Ramelli*, 84 Cal. 157, as having no application to the case before the court, and holding that a separate action cannot be brought for the recovery of a debt for which a mortgage security has been given, though such security was originally valueless or totally inadequate by reason of prior mortgages to the full value of the premises.

23 Cal. 233-236. **SWINFORD v. ROGERS.**

Fraudulent Conveyance.—Conveyance of property made and received with intent to defraud creditors is void, though there may have been a full and valuable consideration paid therefor, and it will not be allowed to stand even as security for advances actually made, p. 236.

Cited as authority and doctrine approved in *Bull v. Ford*, 66 Cal. 177; *Burke v. Koch*, 75 Cal. 359; and *Lyons v. Leahy*, 15 Oreg. 14; S. C. 3 Am. St. Rep. 138; *Burt v. Gotzean*, 102 Fed. 947, holding assignment of sheriff's certificate void under facts stated. Cited to the ruling stated, in 73 Am. Dec. 575, note.

Same.—The court may compel the fraudulent vendee to account for the value of the property, and direct the proceeds to be paid over to the creditors of the vendor, p. 236.

Cited as authority to the proposition that if a fraudulent vendee has sold goods exceeding the amount of the creditor's claim, personal judgment may be rendered against him, in *Massey v. Gorton*, 90 Am. Dec. 295, note discussing subject of creditors' bills.

23 Cal. 237-243. **TUSTIN v. FAUGHT.**

Deed.—When grantor signs a different name from that in body of deed, identity must be shown, p. 239.

Cited in *Zann v. Haller*, 71 Ind. 139; S. C. 36 Am. Rep. 195, holding that a mortgage is well executed by a married woman, signing by her Christian name alone, her full name appearing in the body of the instrument and the acknowledgment.

Same.—Deed executed by part only of grantors named, conveys title of parties executing, p. 239.

Cited as authority in *Moore v. Hinnant*, 89 N. C. 458, case of deed of trust executed to secure creditors.

Same.—Deed to wife reciting a consideration of money paid, as well as love and affection, is presumed to convey community property and the deed of the husband alone is sufficient to convey it, p. 241.

Cited, holding that the common property is subject to the control and

disposition of the husband, in *Landers v. Bolton*, 26 Cal. 420; and so in *Hearfield v. Bridges*, 75 Fed. Rep. 49. Cited to the ruling stated, in *Schuyler v. Broughton*, 70 Cal. 283; 73 Am. Dec. 543, note; 86 Am. Dec. 637, 639, note; and 96 Am. Dec. 423, note. Distinguished in *Peck v. Vandenberg*, 30 Cal. 56, 63, in which case evidence was admitted for the purpose of proving the deed to have been one of gift. Overruled in *Salmon v. Wilson*, 41 Cal. 608, where it is said that "the court fell into error in deciding on the character and legal effect of the instrument."

Ejectment.—Defendant may show in defense a title to the demanded property acquired by him after the commencement of the action, p. 242.

Explained and distinguished in *Moss v. Shear*, 30 Cal. 474, deciding that, in ejectment, title acquired pending suit must be pleaded by supplemental answer.

23 Cal. 243-244. O'BRIEN v. BRADY.

New Trial.—When motion for is based upon newly-discovered evidence, or that the verdict is against evidence, an enlarged discretion is vested in the court below, p. 244.

Affirmed in *People v. Sutton*, 73 Cal. 248; and *Bates v. Howard*, 105 Cal. 178. Cited as authority in *Newton v. Brown*, 2 Utah, 130.

Same.—Action of court in granting or refusing, based upon questions of law, is not discretionary, p. 244.

Affirmed in *Cochran v. O'Keefe*, 34 Cal. 557; and approved as authority in *Aultman v. Gunderson*, 6 S. Dak. 232; S. C. 55 Am. St. Rep. 841. Cited in *United States v. Trabing*, 3 Wyo. 146, reviewing the practice.

23 Cal. 245-249. COLMAN v. CLEMENTS.

Mining Law.—In support of title, evidence of mining rules and customs may be given without specially pleading them, p. 247.

Affirmed in *Jacob v. Day*, 111 Cal. 576. Cited in *Hewitt v. San Jacinto etc. Co.*, 124 Cal. 190, applying rule to usages and regulations as to delivery of water by irrigation district. Referred to, as to proof of customs, in 63 Am. Dec. 93, note.

Possession of one tenant in common is presumed to be the possession of all, and mere failure to recognize a cotenant does not amount to an ouster, p. 247.

Cited in *Tully v. Tully*, 71 Cal. 346, dissenting opinion of McKee, J. *Bader v. Dyer*, 106 Iowa, 721, 68 Am. St. Rep. 337, *Mattis v. Hosmer*, 37 Or. 532, and *Smith v. Water Co.*, 16 Utah, 200, holding no adverse possession between cotenants shown under facts stated. So, in 29 Am. Dec. 485, note. Approved in *Squires v. Clark*, 17 Kan. 88; and *Terrell v. Martin*, 64 Tex. 128.

Where Forfeiture Claimed under mining regulation or custom, regulation or custom strictly construed against forfeiture, p. 248.

Ruling approved in *Rush v. French*, 1 Ariz. Ter. 146; *King v. Edwards*, 1 Mont. 241; and *Leet v. Mining Co.*, 6 Nev. 222; *Walton v. Wild Goose Min. etc. Co.*, 123 Fed. 219, approving instructions on question of forfeiture; *South End Min. Co. v. Tinney*, 22 Nev. 67, dissenting opinion of *Murphy, C. J.*, as authority that the rules and regulations of miners were recognized and enforced by the courts of the mining states and territories.

23 Cal. 249-254. **PIERSON v. McCaHILL.** S. C. 21 Cal. 122; 22 Cal. 127.

Appeal from order refusing change of venue, operates as a stay of all further proceedings in the case in the court below, until such appeal is determined, p. 253.

Cited in *South. Pac. R. R. Co. v. Superior Court*, 63 Cal. 610, 611, as a case illustrating the difference between a stay of proceedings and a complete loss of jurisdiction. Referred to in *Howell v. Thompson*, 70 Cal. 636, 637, as stating the rule under the former practice act, but, holding that under the Code of Civil Procedure, section 949, such an appeal does not operate to stay proceedings in the lower court. Cited as authority in *Farmers' Nat. Bank v. Backus*, 63 Minn. 117, setting forth effect of appeal with a supersedeas from an interlocutory order.

Mistake.—Reformation may be decreed in case of, p. 254.

Cited in note to *Williams v. Hamilton*, 65 Am. St. Rep. 492, on general subject.

General Citations.—In *State v. District Court*, 18 Nev. 289, and holding that the district court is not bound to take judicial notice of the proceedings of the district court of another county, and a disregard of an adjudication of insolvency there made, even if properly proven, would amount to no more than error.

23 Cal. 255. **NORTHAM v. GORDON.**

Judgment.—Purchaser of judgment entered by default takes it subject to the right of the defendant to have the default and judgment set aside upon a proper showing, p. 255.

Ruling approved in *Bennett v. Sheriff etc.*, 91 Mich. 145; and *Weber v. Tschetter*, 1 S. Dak. 215. Cited in note to *Chilstrom v. Eppinger*, 78 Am. St. Rep. 52, 56, on assignment of judgment.

23 Cal. 256-257. **GOLDMAN v. DAVIS.**

Contract of Indorser of Promissory Note is a written one, and cannot be varied by parol evidence, p. 257.

Approved and applied in *Smith v. Caro*, 9 Oreg. 285. Cited in *Citizens'*

etc. *Bank v. Jones*, 121 Cal. 32, applying rule to indorsement of certificate of deposit; dissenting opinion, *Ames v. Southern Pac. Co.*, 141 Cal. 734, discussing general rule as to introduction of parol evidence; *Nicholson v. Tarpey*, 89 Cal. 621, holding that the rights of parties to a written contract must be ascertained from its terms, and whether the writing be lost or not, evidence of the intention of the parties in making it is inadmissible, in the absence of fraud or mistake.

23 Cal. 257-259. LATHROP v. MIDDLETON. 83 Am. Dec. 112.

Execution.—Ferryboat is not exempt from execution because the ferry is on the mail route, and the boat is used also to convey the United States mail, p. 259.

Cited as authority in *Badger Lumber Co. v. Marion etc. Power Co.*, 48 Kan. 189; S. C. 30 Am. St. Rep. 308, sustaining mechanics' liens against property of quasi public corporations; Cited in *Risdon etc. Works v. Citizens' etc. Co.*, 122 Cal. 97, 68 Am. St. Rep. 26, holding personality of street railroad company not included in exemption of its franchise; 35 Am. St. Rep. 406, note.

Statutes.—Penal statutes must be strictly construed, p. 259.

Cited in 91 Am. Dec. 287, note; and 10 Am. St. Rep. 34, note.

23 Cal. 259-267. ROBERTS v. CHAN TIN PEN.

Ejectment.—Admissibility of tax deeds in evidence, considered, pp. 261, et seq.

Cited in *Frink v. Roe*, 70 Cal. 320, as authority for exclusion of tax deed offered in evidence; *Eastman v. Gurrey*, 15 Utah, 420, evidence under general denial by defendant in ejectment.

Objections to Evidence must be specific, p. 264.

Cited in *Balcom v. O'Brien*, 13 S. Dak. 428, holding certain objections to admissibility of note waived.

Tax Sale.—Designation of the property to be sold, how made, p. 266.

Distinguished in *Hewes v. McLellan*, 80 Cal. 395, 396, holding that under the present statute (Pol. Code, sec. 3773), it is left to the discretion of the tax collector to offer a part or the whole of the property, as he may think best.

23 Cal. 268. HOLMES v. OHM.

Pleading.—In action on undertaking on appeal, it is a sufficient averment of the delivery of the undertaking, if the complaint shows that it was filed in the clerk's office, p. 268.

Distinguished in *Parrott v. Scott*, 6 Mont. 345, and holding that the complaint is defective when it fails to allege that the undertaking was

Notes Cal. Rep.—75

delivered. Cited in *Howard etc. Co. v. Silverberg*, 89 Fed. 172, noted under *Dore v. Covey*, 13 Cal. 502; *Clark v. Drever*, 9 Colo. App. 460, as to effect of admissions in answer.

23 Cal. 268-274. JACKSON v. SACRAMENTO VALLEY RAILROAD COMPANY.

Warehouseman.—Railroad company's responsibility as a common carrier ceases when the goods are deposited in its warehouse at the destination of the goods, and it is then only liable as a warehouseman, and the burden of proof in case of loss is on the bailor, p. 272.

Affirmed in *Wilson v. South. Pac. R. R. Co.*, 62 Cal. 172; and approved as authority in *Francis v. Dubuque etc. R. R. Co.*, 25 Iowa, 66; S. C. 95 Am. Dec. 773; *Gashweiler v. Wabash etc. Ry. Co.*, 83 Mo. 118; S. C. 53 Am. Rep. 562; and *Texas etc. R. R. Co. v. Morse*, 1 Tex. App. Civ. 182. Cited, reviewing the authorities upon the subject, in *Bloyd v. Pollocks*, 27 W. Va. 115. So in 8 Am. Dec. 216, note; and 24 Am. Dec. 148, 153, note. Examined in *Wilson v. California Cent. R. R. Co.*, 94 Cal. 170, 171, and holding that failure of a common carrier to deliver the goods on demand, without lawful excuse, even after the transit has ceased, and the goods have been stored in a warehouse at the place of consignment, is a breach of the carrier's original contract, for which suit may be brought on that contract. Cited, *Jenne v. Burger*, 120 Cal. 446, as authority that a receipt is only prima facie evidence of the facts stated in it.

23 Cal. 275-277. WHITNEY v. STONE.

Specific Performance will be decreed when proper, though defendant offer to pay penalty agreed upon, p. 277.

Cited as authority in *Fletcher v. Arnett*, 4 S. Dak. 627; *Glock v. Howard etc. Co.*, 123 Cal. 9, 69 Am. St. Rep. 24, sustaining right of vendor to retain purchase money after unexcused default of vendee, and construing Civil Code, sections 3387, 3389; *Thornburg v. Fish*, 11 Mont. 62, holding that the right to a specific performance of a contract for the sale of lands is not absolute, but is a matter of sound judicial discretion, which is controlled by the circumstances of each controversy.

23 Cal. 277-279. BARTHOLOMEW v. HOOK.

Homestead.—Judgment docketed before filing declaration of homestead is a lien thereon, p. 279.

Ruling approved in *Smith v. Richards*, 2 Idaho, 468; and *Gage v. Neblett*, 57 Tex. 376. Cited in 34 Am. St. Rep. 496, note. Distinguished in *Noble v. Hook*, 24 Cal. 639, in which case the parties had filed no declaration of homestead whatever. Cited in 34 Am. St. Rep. 496 note.

Same.—But if, after the judgment is docketed, the wife file a declaration of homestead, she can compel such judgment creditor to ex-

haust the husband's personal property, before selling the homestead, p. 279.

Cited as authority in *Frick Company v. Ketels*, 42 Kan. 532; S. C. 16 Am. St. Rep. 508, case of mortgage of homestead and other property. Distinguished in *Abbott v. Powell*, 6 Sawy. 93, case of mortgage of homestead, and discussing question of rights of junior mortgagee. Cited to the ruling stated, in 76 Am. Dec. 442, note.

23 Cal. 280-281. PEOPLE v. SMITH.

Larceny.—Where bailee of property obtains possession of it from the owner, with the intent of stealing it, and carries out that intent, he is guilty of larceny, p. 280.

Rule recognized and approved in *People v. Raschke*, 73 Cal. 383, So in *State v. Woodruff*, 47 Kan. 154; S. C. 27 Am. St. Rep. 287. Cited in *People v. De Graff*, 127 Cal. 679, holding crime to have been larceny and not embezzlement, under facts stated. Referred to as pointing out the distinction between larceny and embezzlement, in *People v. Johnson*, 71 Cal. 390. Cited to the ruling stated, in 57 Am. Dec. 280, note.

23 Cal. 281-282. PEOPLE v. O'CONNELL.

Default.—Judgment by should not be set aside, unless the defendant shows that the judgment was entered through mistake, inadvertence, surprise, or excusable neglect on his part, and costs should be imposed as a condition, p. 282.

Affirmed in *Bailey v. Taaffe*, 29 Cal. 424; *Watson v. Railroad Co.*, 41 Cal. 21; and *Heermann v. Sawyer*, 48 Cal. 563; and cited as authority in *Haley v. Eureka Co. Bank.*, 20 Nev. 421; *Erpenbach v. Railway Co.*, 8 S. Dak. 578; and 58 Am. Dec. 395, note.

23 Cal. 283-285. KITTREDGE v. STEVENS.

Appeal.—Order made by a court on a motion is a final adjudication upon the subject matter, unless appealed from within the statutory time, nor can the time be extended by subsequent renewal of the motion, p. 284.

Ruling approved in *Weinrich v. Porteus*, 12 Nev. 104; and *Insurance Co. v. Weber*, 2 N. Dak. 246. Cited in *Smith v. Neufeld*, 61 Neb. 701, as to decision that petition was sufficient in form.

23 Cal. 285-286. MEEKER v. HARRIS.

Jurisdiction of supreme court, on appeal from order relating to costs, p. 286.

Distinguished in *Dashiell v. Slingerland*, 60 Cal. 657, observing that the constitution of 1849 did not exclude interest in fixing the appellate jurisdiction of the supreme court.

Bill of Costs may be attacked by motion to retax, p. 286.

Cited in *Carpy v. Dowdell*, 129 Cal. 245, construing Code of Civil Procedure, section 1033, and holding objectionable items attackable by written notice of motion to tax.

23 Cal. 287-298. O'GRADY v. BARNHISEL.

Evidence.—Tax deed reciting generally that the property was duly assessed, and that the taxes were levied upon it according to law is prima facie evidence of title in the grantee, and is entitled to be received in evidence as such without any further proofs, p. 292.

Approved as authority in *Brunn v. Murphy*, 29 Cal. 327; *Wetherbee v. Dunn*, 32 Cal. 107; and *Shell v. Duncan*, 31 S. C. 553; cited, discussing subject of tax titles, in *Chauncey v. Wass*, 35 Minn. 16; 17 Am. Dec. 509, 512 note; and 4 Am. St. Rep. 188, note.

Taxes.—Tax law creates two remedies, one against the person and the other against the property, each having a distinct and separate existence, p. 294.

Cited as authority in *State v. Mining Co.*, 14 Nev. 231.

Same.—Tax sale is not invalidated by a slight mistake made in computing the amount of taxes and costs, p. 297.

Approved in *Burt v. Hasselman*, 139 Ind. 199; and cited in 77 Am. Dec. 732, note.

23 Cal. 299-302. GASSNER v. PATTERSON.

Chattel Mortgage made under act of 1861, was of no validity, except between the parties, unless the provisions of the act were strictly complied with, p. 301.

Cited in *Dufficy v. Shields*, 63 Cal. 333, case of chattel mortgage upon upholstery and furniture in hotel to secure purchase money, and holding that if the mortgage was made to secure the purchase money of other property than the furniture and upholstery used in the hotel, it was void. So, in *Butte Hardware Co. v. Sullivan*, 7 Mont. 312, holding that statutes concerning chattel mortgages, being in derogation of the common law, should be strictly construed. So, to same effect, in *Simpson v. Harris*, 21 Nev. 368; *Swiggett v. Dodson*, 38 Kan. 713; and *Ryan Drug Co. v. Hvambasahl*, 89 Wis. 65, construing similar statutes. Distinguished in *Harms v. Silva*, 91 Cal. 639, noting that the code provisions, as to those chattels on which a mortgage is permitted, puts them, except as to certain specified conditions, on the same basis as mortgages upon real estate. Cited, inadequacy of consideration on execution sale, in 65 Am. Dec. 481, note.

23 Cal. 302-303. FALL v. PAINE.

Certiorari.—Writ of lies to review action of board of supervisors, p. 303.

Approved in *Murray v. Supervisors*, 23 Cal. 495; and *Levee District v. Farmer*, 101 Cal. 181. So in *Gilbert v. Board of Police etc.*, 11 Utah, 393, and held applicable to action of board of police and fire commissioners.

23 Cal. 306-312. MAYE v. TAPPAN.

In trespass by entering upon and removing the gold-bearing earth from a mining claim, the true measure of damages is the value of that earth at the time it is separated from the surrounding soil, and becomes a chattel, less the expense of separating the earth from the gold, p. 311.

Followed in *Goller v. Fett*, 30 Cal. 485; and *Hendricks v. Spring Valley Min. etc. Co.*, 58 Cal. 193; S. C. 41 Am. Rep. 258. Limited, in *Empire Co. v. Bonanza Co.*, 67 Cal. 409, holding that the rule cannot be extended so as to entitle a defendant who has committed a trespass to justify his act and obtain a verdict by showing the value of the property taken to be less than the expense of its severance from the realty. Approved as to rule of damages in *Omaha etc. Refining Co. v. Tabor*, 13 Colo. 56; S. C. 16 Am. St. Rep. 196 (conversion of ore); *Wright v. Skinner*, 34 Fla. 464 (logs taken from another's land); *McLean Co. Coal Co. v. Long*, 81 Ill. 362 (conversion of coal); *Chamberlain v. Collinson*, 45 Iowa, 434; *Austin v. Mining Co.*, 72 Mo. 545; *Railroad Co. v. Hutchins*, 37 Ohio St. 295 (conversion); and *Meeker v. Gardella*, 1 Wash. St. 148 (crops cut and taken away). Cited in *Keys v. Coal Co.*, 58 Ohio St. 269, 65 Am. St. Rep. 762, applying rule to taking of coal by one, cotenant; *Durant etc. Co. v. Percy etc. Co.*, 93 Fed. 169, discussing rule when taking was inadvertent; denied in *Eaton v. Langley*, 65 Ark. 460, limiting expense for increase in value to that increase alone; *Franklin Coal Co. v. McMillan*, 49 Md. 559; S. C. 33 Am. Rep. 282; S. C. 49 Md. 564; and *Blaen Avon Coal Co. v. McCulloh*, 59 Md. 419; S. C. 43 Am. Rep. 561, in which cases the rule is asserted, that in trespass for mining and carrying away coal, the measure of damages, independently of circumstances of aggravation, is the value of the coal immediately after severance, without abatement of the cost of severance. Also cited in *Foote v. Merrill*, 54 N. H. 492, S. C. 20 Am. Rep. 154, trespass quare clausum fregit, and for cutting and carrying away trees, the court holding that the increased value of the trees, occasioned by the labor of the defendant in converting them into timber, ought not to be included in the damages. Criticised in *Waters v. Stevenson*, 13 Nev. 176, 177, S. C. 29 Am. Rep. 301, 302, in connection with *Goller v. Fett*, supra, the court saying: "We can only disregard both"; holding, however, that the defendant should be allowed the necessary cost of mining the ore converted by him. Cited to the ruling stated, in 4 Am. Dec. 371, note. So in *Baker v. Wheeler*, 24 Am. Dec. 79, note, where the decisions bearing upon the subject are collected and collated. So in 26 Am. Rep. 529, note; and 36 Am. Rep. 770, note.

23 Cal. 312-314. GLUCKAUF v. BLIVEN.

Homestead.—Act of 1860, restricting right to mortgage homestead has no application to homesteads held under the act of 1851, pp. 313, 314.

Approved in Commercial etc. Bank v. Corbett, 5 Sawy. 549, construing Nevada statute, adopted from California. Cited in Speidel v. Schlosser, 13 W. Va. 699, as authority for constitutionality of statutory requirement of declaration of intention to hold a homestead.

23 Cal. 314-321. SATTERLEE v. SAN FRANCISCO.

Referred to in Herzo v. San Francisco, 33 Cal. 140, as one of the "City Slip Cases," the material facts in the two cases being the same.

Right to Office.—Question of eligibility of incumbent cannot be inquired into in a collateral action, and can only be raised by a direct proceeding to contest the election or by writ of quo warranto, p. 320.

Approved in Hull v. Superior Court, 63 Cal. 177; and Wear v. State, 35 Tex. Cr. App. 33. Cited in Sublett v. Bedwell, 47 Miss. 275, holding that if an eligible candidate receiving the majority of votes cannot take office, the electors have failed to make a choice. Cited to the ruling stated, in 58 Am. Dec. 407, note.

23 Cal. 321. WENBORN v. BOSTON.

Appeal.—None lies from an order denying a motion for leave to intervene, p. 321.

Cited in 16 Am. Dec. 184, note, where it is said that subsequent decisions seem to establish a different rule, citing Stich v. Dickinson, 38 Cal. 608.

General Citations.—Referred to in Haynes v. Calderwood, 23 Cal. 410, sustaining the validity of the decree, and the effect of the *lis pendens* filed in the case. So in Boston v. Haynes, 33 Cal. 36, in which the court say: "We find nothing in the complaint which entitles the plaintiff to a new trial in the case of Wenborn v. Boston and Wife."

23 Cal. 322-323. WELCH v. ALLINGTON.

Payment.—Acceptance of note for a debt does not discharge the debt, unless expressly agreed to be payment. The only effect is to suspend the right of action on the debt until the maturity of the note given, and suit may be brought on the original debt in case of the nonpayment of the accepted note, p. 323.

Ruling affirmed in Brown v. Olmsted, 50 Cal. 166; Comptoir D'Es-compte v. Dresbach, 78 Cal. 20; Tolman v. Smith, 85 Cal. 287; Jenne v. Burger, 120 Cal. 447; and Steinhart v. National Bank, 94 Cal. 366; S. C. 28 Am. St. Rep. 136. Cited as authority to the ruling stated, in First

Nat. Bank v. Newton, 10 Cal. 171; *Knox v. Gerhauser*, 3 Mont. 275; *Nightingale v. Chafee*, 11 R. I. 618; S. C. 23 Am. Rep. 536; and 41 Am. St. Rep. 761, note. Cited in *Bonestell v. Bowie*, 128 Cal. 515, further holding that no presumption exists that note was so taken in payment; and cf. *Bank v. Newton*, 10 Colo. 171; *Bantz v. Basnett*, 12 W. Va. 801, reviewing the cases, and holding that where, before a note is due, a part of the debt is paid, and a new note executed for the residue, by the debtor, and an express agreement made between the parties that the old note shall be surrendered, such agreement is founded upon a valuable consideration and extinguishes the old note, and no suit can be maintained thereon.

23 Cal. 323-331. **CONTRA COSTA RAILROAD CO. v. MOSS.**

Eminent Domain.—Legislature may confer upon railroad companies the power to take land from the owners upon the payment of a just compensation, p. 26.

Approved in *Colorado etc. Ry. Co. v. Railway Co.*, 41 Fed. Rep. 298. Cited in *Kansas etc. Co. v. Northwestern etc. Co.*, 161 Mo. 309-311, 313, 84 Am. St. Rep. 723-726, sustaining exercise of right of condemnation by railroad company under local constitution and statutes when the use was a public one.

Same.—Whether or not the right of eminent domain should be exercised is a political and legislative question, and not a judicial one, p. 327.

Cited as authority in *Wulzen v. Board of Supervisors*, 101 Cal. 21; S. C. 40 Am. St. Rep. 24.

Same.—One railroad company cannot locate its line upon that of another railroad company, except where it may be necessary for one railroad to cross another, nor condemn land previously appropriated by another company, p. 330.

Approved, stating modifications of the rule, in *Southern Pac. R. R. Co. v. Railway Co.*, 111 Cal. 227; so in *Rochester etc. R. R. Co. v. Railroad Co.*, 110 N. Y. 134; and *Alexandria etc. R. R. Co. v. Railroad Co.*, 75 Va. 790; S. C. 40 Am. Rep. 747. Cited in *Butte etc. Ry. Co. v. Railway Co.*, 16 Mont. 546, S. C. 50 Am. St. Rep. 534, the court declining to assent to the ruling. "without careful qualification and modification." Also cited, discussing the subject, in *Lake Shore etc. Ry. Co. v. Cincinnati etc. R. R. Co.*, 116 Ind. 590; and *Baltimore etc. R. R. Co. v. Railroad Co.*, 17 W. Va. 844, 845. So in 9 Am. St. Rep. 143, note.

Common Carriers.—Under general railroad law, all railroad companies are common carriers, p. 328.

Cited in 47 Am. Dec. 651, note.

General Citations.—In *Lake Merced Water Co. v. Cowles*, 31 Cal. 217, two condemnations of the same land, question of priority. So in *Sam*

Francisco etc. *Water Co. v. Alameda Water Co.*, 36 Cal. 645, rights of rival corporations. In *Appeal of Houghton*, 42 Cal. 68, jurisdiction of special cases, dissenting opinion of Rhodes, C. J., *Chicago etc. R. Co. v. Morehouse*, 112 Wis. 11.

23 Cal. 331-335. **GALLAGHER v. WILLIAMSON.** S. C. 83 Am. Dec. 114.

Evidence.—Where the vendor of goods remains in actual possession of the goods, his statements explanatory of such possession, are admissible for the purpose of showing fraud in the sale, p. 333.

Cited as authority in 41 Am. St. Rep. 203, note. So in 76 Am. Dec. 504, note, as to proper question to witness in such case.

Same.—Confidential communications made by client to attorney are privileged. But statements made by the client to others at the time, or by others to him, are not thus privileged, pp. 333, 334.

Approved in *Sharon v. Sharon*, 79 Cal. 678; *Murphy v. Waterhouse*, 113 Cal. 472; S. C. 54 Am. St. Rep. 368; and cited as authority to the ruling stated, in *Weinstein v. Reed*, 25 Mo. App. 49; *Smith v. Caldwell*, 22 Mont. 338, but holding information incidentally acquired not to be privileged; note 66 Am. St. Rep. 218, 220, 224; 25 Am. Dec. 420, note; 73 Am. Dec. 549, note; 86 Am. Dec. 394, note; 90 Am. Dec. 554, note; 97 Am. Dec. 418, note; and 6 Am. St. Rep. 587, note.

Instructions.—Where court instructs jury upon what state of facts they may find a verdict for a party, the instruction should include all the facts in controversy material to the right of plaintiff or defense of defendant, p. 334.

Approved as authority in *Castagnino v. Balletta*, 82 Cal. 261; *Venine v. Archibald*, 3 Colo. 169; *Deasey v. Thurman*, 1 Idaho, 779; *Johnson v. Fraser*, 2 Idaho, 373; and *Barker v. State*, 48 Ind. 167. Cited to the point stated, in 90 Am. Dec. 390; and 97 Am. Dec. 499.

23 Cal. 335-337. **CALDERWOOD v. TEVIS.**

Waiver.—Failure of court to dispose of demurrer is waived by going to trial without objection, p. 336.

Approved as authority in *Darke v. Smith*, 14 Utah, 39.

Lis Pendens.—Purchaser pending suit affecting title, when lis pendens is filed, takes subject to decree, p. 337.

Approved in *Amador etc. Min. Co. v. Mitchell*, 59 Cal. 178.

Homestead.—Mere possession and use of premises, as a homestead, does not of itself create any interest in the property, when the parties claiming the homestead have no title or estate therein, p. 337.

Distinguished in *Brooks v. Hyde*, 37 Cal. 372, holding that a dedication of land to homestead purposes protects it against creditors of the true owner.

23 Cal. 338-339. NELSON v. MURRAY.

Pleading.—Denials on information and belief, when sufficient, p. 338.

Harmonized in *Landis v. Morrissey*, 69 Cal. 87. Explained and distinguished in *Oregonian Ry. Co. v. Navigation Co.*, 10 Sawy. 468; S. C. 22 Fed. Rep. 247.

Same.—Answer merely denying the conclusions of law resulting from the facts averred in the complaint, is insufficient to raise an issue, and the facts are deemed admitted, p. 339.

Approved in *Lake v. Steinbach*, 5 Wash. St. 663; *Kidwell v. Ketler*, 146 Cal. 18, where complaint to terminate trust under will sets forth will and claims title to one half of trust estate and cross complaint sets up will derailing title thereunder and admitting plaintiff's title, admission and allegation of title are conclusions of law to be construed by court according to will.

23 Cal. 339-347. VERZAN v. MCGREGOR.

Evidence.—Where preliminary proof is necessary to the introduction of any kind of documentary evidence, the sufficiency of such proof is to be determined in the first instance by the trial judge, and his determination will not be disturbed unless there has been an abuse of discretion, p. 342.

Approved as a general rule, in *Bryce v. Joynt*, 63 Cal. 378; and *Webster v. San Pedro Lumber Co.*, 101 Cal. 329.

23 Cal. 347-349. DRAPER v. DOUGLASS.

Evidence.—Declarations of party in possession of land, in relation to his property therein, are admissible in evidence as part of the *res gestae*, p. 348.

Cited as authority to the ruling stated, in *People v. Blake*, 60 Cal. 511; and *Marshall v. Beysser*, 75 Cal. 547.

23 Cal. 349-352. PELBERG v. GORHAM.

Damages.—For wrongful seizure of goods by sheriff, the true measure of damages is the value of the goods at the time of the taking, p. 351.

Cited as authority in *Weaver v. Ashcroft*, 50 Tex. 445.

23 Cal. 352-354. DE UPREY v. DE UPREY.

Statute of Limitations.—When a judgment is rendered payable in installments, time begins to run from the period fixed for the payment of each installment as it becomes due, p. 353.

Approved as authority in *Gaston v. Gaston*, 114 Cal. 547; S. C. 55 Am. St. Rep. 89; and *Knapp v. Knapp*, 59 Fed. Rep. 644. Cited in

Kraft v. Greathouse, 1 Idaho, 258, holding that the objection of the statute must be raised by demurrer or answer.

23 Cal. 354-359. FLANDREAU v. DOWNEY.

Estoppel by deed or matter of record should be pleaded as such, where there is an opportunity to plead it, but where no opportunity to plead it occurs, it is conclusive as evidence, pp. 357, 358.

Principle approved in **Hamm v. Arnold**, 23 Cal. 375; **Jackson v. Lodge**, 36 Cal. 38; **Clink v. Thurston**, 47 Cal. 29; **Wixson v. Devine**, 67 Cal. 346; **Dyer v. Scalmanini**, 69 Cal. 642; and **Parlman v. Young**, 2 Dak. Ter. 184. Cited as authority to the ruling stated, in 27 Am. St. Rep. 345, 346, note. Referred to in **Johnson v. Savings Union**, 75 Cal. 141; S. C. 7 Am. St. Rep. 132, and said to have no application.

23 Cal. 359-362. SARGENT v. STURM. 83 Am. Dec. 118.

Demand.—If the original possession of property is acquired by a tort, no demand prior to suit is necessary, p. 361.

Affirmed in **Wellman v. English**, 38 Cal. 584; and **Harpending v. Meyer**, 55 Cal. 560. Cited as authority in **Morrow Shoe Mfg. Co. v. New England Shoe Co.**, 57 Fed. Rep. 692; 11 Am. St. Rep. 409; and 30 Am. St. Rep. 484.

A pre-existing debt is not a valuable or sufficient consideration for the purchase of goods as against a third person from whom the vendor fraudulently obtained them, p. 361. -

Approved as authority in **Ames Iron Works v. Kalamazoo Pulley Co.**, 63 Ark. 91, 93; **Reed v. Brown**, 89 Iowa, 460; S. C. 48 Am. St. Rep. 407; **Henderson v. Gibbs**, 39 Kan. 684; **Eaton v. Davidson**, 46 Ohio St. 363; **Wallace v. Cohen**, 111 N. C. 106; and **Sleeper v. Davis**, 64 N. H. 61; 10 Am. St. Rep. 380. Cited in **Woonsocket etc. Co. v. Loewenberg**, 11 Wash. 35, 61 Am. St. Rep. 906 (and note, page 908), holding certain creditors not bona fide purchasers under facts stated; Cited in 28 Am. Dec. 487, note.

General Citations.—In 91 Am. Dec. 441, note, validity of title acquired from fraudulent purchaser. So in 2 Am. St. Rep. 173, note. And 92 Am. Dec. 713, note, protection to bona fide purchaser from fraudulent grantor.

23 Cal. 362-363. MATTER OF ESTATE OF HIDDEN.

Estate of Decedent.—Allowance of claim against, by an executor or administrator, and the probate judge, has the force and effect of a judgment, p. 363.

Affirmed in **Estate of Olivera**, 70 Cal. 185; and **Estate of Glenn**, 74 Cal. 568, and holding that an allowed claim must draw interest. Cited to the ruling stated in 65 Am. Dec. 122, note; and 68 Am. Dec. 257, note.

23 Cal. 364-365. LEWIS v. TYLER.

Lien.—One who merely provides food, and takes the care of an animal, as an agister, or a liverystable keeper, has no lien on the property, unless there is a special agreement to that effect, p. 364.

Cited as the rule at common law, in *Kelsie v. Layne*, 28 Kan. 223; 42 Am. Rep. 159, construing Kansas statute giving a lien to keepers of livery stables. So in *Pickett v. McCord*, 62 Mo. App. 473, construing a similar Missouri statute. Cited to the ruling stated, in 37 Am. Dec. 522, note. See Cal. Civ. Code, sec. 1861, by the provisions of which the subject is now regulated.

23 Cal. 365-370. DUDLEY v. THOMAS.

Arbitration.—Arbitrators may select umpire, either before or after the investigation of the matter has commenced, though the articles of submission contain a clause providing for such selection in the event of a disagreement, p. 366.

Approved as authority in *Leonard v. Cox*, 64 Mo. 35. *McDonald v. Bond*, 195 Ill. 127.

23 Cal. 370-372. AMYX v. TABER.

Ordinances.—Under charter of 1862, common council of City of Stockton had power to make ordinances to prevent cattle and hogs from running at large in the city streets, p. 372.

Cited as authority in *McCloskey v. Kreling*, 76 Cal. 512, sustaining validity of ordinance establishing fire limits in the city of San Francisco.

23 Cal. 373-375. HAMM v. ARNOLD.

Estoppel.—Judgment in equity suit held not to be an estoppel in the particular case, p. 375.

Cited, and the principle of the decision approved, in *Marshall v. Shafter*, 32 Cal. 199. Cited, also, in 76 Am. Dec. 479, note, as authority that a verdict and judgment are not conclusive as to matters not passed upon.

23 Cal. 375-379. WATSON v. WHITNEY.

Forcible Entry and Detainer.—Entry of armed men, retaining possession with threats of violence, is forcible, p. 377.

Cited as authority in *Romero v. Gonzales*, 3 N. Mex. 19, holding that when force is relied on, actual force in the nature of a breach of the peace, must be shown. Cited to the ruling stated, in 18 Am. Dec. 146, note.

Venue.—Change of, by reason of bias and prejudice of citizens of county, is a matter resting in the sound discretion of the court, subject to revision only in cases of abuse, p. 378.

Affirmed in *Avila v. Meherin*, 68 Cal. 479. Approved as authority in *Hyde v. Harkness*, 1 Idaho, 603; and *State v. Pomeroy*, 30 Oreg. 20.

Pleadings.—Parties are not held to any great strictness in respect to, in justices' courts, p. 378.

Cited in *Lataillade v. Santa Barbara Gas Co.*, 58 Cal. 5, sustaining sufficiency of complaint.

Challenges.—In impaneling jury, each party may put questions to a juror to show not only that there exists proper grounds for a challenge for cause, but to elicit facts to enable him to decide whether he will make a peremptory challenge, p. 379.

Affirmed in *People v. Car Soy*, 57 Cal. 103; and cited as authority in *Donovan v. People*, 139 Ill. 418; *Basye v. State*, 45 Neb. 271; *State v. Tighe*, 27 Mont. 340, in prosecution for murder it is proper for defendant to ask each juror on voir dire whether he was member of certain fraternal order where counsel stated decedent was probably a member of those orders; 23 Am. Dec. 131, note. Disapproved, as to the latter clause of the ruling stated, in *People v. Hamilton*, 62 Cal. 382.

23 Cal. 379-381. **MERRILL v. FORBES.**

Forcible Entry.—Action of does not lie for a mere trespass on land, p. 381.

Affirmed in *Castro v. Tewksbury*, 69 Cal. 508.

23 Cal. 381-385. **MITCHELL v. DAVIS.**

Forcible Entry and Detainer.—Judgment in ejectment against defendant is admissible in evidence to show extent of plaintiff's possession, and as an estoppel, p. 382.

Cited in *Boardman v. Thompson*, 3 Mont. 395, holding that evidence of staking a claim is competent to show the extent of plaintiff's possession, on the same grounds as a deed would be to show boundaries. Principle of the decision approved and applied in *Clark v. Perdue*, 40 W. Va. 306. Cited, also, in 77 Am. Dec. 553, note.

Law of Case.—Decision of appellate court upon former appeal becomes the law of the case through all its subsequent stages, so long as the evidence develops the same state of facts, p. 383.

Ruling approved in *McLeran v. Benton*, 73 Cal. 337; *S. C. 2 Am. St. Rep.* 817; *People v. Hamilton*, 103 Cal. 496; *Wallace v. Sisson*, 114 Cal. 44; *Dodge v. Gaylord*, 53 Ind. 372; *Judy v. Citizen*, 101 Ind. 22; *Bloomfield v. Buchanan*, 14 Oreg. 184; and *Balch v. Haas*, 73 Fed. Rep. 978, in all of which cases the principle is asserted that "the law of the case" does not apply to the facts, but only to the law. Disapproved in *Meyers v. Dittmar*, 47 Tex. 375; and *Burns v. Ledbetter*, 56 Tex. 284, the Texas appellate court in some cases departing from the law as decided on the former appeal.

Forcible Entry.—Questions of title or right of possession cannot arise in action of, p. 384.

Approved in *Voll v. Hollis*, 60 Cal. 573, 574; *Boardman v. Thompson*, 3 Mont. 392; and *Myers v. Koenig*, 5 Neb. 422. Cited in 77 Am. Dec. 552, note.

Guilty party must first deliver up the possession, forcibly acquired, and then he may litigate his title or right to possession in a proper action, p. 384.

Approved in *Lachman v. Barnett*, 18 Nev. 277. Approved in *Gore v. Altice*, 33 Wash. 338, in action of forcible entry and detainer evidence of title or rightfulness of plaintiff's possession or of good faith and claim of right of defendants is inadmissible.

23 Cal. 385-388. **HERRITER v. PORTER. HIHN, INTERVENOR.**

Cause of Action.—Plaintiff having an entire demand, cannot divide it into distinct parts and maintain separate actions upon each, and if he undertakes such a course, a recovery in one action will bar the others, p. 387.

Ruling approved in *Grain v. Aldrich*, 38 Cal. 519; S. C. 99 Am. D. C. 424; *Wichita etc. R. R. Co. v. Beebe*, 39 Kan. 470; *Thisler v. Miller*, 53 Kan. 521; S. C. 42 Am. St. Rep. 305; *Continental Ins. Co. v. Lumber Co.*, 93 Mich. 142; S. C. 32 Am. St. Rep. 496; *Pierro v. Railway Co.*, 39 Minn. 453; S. C. 12 Am. St. Rep. 675 (cause of action for trespass upon land); and *Little v. City of Portland*, 26 Ore. 243. Cited in *Taub v. McClelland etc. Co.*, 10 Colo. App. 193, but holding rule to be otherwise when such splitting of demand is compulsory; *Stern v. Riches*, 111 Wis. 594, as to successive replevin suits for portions of property converted at same time; *Lindsay v. Stewart*, 72 Cal. 543, holding the rule inapplicable where the defendant in the former action is the aggressor, and the other party relies upon the matters contained in that action for his defense.

Appeal.—Error committed by court below must be shown affirmatively by appellant, p. 388.

Cited as authority in *Federico v. Hancock*, 1 Ariz. Ter. 513.

23 Cal. 390-393. **TREASURER v. COMMERCIAL MINING COMPANY.**

Specific Performance will be decreed of a contract for the sale of personal property, in the absence of an adequate remedy at law, p. 392.

Approved as authority in *Frue v. Houghton*, 6 Colo. 322; *Gage v. Fisher*, 5 N. Dak. 304; *Goodwin Gas Stove etc. Co.'s Appeal*, 117 Pa. St. 535; S. C. 2 Am. St. Rep. 700; *Manton v. Ray*, 18 R. I. 674; S. C. 49 Am. St. Rep. 812; and *McGibben v. Perin*, 49 Fed. Rep. 187, cases of contract relating to corporate stocks; *Adams v. Messinger*, 147 Mass. 188, S. C. 9 Am. St. Rep. 680, contract relating to patents; *Senter v. Davis*, 38 Cal. 453, contract relative to newspaper route, but specific performance

denied in the particular case, it not being shown why damages would not be fully compensated; Cited in *Ashton v. Heggerty*, 130 Cal. 521, as to action to compel transfer to plaintiffs of corporate stock improperly issued to defendants; *Fleishman v. Woods*, 135 Cal. 260, noted under *Johnson v. Rickett*, 5 Cal. 218; 33 Am. Dec. 740, note.

23 Cal. 393-401. **MCDONALD v. BADGER.** 83 Am. Dec. 123.

Homestead.—Declaration of may include several contiguous lots, if they do not exceed in value the amount allowed by the homestead law, p. 396.

Cited in 90 Am. Dec. 180, note; and 91 Am. Dec. 643, note. Referred to in *Greeley v. Scott*, 2 Woods, 662, note, relative to the character of premises in which homestead right may exist.

Same.—Surplus land may be sold on execution where the homestead covers more property than the law allows, p. 400.

Cited in 84 Am. Dec. 572, note; 88 Am. Dec. 696, note; 91 Am. Dec. 644, note; and 6 Am. St. Rep. 54, note.

Husband and Wife.—Property acquired during existence of community is presumed to belong to it, but this presumption may be overcome by clear and satisfactory proof that it was acquired by the separate funds of either spouse, p. 398.

Cited as authority in *Charauleau v. Woffenden*, 1 Ariz. Ter. 273; *Schuyler v. Broughton*, 70 Cal. 283; 73 Am. Dec. 537, note; 73 Am. Dec. 543, note; 86 Am. Dec. 637, 638, note; and 96 Am. Dec. 423, note.

Same.—Community property is subject to control and disposition of husband, p. 398.

Cited in *Heartfield v. Bridges*, 75 Fed. Rep. 49, holding that, in California, the husband may sell or mortgage the community property.

Execution Sale.—Execution defendant cannot defeat the recovery, in ejectment, of the purchaser at the execution sale, by setting up title in a third person, p. 399.

Cited as authority in *Blood v. Light*, 38 Cal. 658; S. C. 99 Am. Dec. 447; *Los Angeles County Bank v. Raynor*, 61 Cal. 147; *Robinson v. Thornton*, 102 Cal. 681; 84 Am. Dec. 573, note; and 4 Am. St. Rep. 724, note.

General Citations.—In 76 Am. Dec. 518, note, as to whether judgment is a lien on the homestead. So in 87 Am. Dec. 278, note; 92 Am. Dec. 117, note; 93 Am. Dec. 351, note; 4 Am. St. Rep. 687, note; 6 Am. St. Rep. 53, note; and 59 Am. St. Rep. 571, note. In 86 Am. Dec. 711, note; and 87 Am. Dec. 273, note, that homestead is exempt from sale under execution.

23 Cal. 401-404. ROWLEY v. HOWARD.

Return of Process.—Return of deputy sheriff, on a process served, is a nullity, unless made in the name of sheriff, p. 403.

Affirmed in *Reinhart v. Lugo*, 86 Cal. 398; S. C. 21 Am. St. Rep. 53. Approved in *Blackwell v. Glass*, 43 Ark. 211; and so in *Robinson v. Hall*, 33 Kan. 143, holding that a sheriff's deed executed by deputy, is invalid, if not executed in name of sheriff.

Same.—And judgment rendered by default in such case is null and void, for want of jurisdiction, p. 403.

Affirmed in *Reinhart v. Lugo*, 86 Cal. 398; S. C. 21 Am. St. Rep. 53. Approved to same effect, in *Gibbens v. Pickett*, 31 Fla. 151.

So in *Palmer v. McMaster*, 8 Mont. 195, holding that in taking a judgment by default, the statute should be strictly followed.

Cited in 26 Am. Dec. 415, note; and 83 Am. Dec. 76, note.

Justices' Courts.—Jurisdiction of is special and limited, and the law presumes nothing in favor of their jurisdiction, p. 403.

Affirmed in *Ex parte Kearny*, 55 Cal. 217; *Cardwell v. Sabichi*, 59 Cal. 493; and *Kane v. Desmond*, 63 Cal. 467.

Justice's Court.—Jurisdiction does not exist where title to realty is involved, though answer is not verified, p. 403.

Cited in *King v. Kutner*, 135 Cal. 68, applying rule to action for trespass.

Judgments.—Cannot be impeached in a collateral action, for errors or irregularities, but may be for want of jurisdiction, p. 404.

Cited in *Lomme v. Sweeney*, 1 Mont. 591, holding that an irregular judgment will support an execution and may be enforced.

23 Cal. 404-408. HICKS v. WHITESIDE. S. C. on former appeal, 18 Cal. 700; and on third appeal, 35 Cal. 152.

Possessory Act.—To recover in an action under the "possessory act" of California, the plaintiff must show a complete compliance with the provisions of the act, p. 408.

Affirmed in *Crowell v. Lanfranco*, 42 Cal. 656.

23 Cal. 409-410. HAYNES v. CALDERWOOD.

Lis Pendens.—Purchaser after lis pendens filed is bound by the judgment rendered in the action, p. 410.

Affirmed in *Sharp v. Lumley*, 34 Cal. 615.

Homestead.—Failure to file declaration of, within the time fixed by the statute, is a waiver of the homestead right, p. 412.

23 Cal. 410-413. IN MATTER OF ESTATE OF REED.

Affirmed in *Noble v. Hook*, 24 Cal. 639. Denied in *In re Swearinger*, 5 Sawy. 54, construing the Nevada statute adopted from California.

23 Cal. 415-418. IN MATTER OF ESTATE OF JAMES.

Homestead.—By homestead act of 1860, the legislature seems to have intended that the homestead, upon the death of either husband or wife, should descend to and rest absolutely in the survivor, p. 418.

Cited, discussing the character of the homestead under act of 1860, in *Tipton v. Martin*, 71 Cal. 327. Approved construing homestead law of Nevada, in *Smith v. Shrieves*, 13 Nev. 309.

Same.—Probate court has no jurisdiction to determine question of title to homestead, p. 418.

Affirmed in *Rich v. Tubbs*, 41 Cal. 36; and *Estate of Burton*, 63 Cal. 38. Cited in *McClay v. Arnett*, 47 Ark. 454, holding an order of the probate court for the sale of the homestead to be a nullity.

23 Cal. 418-420. SPENCER v. DOANE.

New Trial.—Newly-discovered evidence, merely cumulative, is no ground for, p. 420.

Approved in *Barton v. Laws*, 4 Colo. App. 219.

23 Cal. 427-431. GRIGGS v. CLARK.

Partnership.—Jurisdiction of probate courts over estates of decedents does not divest district courts of their general jurisdiction, as courts of chancery, over actions for settlement of partnership affairs, p. 429.

Cited in *Toland v. Earl*, 129 Cal. 156, 79 Am. St. Rep. 106, but denying jurisdiction of equity court to construe will then under probate in probate court; *Dunlap v. Byers*, 110 Mich. 115, on point that foreign equity court in action for dissolution can direct its receiver to sell partnership lands beyond its jurisdiction. Cited to the ruling stated in 63 Am. Dec. 84, note; and 73 Am. Dec. 560, note. Explained and distinguished in *Rosenberg v. Frank*, 58 Cal. 416.

In absence of any special agreement between partners upon the subject, they share equally both profits and losses, p. 429.

Cited in *Berry v. Woodburn*, 107 Cal. 510, discussing nature of mining partnership; *Comstock v. McDonald*, 126 Mich. 151, construing partnership agreement as to profits.

Surviving partner who expends his time and labor in the care and management of the partnership property, by which its value is enhanced, should receive compensation therefor, to be deducted out of the profits realized from the enhanced value of the property, p. 430.

Principle approved and applied in *Maynard v. Richards*, 166 Ill. 482, 57 Am. St. Rep. 152; *Wisner v. Fields*, 11 N. Dak. 260, denying partner compensation for services in regular course of partnership work; 57 Am. Dec. 680, note; 65 Am. Dec. 302, note; and 8 Am. Rep. 212, note.

Same.—In an accounting, the transactions of each and all the partners should be taken into account, and the decree should include all these, so as to leave nothing for future litigation, p. 431.

Affirmed in *Bremner v. Leavitt*, 109 Cal. 132, and principle approved in *Watson v. Sutro*, 86 Cal. 529.

General Citation.—*Wilmington v. Ewing*, 2 Penne. (Del.) 104.

23 Cal. 431-444. **KILE v. TUBBS.** S. C. 28 Cal. 42; 32 Cal. 332.

Constructive Possession.—One who takes and holds actual possession of a part of a tract of land, bona fide, claiming the whole under a deed in which the entire tract is described by metes and bounds, is not limited in his possession to the actual inclosure, but acquires constructive possession to the entire tract, no person being in the adverse possession at the time, p. 436.

Approved in *Walsh v. Hill*, 38 Cal. 487, 489; *Kendrick v. Latham*, 25 Fla. 837; and *Joy v. Stump*, 14 Oreg. 364. Cited in *Lockey v. Horsky*, 4 Mont. 483; and 82 Am. Dec. 747, note.

State Lands.—State has no right to sell lands within its limits, to which it has no present or prospective title, by grant from the United States, p. 441.

Cited in *Tarpey v. Madsen*, 17 Utah, 360, holding right of pre-emptioner under United States not lost or abandoned under facts stated; 49 Am. Dec. 111, note.

Pre-emption Rights.—Defendant in ejectment, in possession as a pre-emptioner under the laws of the United States, may attack a patent given by the state to the plaintiff for the land as swamp and overflowed, by evidence showing that the land was dry, p. 442.

Ruling affirmed in *Kyle v. Tubbs*, 28 Cal. 403; *Thornton v. Thompson*, 28 Cal. 603; *Robinson v. Forrest*, 29 Cal. 321; *Kyle v. Tubbs*, 32 Cal. 338; *Read v. Caruthers*, 47 Cal. 182; and principle approved and applied in *Rosecrans v. Douglass*, 52 Cal. 216; and *Burling v. Thompson*, 77 Cal. 261.

23 Cal. 444-447. **WAUGENHEIM v. CHILDS.**

Sales.—Vendor of personal property is a competent witness for his vendee in contests respecting the validity of sales between the creditors of a vendor and his vendee, p. 446, overruling *Howe v. Scannell*, 8 Cal. 325.

Cited in 53 Am. Dec. 522, note.

Notes Cal. Rep.—76

23 Cal. 447-452. CONNOR v. MORRIS

Appeals.—It is unnecessary to examine objections to findings reported by referee, where he was ordered to try all the issues both of law and fact, and report a judgment, but was not ordered to report the facts, p. 451.

Referred to without expressing an opinion upon the authority of the decision, in *Lucas v. San Francisco*, 28 Cal. 595. Cited in *Reever v. White*, 8 Utah, 190, noted under *Plant v. Fleming*, 20 Cal. 93.

Mandamus.—In petition for mandamus to county treasurer, to pay county warrants, it is sufficient to aver that the warrants were drawn by the county auditor, as it will not be presumed that the auditor violated his duty in issuing the warrants, p. 450.

Approved as authority in the similar case of *Jones v. Morgan*, 67 Cal. 310.

Appeal.—Depositions on file with the clerk may be called for by a mere reference, and afterward inserted in the statement at the proper place, p. 450.

Cited as authority in *Sharon v. Sharon*, 79 Cal. 643.

County Auditor has no power to draw his warrant on the county treasurer for the payment of a claim which the board of supervisors have not expressly "ordered" to be paid, p. 452.

Cited in *Lamberson v. Jefferds*, 116 Cal. 494, holding that the auditor is not protected by an order of the supervisors allowing an illegal claim. Examined and doubted in *Beeney v. Irwin*, 6 Col. App. 70, 71.

23 Cal. 452-457. RUPLEY v. WELCH.

Waters.—Prior appropriation of water for purposes of irrigation is good against miners as well as against others, p. 455.

Examined and distinguished in *Natoma etc. Min. Co. v. Hancock*, 101 Cal. 55, 56, 67. Cited, discussing rights of miners, in *Lux v. Haggin*, 69 Cal. 447, dissenting opinion of Ross, J. So in 63 Am. Dec. 96, 110, note; and 91 Am. Dec. 694, note.

23 Cal. 457-461. VAN WINKLE v. STOW.

Mechanic's Lien is enforced by a special statutory proceeding, in the nature of a proceeding in rem against the property alone, p. 458.

Referred to in *Dickinson v. Corbett*, 10 Nev. 441, treating of jurisdiction to enforce mechanics' liens. Cited in 70 Am. Dec. 754, note, as authority that all parties interested in premises prior to suit or proceeding must be made parties.

23 Cal. 461-462. BALDWIN v. FERRE.

New Trial.—Statement on, and amendments thereto, must be in-

incorporated into one document, and authenticated by the signature of the judge, or the statement will not be considered, p. 462.

Affirmed in *Smith v. Davis*, 55 Cal. 28. So in *Fritsch v. Stampfli*, 117 Cal. 443, the bill of exceptions being unintelligible, by reason of failure to incorporate the proposed amendments and the proposed bill into one paper.

23 Cal. 463. **PARSONS v. SAN FRANCISCO.**

City and County of San Francisco is not liable, under consolidation act, for injuries received on public highways, p. 463. J.A.

Cited in *Mayor v. Ewing*, 2 Penna. 104, sustaining constitutionality of similar statutory provisions.

23 Cal. 464-468. **CREANOR v. NELSON.**

Highway.—Taking land for a public highway will not be enjoined if the land has been duly condemned, and compensation provided and tendered to the owner of the land, but refused by him, p. 466.

Cited as authority to the ruling stated, in *Oliver v. Railroad Co.*, 83 Ga. 265; *New Orleans etc. R. R. Co. v. Frederic*, 46 Miss. 12; and *St. Louis etc. Ry. Co. v. Clark*, 119 Mo. 371.

General Citations.—In *Kimball v. Alameda County*, 46 Cal. 24, that boards of supervisors have jurisdiction over roads, ferries, and bridges within their respective counties. In 53 Am. Dec. 367, note, treating of consequential injuries through work authorized by law.

23 Cal. 468-471. **WARD v. PRESTON.**

Agency.—Declarations of agent are admissible against his principal, if made in discharge of his agency, p. 470.

Approved in *Pacific Livestock Co. v. Gentry*, 38 Or. 286, statements of general superintendent of company which was trying to acquire land that occupant thereof was in employ of company made to acquaintance of occupant in course of inquiry as to character, are admissible against company in action between occupant and company over title; 12 Am. Dec. 326, note.

Evidence.—Striking out erroneous evidence admitted, and instructing the jury to disregard it, cures the error, p. 471.

Distinguished in *Juergens v. Thom*, 39 Minn. 460, in which case exception to the admission of the evidence was taken at the time.

23 Cal. 472-475. **IRVINE v. McKEON.**

Corporations.—Statute making directors of a corporation, liable for the debts of the corporation, where they are guilty of certain official delinquencies, is penal in its nature, and is to be strictly construed, p. 475.

Approved in *Moore v. Lent*, 81 Cal. 506; *Savings and Loan Soc. v. McKoon*, 120 Cal. 179; *Patterson v. Thompson*, 86 Fed. Rep. 87; *Mitchell v. Hotchkiss*, 48 Conn. 21, 40 Am. Rep. 152; and *State Sav. Bank v. Johnson*, 18 Mont. 442, 58 Am. St. Rep. 592. Cited in *Snell v. Bradbury*, 139 Cal. 382, applying rule to construction of section 1193, Code of Civil Procedure; *Steam Engine Co. v. Hubbard*, 101 U. S. 192, holding that the statute can be enforced only in the state where passed; *Hodges v. New England Screw Co.*, 53 Am. Dec. 651, note, discussing the subject at length.

29 Cal. 476-481. IN MATTER OF ESTATE OF PACHECO. S. C.
subsequent appeal, 29 Cal. 224, 226, the court holding that notwithstanding the death of one of the proposed administrators, there could be no objection to carrying the judgment into effect, to the extent that it could be done, by the appointment of the survivor.

Administration.—It is the duty of the court to revoke letters of administration at any time in favor of a preferred petitioner if competent, p. 481.

Approved in *In re Li Po Tai*, 108 Cal. 487, construing section 1363 of the Code of Civil Procedure, and the rule held to apply where the decedent has left a will as well as to cases of intestacy. So in *In re Nickala*, 21 Nev. 464, holding that where all parties applying for administration are equally qualified and competent the court has no discretion, but must appoint the applicant that, under the statute has the prior right. Distinguished in *Estate of Carr*, 25 Cal. 587, pointing out the only parties who can obtain revocation of letters of administration as an absolute right.

Same.—Inability of applicant to read or write, or speak English, does not establish incompetency for administration, p. 480.

Cited as authority in *In re Banguier*, 88 Cal. 311, construing the words "want of integrity" as used in the statute, and holding that they do not apply to a case where there is a simple conflict of interest in regard to the estate between the executor named in a will and the other legatees. Cited to the ruling stated, in 54 Am. Dec. 521, note.

23 Cal. 481-488. PHOENIX WATER CO. v. FLETCHER.

Waters.—Prior appropriator has a right to have the water flow down above the point of his appropriation without interruption or diminution in quantity, p. 486.

Affirmed in *Natoma Water etc. Co. v. McCoy*, 23 Cal. 492; and *Hill v. Smith*, 27 Cal. 483. Approved in *Atchison v. Petersen*, 1 Mont. 568; *Carson v. Hayes*, 39 Or. 102, subsequent appropriator of water for mining purposes cannot impound waters of stream and send it down at irregular intervals and with irregular flow to prior appropriator who uses it for

mining purposes, and he may be enjoined; on subject of water rights, in 43 Am. Dec. 279, 282, note; 68 Am. Dec. 331 note.

23 Cal. 489-490. McDERMOTT v. HIGBY.

Special Verdict.—Special findings of jury will control general verdict, if inconsistent therewith and covering all the issues, pp. 489, 490.

Cited as authority to the ruling stated, in *Ogg v. Shehan*, 17 Neb. 324.

23 Cal. 492-495. MURRAY v. SUPERVISORS OF MARIPOSA COUNTY.

Certiorari.—Writ of *Hes* to review action of board of supervisors in granting a ferry license, p. 495.

Cited as authority in *Levee District v. Farmer*, 101 Cal. 181, review of action of board in vacating or closing up a certain road. So in *Dexter v. Town Council*, 17 R. I. 224, holding that the action of a town council in granting a liquor license may be reviewed on certiorari. So in *Wulzen v. Board of Supervisors*, 40 Am. St. Rep. 40, note, where the subject is discussed at length, and the authorities reviewed.

Distinguished in *S. V. W. W. v. Bryant*, 52 Cal. 135, denying writ to review action of supervisors when legislative in character as to passage of ordinance. Overruled in *People v. Dean*, 122 Cal. 424, denying writ in case of granting franchise by supervisors where similarly legislative.

23 Cal. 495-501. BULLOCK v. HUBBARD. S. C. 83 Am. Dec. 130.

Partnership.—When some of the partners are members of other firms, rule as to the preference of partnership over individual creditors applies, p. 501.

Cited as authority in *Whelan v. Shaip*, 115 Cal. 329. So in *In re Assignment of Gilbert*, 84 Wis. 114; and *McLaughlin v. Mulloy*, 14 Utah, 493, holding that one firm may become partner in another firm, and such partner will be treated as a constituent member of the new firm. Cited, bearing on rights of partnership creditors, in 73 Am. Dec. 610, note; 88 Am. Dec. 235, note; 89 Am. Dec. 631, note; 95 Am. Dec. 519, note; and 2 Am. St. Rep. 771, note.

23 Cal. 501-506. HUGHES v. DEVLIN.

Mining Claim.—The interest of miners in mining claims upon the public lands is real estate, and mining claims are subject to partition, pp. 505, 506.

Cited as authority, holding that question of title to mining ground is not a subject for arbitration, in *Spencer v. Winselman*, 42 Cal. 483; *Gillett v. Gaffney*, 3 Colo. 355, as applicable to townsite lands; *Mt. Rosa etc. v. Palmer*, 26 Colo. 62, 77 Am. St. Rep. 250, noted under *Merved etc. Co. v. Fremont*, 7 Cal. 317; *Catlin etc. Co. v. Lloyd*, 176 Ill.

284, noted under *Merritt v. Judd*, 14 Cal. 60; concurring and dissenting opinions in *Hall v. Vernon*, 47 W. Va. 297, 300, denying partition by division of oil and gas owned by co-owners when separate from the surface; *Lavagnino v. Uhlig*, 26 Utah, 24, under Revised Statutes of 1898, section 2498, subdivision 10, mining claims are real property and pass by deed; *Gold Hill Quartz Min. Co. v. Ish*, 5 Oreg. 106, holding that the right of mining for the precious metals is a franchise, and the attending circumstances raise the presumption of a general grant from the sovereign of the privilege; *Aspen etc. Smelting Co. v. Ruckar*, 28 Fed. Rep. 222, construing Colorado statute providing for partition of mining claims. Ruling approved in *Ames v. Ames*, 160 Ill. 601. Cited in 68 Am. Dec. 274, note; and 70 Am. Dec. 643, note. Distinguished in *Smith v. Cooley*, 65 Cal. 48, and held to be inapplicable in the case of a grant of an undivided interest in a piece of mining ground expressly conditioned that no rights are conveyed, except a mining right upon the premises. The interest of the vendee is not an estate which can be the subject of an action for partition.

Partition.—All material allegations in a complaint for partition which are not denied by the answer are deemed admitted for the purposes of the trial, p. 507.

Approved in *Reinhart v. Lugo*, 75 Cal. 640, 641.

23 Cal. 508-511. BLACKMAN v. PIERCE.

Stoppage in Transitu.—Vendor of goods who has sold them on credit to an insolvent whose insolvency was unknown at the time, may reclaim them at any time before they go into possession of the insolvent purchaser, p. 510.

Affirmed in *Jones v. Earl*, 37 Cal. 632; S. C. 99 Am. Dec. 338; and approved as authority in *Ward v. Clark*, 35 Kan. 315; *Scott v. Dry-Goods Co.*, 48 Mo. App. 526; and *Fenkhausen v. Fellows*, 20 Nev. 316. Cited in 19 Am. Rep. 90, note. So in 42 Am. Dec. 260, note; and 29 Am. Dec. 389, note, goods in hands of warehouseman.

Same.—Right of stoppage in transitu is paramount to any lien on the goods claimed by third persons through the purchaser, p. 511.

Cited as authority to the ruling stated in *Farrell v. Richmond etc. R. R. Co.*, 102 N. C. 401; S. C. 11 Am. St. Rep. 763; and *Hause v. Judson*, 29 Am. Dec. 303, extended note.

23 Cal. 511-513. HALE v. BRENNAN.

Partnership.—Books of defendant are admissible against plaintiff, if other evidence tends to show that plaintiff and defendant were partners when services sued for were rendered, p. 513.

Approved as authority in *Bryce v. Joynt*, 63 Cal. 377; S. C. 49 Am. Rep. 95.

23 Cal. 514-519. BISHOP v. HUBBARD. 83 Am. Dec. 132.

Homestead cannot be established upon property held in joint tenancy, or tenancy in common, p. 517.

Referred to as correctly stating the law prior to act of March 9, 1863, in *Carroll v. Ellis*, 63 Cal. 442; and *Fitzgerald v. Fernandez*, 71 Cal. 507. Cited as authority in *Michigan Trust Co. v. Chapin*, 106 Mich. 386, S. C. 58 Am. St. Rep. 491, holding that a homestead interest cannot be acquired in real property constituting part of the assets of a partnership as against the creditors thereof. So in *Lindley v. Davis*, 6 Mont. 456; but in the same case again, 7 Mont. 206, 214, it was held that a cotenant is entitled to a homestead in the realty held in cotenancy, under the laws of Montana. Cited in 63 Am. Dec. 122, 123, note; 30 Am. St. Rep. 560, note; 70 Am. St. Rep. 107, note.

Homestead.—Where a partnership, in failing circumstances, converts its means into real estate to be claimed as a homestead by one of the firm, in order to place those means beyond the reach of creditors, the land is nevertheless liable to the executions of the creditors, p. 518.

Approved as authority in *Shim v. MacPherson*, 58 Cal. 599; dissenting opinion in *In re Wilson*, 123 Fed. 24, majority holding under California laws use of funds by insolvent to discharge liens on homestead is not fraudulent, and does not invalidate claim to homestead exemption or give bankruptcy trustee right to subject homestead to lien for amount so derived from his creditors; cited in 87 Am. Dec. 275, note; and 83 Am. Dec. 129, note. So, as to homestead exemption generally, in 86 Am. Dec. 711, note; 7 Am. St. Rep. 98, note; and 58 Am. St. Rep. 904, note.

23 Cal. 519-522. HENDERSON v. ALLEN.

Mining Agreement.—Construed, and held not to create the relation of landlord and tenant between the parties, but that it made them tenants in common, or partners in mining, p. 521.

Distinguished in *Anaconda etc. Min. Co. v. Butte etc. Min. Co.*, 17 Mont. 523, setting forth the essential conditions to the existence of a mining contract under the Montana Code. Cited in 18 Am. Dec. 445, note; and 50 Am. St. Rep. 845, note.

23 Cal. 522-526. McCREA v. CRAIG.

Mechanics' Liens commences and attaches to the property at the time of the commencement of the work, or the beginning to furnish the materials, p. 525.

Affirmed in *Pacific Mut. L. Ins. Co. v. Fisher*, 106 Cal. 236.

Same.—Allegation in complaint that plaintiff furnished the materials between the 6th of April, 1862, and the 28th of June, 1862, construed to mean that he commenced furnishing the materials on the 6th of April, and continued so to do from time to time till June 28th, p. 525.

Construction approved in *Rust-Owen Lumber Co. v. Fitch*, 3 S. Dak. 217.

Same.—Must be enforced in accordance with the requirements of the law in force at the time such proceedings are had, p. 525.

Cited as authority in *Groesbeck v. Barget*, 1 Kan. App. 64; *Hopkins v. Jamieson-Dixon Mill Co.*, 11 Wash. St. 315; and *McQuesten v. Morrill*, 12 Wash. St. 341.

General Citations.—Referred to as authority that a subcontractor may acquire a lien for work and materials in *Colter v. Frese*, 45 Ind. 107; *Albright v. Smith*, 2 S. Dak. 591; *Sabin v. Connor*, Fed. Cas. No. 12,197.

23 Cal. 526-527. **CUMMINS v. SCOTT.**

Appeal.—Filing of new undertaking on, and the sureties therein held liable, p. 527.

Cited in *Meredith v. Santa Clara Min. Assn.*, 60 Cal. 620, as authority that rights of sureties in undertaking may be waived.

Forcible Entry.—Complaint must allege actual possession of plaintiff, p. 527.

Cited in *Knowles v. Crocker Estate Co.*, 125 Cal. 265, holding complaint demurrable for uncertainty as to allegations.

23 Cal. 528-537. **DYSON v. BRADSHAW.**

Ejectment.—Defendant may show in defense that plaintiff has divested himself of the title before commencement of action, by executing a deed to a third party, although the defendant does not connect himself with the title of such third party, p. 536.

Cited as authority in *Mallett v. Uncle Sam Min. Co.*, 1 Nev. 202; S. C. 90 Am. Dec. 492. Also cited in 70 Am. Dec. 620, note; and 70 Am. Dec. 698, note. Ruling approved, but held inapplicable, in *Robrecht v. Reid*, 114 Cal. 361.

Deed.—Delivery in escrow does not take effect except upon strict compliance with the conditions specified, p. 536.

Affirmed, holding that no title will pass without delivery, in *Boyd v. Slayback*, 63 Cal. 494; and approved as authority, holding that a deed delivered as an escrow is not effective if placed in the hands of the grantee in violation of a condition upon which the person who holds it as an escrow is authorized to deliver it, in *Stanley v. Valentine*, 79 Ill. 548; *Harkreader v. Clayton*, 56 Miss. 391; S. C. 31 Am. Rep. 373; and *Tyler v. Cate*, 29 Oreg. 524; *Hilgar v. Miller*, 42 Or. 556, holding conditions of escrow to care for grantor during life and to provide decent burial for remains substantially complied with; Referred to as correctly stating an abstract proposition, in *Quick v. Milligan*, 108, 421; S. C. 58 Am. Rep. 50, but holding that where a deed is put in the hands of a

third person, to be delivered only on payment of the purchase money, the grantee being in possession, and subsequently obtaining the deed without payment, by fraudulent representations to the custodian, and deeding the land to a purchaser in good faith, the original grantor is estopped as to such purchaser.

23 Cal. 540-554. **WALDEN v. MURDOCK.** 83 Am. Dec. 135.

Appeal.—On appeal from order refusing new trial, the appellate court may, if satisfied that the lower court erred, reverse the order and grant a new trial, the effect of which will be to vacate the judgment, p. 549.

Distinguished in *Bornheimer v. Baldwin*, 42 Cal. 31, and holding that the pendency of an appeal from an order denying a new trial will not operate to prolong the time for an appeal from the judgment. So in *Pierce v. Birkholm*, 110 Cal. 672, in which case it is held, that pending an appeal from an order granting a new trial, the judgment remains subsisting for the purposes of an appeal, and an appeal therefrom cannot be dismissed upon the ground that it was vacated by the order granting a new trial. Cited in *Sharon v. Sharon*, 79 Cal. 655, 691, to the point that the disposition of one of the two appeals allowed by the statute does not affect the rights of the party under the other. Referred to in 97 Am. Dec. 769, note.

Same.—New trial statement is sufficient without preparing another statement on appeal from order granting or refusing new trial, p. 549.

Cited in 93 Am. Dec. 409, note.

Debtor and Creditor.—Debtor in failing or insolvent circumstances may prefer one creditor to another, p. 550.

Cited to the point stated, in 83 Am. Dec. 134.

Sales.—Sufficiency of delivery depends upon character of articles and circumstances, pp. 550, et seq.

Approved in *Williams v. Lerch*, 56 Cal. 334, goods in care and keeping of third person; *Bethel Steam Mill Co. v. Brown*, 57 Me. 21; S. C. 99 Am. Dec. 757, symbolical delivery of logs. Cited in *Rail v. Lumber Co.*, 47 Minn. 425; 49 Am. Dec. 336, note; 87 Am. Dec. 482, note; 88 Am. Dec. 467, note; and 99 Am. Dec. 758, note.

23 Cal. 554-569. **MILLER v. NEWTON.**

Married Woman may contract for services to be rendered in the protection and preservation of her separate estate, and for services thus rendered, on the faith of the estate, a court of equity will decree and enforce a lien upon it, p. 564.

Overruled in *MacLay v. Love*, 25 Cal. 375, 378, 379, S. C. 85 Am. Dec. 137, 138, holding that a married woman could not bind her separate estate in equity without statutory method of encumbrancer. But af-

firmed in *Terry v. Hammonds*, 47 Cal. 36; and *Friedberg v. Parker*, 50 Cal. 105, the amendment of 1862 to the act of 1850, taking the personal estate of the wife out of the rule laid down in *Macleay v. Love*, *supra*. Cited in *Radford v. Carwile*, 13 W. Va. 646, 677, construing the West Virginia statute, and holding that a married woman, as to property settled to her separate use, is to be regarded as a feme sole. Denied in *Kantrowitz v. Prather*, 31 Ind. 103, S. C. 99 Am. Dec. 596, holding that credit given to a married woman on the faith of her separate property is not sufficient to bind it, or its income. Cited in 34 Am. Dec. 353, note.

23 Cal. 570-574. **FOGARTY v. SAWYER.**

Mortgagee.—Sale under a mortgage containing a power of sale need not be conducted by the mortgagee in person, and is valid if he employs an auctioneer to make the sale for him, p. 574.

Approved as authority in *Kennedy v. Dunn*, 58 Cal. 340; and *Palmer v. Young*, 96 Ga. 248; S. C. 51 Am. St. Rep. 137. Cited in 41 Am. Dec. 174, note, as authority that notary may take acknowledgment under his private seal, if a statute allows it.

23 Cal. 575-576. **PATTERSON v. KEYSTONE MINING CO.** 30 Cal. 360.

Mining Claim.—Title to, will pass by a verbal sale accompanied by an actual transfer of the possession, p. 576.

Referred to as so deciding, in *Patterson v. Keystone Min. Co.*, 30 Cal. 363, discussing the question whether, since the act of 1860, such sale must be in writing. So, in *Hardenbergh v. Bacon*, 33 Cal. 381, where it is said that the doctrine has no bearing when the interest held in the mining ground is considered as real estate. And so, in *Hopkins v. Noyes*, 4 Mont. 558, and holding that the interest in a mining claim can only be transferred by deed under Montana law. Cited in *McClintock v. Bryden*, 63 Am. Dec. 107, note, where the cases bearing upon the subject are collected; referred to, in 76 Am. Dec. 571, note; and 76 Am. Dec. 579, note.

23 Cal. 577-581. **PEOPLE v. BAILEY.**

Embezzlement.—Statute confines crime of, to cases where the clerk or servant receives the money or property directly from the hands of his master or employer, p. 580.

Denied, construing similar statute, in *Ex parte Ricord*, 11 Nev. 291, 292. So in *State v. Fournier*, 12 Mont. 237, 238. Cited as authority that the nature, purpose and character of the bailment or trust, must be stated in the indictment, in 98 Am. Dec. 151, 152, note.

23 Cal. 581-585. HODGKINS v. HOOK.

Sale of Personalty.—Question of change of possession, where the testimony is conflicting, should be submitted to the jury, p. 584.

Cited as authority in the similar case of Tuckwood v. Hawthorn, 67 Wis. 339. Referred to in 12 Am. Dec. 470, note; 65 Am. Dec. 496, note.

23 Cal. 585-587. IN MATTER OF ROMAINE.

Fugitive from Justice.—Constitutional provisions relative to, construed, pp. 589, et seq.

Cited in Matter of Fetter, 57 Am. Dec. 390. Extended note on subject. So in 32 Am. Rep. 358, note.

Same.—Warrant should specify offense, and show all the facts upon which the right is based, p. 591.

Cited as authority for sufficiency of warrant, in Kingsbury's case, 106 Mass. 225. So in 57 Am. Dec. 398.

Same.—Defective warrant will be enforced on habeas corpus when the requisition supplies the defect, p. 592.

Cited as authority in State v. Richardson, 34 Minn. 116.

23 Cal. 592-593. DE LA GUERRA v. BURTON.

Judge is disqualified to try action if related to either party thereto within the third degree of consanguinity, p. 593.

Approved in People v. De La Guerra, 24 Cal. 77.

23 Cal. 593-594. ENSMINGER v. MCINTYRE.

Injunction does not lie to restrain miners from digging up fruit trees or crops unless planted before ground was located for mining, p. 594.

Cited in 63 Am. Dec. 96, note; and 91 Am. Dec. 695, note.

Nonsuit should be granted if plaintiff's evidence would not sustain a verdict in his favor, p. 594.

Approved in Meyer v. Houck, 85 Iowa, 326.

23 Cal. 594. MAYO v. MARSHALL.

Redemption from Tax Sale.—Owner of undivided interest cannot redeem it by payment of proportion of total amount, p. 595.

Cited in Rich v. Palmer, 6 Or. 340, noted under People v. McEwen, 23 Cal. 56.

23 Cal. 596-630. HOBBS v. DUFF.

Setoff.—Assignee of judgment takes subject to right of, although he buys in good faith and for a valuable consideration, p. 626.

Cited as authority, applying the rule stated, in *Wells v. Clarkson*, 2 Mont. 232, 233; note to *Chilstrom v. Eppinger*, 78 Am. St. Rep. 55, on general subject.

Jurisdiction in equity relative to setoffs is more extensive than that at law, and where the law cannot give a proper remedy, as in case of the insolvency of one of the parties, equity will afford relief, p. 628.

Approved in *Lyon v. Petty*, 65 Cal. 324.

Cited as authority in *Barnes v. McMullins*, 78 Mo. 271, and held applicable in cases of insolvency or nonresidence; *Patterson v. Ward*, 8 N. Dak. 89, but denying right of setoff under facts stated; *Clark v. Sullivan*, 2 N. Dak. 107, allowance of setoff in equity of surety.

Right of equitable setoff is not lost by failure to plead it as a defense, p. 629.

Cited as authority to the ruling stated in *Hill v. Cooper*, 6 Oreg. 188; and so in 89 Am. Dec. 492, note.

General Citations.—Referred to in *Hobbs v. Duff*, 43 Cal. 488, as containing a concise and accurate history of the litigation out of which the latter suit arose; setting forth also the prominent points decided in the principal case, and holding that the decision on the points mentioned, became the law of the case; *Lyon v. Petty*, 65 Cal. 324, discussing generally the nature of cross-demands. So in *Roberts v. Donovan*, 70 Cal. 112, holding that in an action to enforce the joint liability of the defendants, one of them cannot set up by way of counterclaim a cause of action existing in his favor alone against the plaintiff.

23 Cal. 630-631. FOWLER v. HARBIN.

Foreclosure.—Relief to purchaser at foreclosure sale, on application to have the sale set aside and cancelled, p. 630.

Referred to in *Abadie v. Lobero*, 36 Cal. 399, as deciding nothing affecting the question under consideration. Also referred to in *Boggs v. Olark*, 37 Cal. 238, discussing estoppel by judgment.

Cited in *Boggs v. Fowler*, 76 Am. Dec. 567, note.

23 Cal. 631-633. PEOPLE v. COLMERE.

Challenge to grand jury by defendant in custody, must be taken when impaneled, before indictment found, p. 632.

Affirmed in *People v. Henderson*, 28 Cal. 469.

Failure of court before adjournment to admonish jury not to converse among themselves, etc., on any subject connected with the trial, is not ground for reversal, unless it is shown that the defendant was injured thereby, p. 633.

Cited as authority to the ruling stated, in *State v. Gray*, 19 Nev. 222. Approved in *McKnight v. United States*, 130 Fed. 669, applying rule where admonition had been given on previous adjournments.

23 Cal. 633-636. CAMDEN v. VAIL.

Mortgage executed by married woman on real estate, without signature of husband, is void, and cannot be enforced, p. 635. Affirmed in S. C. 24 Cal. 396, on rehearing.

Approved in dissenting opinion of McKee, J., in *Reis v. Lawrence*, 63 Cal. 139, in which case it is held, that where a married woman obtains a decree of divorce which is void, but assumes her maiden name, lives apart from her husband, and continuously acts and represents herself as a feme sole, a deed of conveyance of her separate real estate, made and acknowledged by her as an unmarried woman, is valid and binding. Cited as authority in *Radford v. Carwile*, 13 W. Va. 668.

Vendor's Lien.—Equitable lien which a vendor has for the unpaid purchase money of land sold and conveyed, is waived by taking a mortgage to secure the same, although the mortgage is void and cannot be enforced, p. 636, on authority of *Baum v. Grigsby*, 21 Cal. 172; S. C. 81 Am. Dec. 153.

Cited and the ruling approved, in *Wells v. Harter*, 56 Cal. 344; *Tripp v. Duane*, 74 Cal. 92; *McKeown v. Collins*, 38 Fla. 290; *Partridge v. Logan*, 3 Mo. App. 516; *Boies v. Benham*, 127 N. Y. 627; *Pease v. Kelly*, 3 Oreg. 419; and *Featherstone v. Emerson*, 14 Utah, 27, in dissenting opinion of Zane, C. J.

Same.—Such lien is not assignable, and the assignee of the right to recover the money for which the land was sold cannot enforce the lien, pp. 635, 636.

Cited as authority to the ruling stated in *Avery v. Clark*, 87 Cal. 624; S. C. 22 Am. St. Rep. 275. So in 81 Am. Dec. 156, note.

23 Cal. 636-650. RICKETSON v. COMPTON.

Authority of Attorney to sign notice of appeal is presumed, p. 649.

Cited in *Pac. Pav. Co. v. Vixelich*, 141 Cal. 8, noted under *Turner v. Caruthers*, 17 Cal. 431.

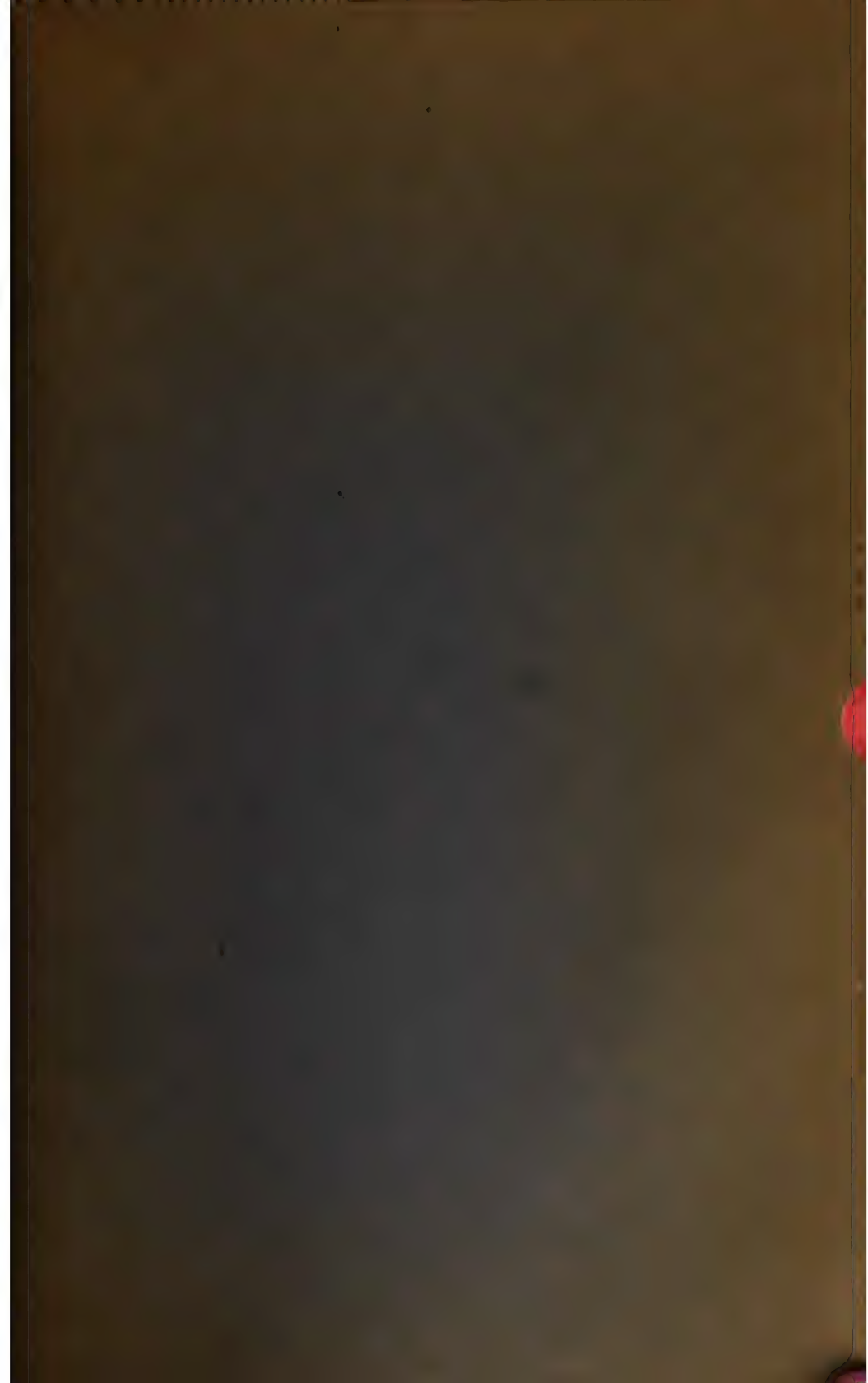
Appeal.—Not ground for motion to dismiss, that it is sham and frivolous, p. 649.

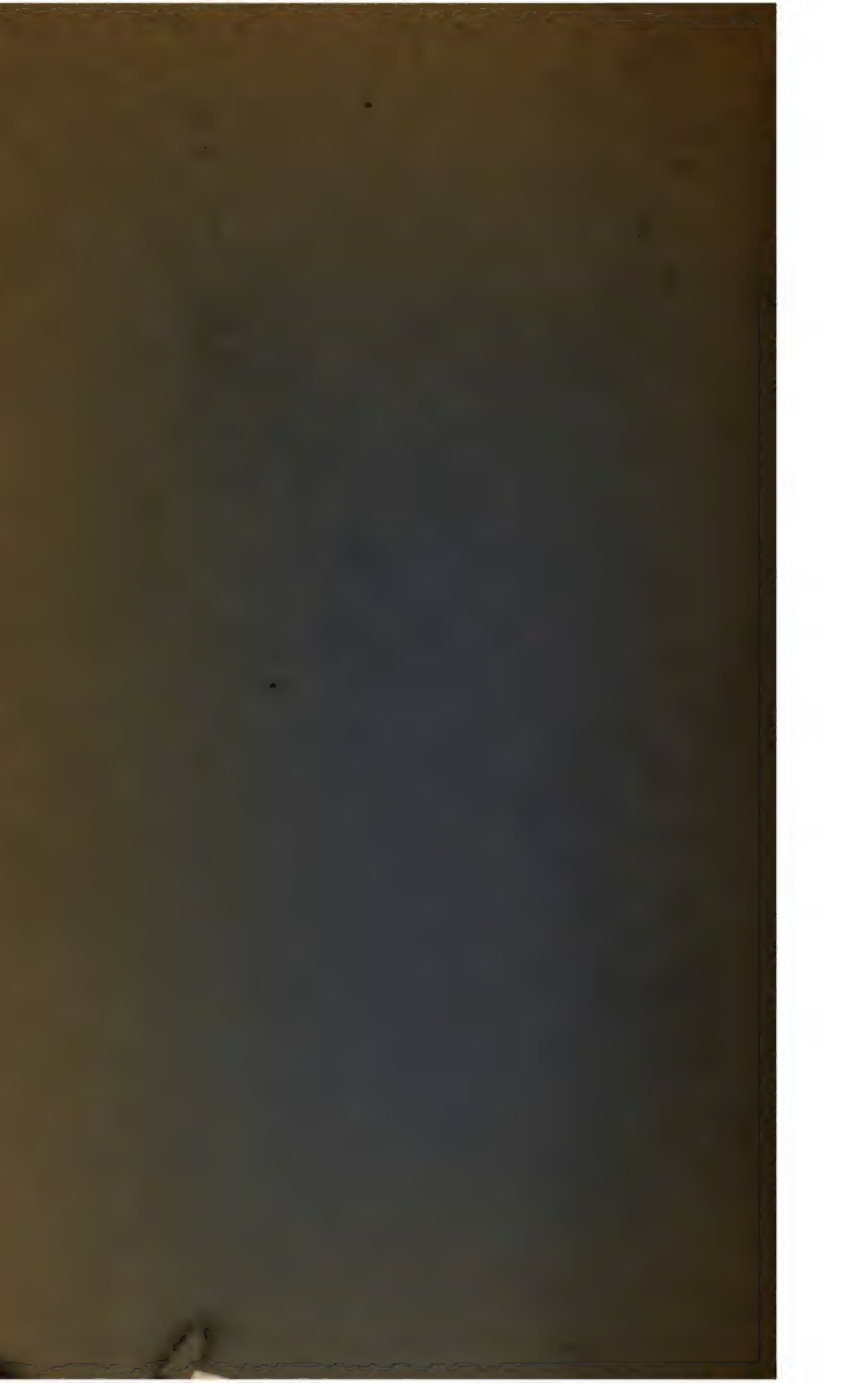
Examined and distinguished in *In re Blythe*, 108 Cal. 127.

Default.—Question whether default was properly entered, or not, can be considered on an appeal from the final judgment, p. 650.

Cited as authority in *Maud v. Wear*, 55 Cal. 26. So in *School District No. 1 v. Whalen*, 17 Mont. 15, holding that the entry of a default is not a final judgment from which an appeal lies.







REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

CHARLES A. TUTTLE,
REPORTER.

VOLUME 24
WITH
NOTES ON CAL. REPORTS

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1906.

Entered according to Act of Congress, in the year of our Lord, 1865, by
CHARLES A. TUTTLE,
In the Clerk's Office of the District Court of the United States in and for the
Northern District of the State of California.

COPYRIGHT, 1898.
BY BANCROFT—WHITNEY CO.

COPYRIGHT, 1906,
BY BANCROFT—WHITNEY CO.

COPYRIGHT, 1906,
BY BANCROFT—WHITNEY CO.

JUSTICES

THE SUPREME COURT

DURING THE TERM OF THESE REPORTS.

HON. SILAS W. SANDERSON.....	CHIEF JUSTICE.
HON. JOHN CURREY.....	} ASSOCIATE JUSTICES.
HON. LORENZO SAWYER.....	
HON. AUGUSTUS L. RHODES....	
HON. OSCAR L. SHAFTER.....	

OFFICERS OF THE COURT.

J. G. McCULLOUGH, Esq.....	ATTORNEY-GENERAL.
W. D. HARRIMAN, Esq.....	CLERK.
CHARLES A. TUTTLE, Esq.....	REPORTER.

DISTRICT JUDGES.

FIRST DISTRICT.....	PABLO DE LA GUERRA.
SECOND DISTRICT.....	W. T. SEXTON.
THIRD DISTRICT.....	S. B. McKEE.
FOURTH DISTRICT.....	E. D. SAWYER.
FIFTH DISTRICT.....	JAMES M. CAVIS.
SIXTH DISTRICT.....	J. H. McCUNE.
SEVENTH DISTRICT.....	J. B. SOUTHARD.
EIGHTH DISTRICT.....	WILLIAM R. TURNER.
NINTH DISTRICT.....	E. GARTER.
TENTH DISTRICT.....	I. S. BELCHER.
ELEVENTH DISTRICT.....	S. N. BROCKWAY.
TWELFTH DISTRICT.....	O. C. PRATT.
THIRTEENTH DISTRICT.....	J. M. BONDURANT.
FOURTEENTH DISTRICT.....	J. B. McFARLAND.
FIFTEENTH DISTRICT.....	S. H. DWINELLE.

INTRODUCTION.

THE Constitution of this State, adopted in 1849, provided for a Supreme Court, to consist of a Chief Justice and two Associate Justices. The jurisdiction of the Court was appellate, and was confined to cases where the matter in dispute exceeded two hundred dollars, or where the legality of any tax, toll, or impost, or municipal fine was in question, and to criminal cases amounting to felony. The Court also had power to issue writs of *habeas corpus*, and all other writs and process necessary to the exercise of its appellate jurisdiction.

For several years, the number of cases brought before the Court was not large, and the three Justices were able, with ease, to dispatch its business. The reports of all the cases determined for seven years, and up to the close of 1856, are contained in six volumes.

But few of the first emigrants to California came with the intention of making it their permanent residence; but little attention was therefore paid to the acquisition of any other property than gold. Gradually, however, they discovered that the mineral wealth of the State could not be exhausted, and that its valleys were fertile and productive. By degrees, they banished all thoughts of leaving, and began to look on the Pacific Coast as their permanent home. Then, lands were purchased and improved, and preparations were made for mining on a more extensive scale. Ditches were excavated, and the waters of the rivers were turned from their beds (to which mining had been at first confined) upon the summits of the mountains.

With the acquisition of permanent property came an increase of litigation. The character of this property, and the nature of the titles by which it was held, helped to swell the amount of this litigation. The larger part of the arable lands in the valleys was held under Spanish or Mexican grants. The boundaries of these grants were not accurately defined, and in many cases the grant was of a smaller tract of land, to be selected within the exterior boundaries of a much larger tract. A great number of these grants had passed from the hands of the original grantees. The sales were made sometimes in small quantities to individuals, sometimes of the entire tract to several persons at one time, and sometimes of undivided fractional parts to several different persons at different times. The lands were generally uninclosed, and the only possession of the purchasers was the constructive seizin arising from the acquisition of the legal title. An impression, too, prevailed that many of these grants were invalid or fraudulent. The result was that farmers settled upon such lands in many places in the hope either that the grant would be rejected or that its boundaries, when ascertained, would not include the land they occupied. All these causes were fruitful sources of law suits, not only among the owners themselves, but between the owners and occupants.

In all the mineral districts, where millions were expended in excavating ditches, and toll roads, and in other improvements of a permanent character, the General Government adopted the policy of withholding the lands from market, so that here the right of property rested on priority of occupancy or of appropriation. Conflict often arose between the different claimants of water upon the same streams about the priority of their respective rights, or the amount of water to which each was entitled. No provision was made by law for recording mining claims, but they were held under such local regulations or customs as the miners of a neighborhood or district might adopt. Here was another source of litigation, and the litigants seldom allowed their causes to rest without an appeal to the Court of last resort.

All these causes combined have brought into the Supreme

Court for the last seven years a large number of causes. The principles involved were frequently novel; and when not new, their solution sometimes required an investigation of Spanish and Mexican law.

The Court had thrown upon it the labor not only of working out the intricacies in which titles to real estate had become involved, but also, in some measure, of elaborating a new system, suited to the peculiar condition of the mineral districts. The Court, as organized, was unable to dispose of the cases brought before it with the celerity which, particularly in new communities, is desirable.

The subject of amending the Constitution so as to reorganize the Supreme Court, and to accomplish some other needed reforms, after being for some time agitated, was entered upon in 1861. The Legislature of that year adopted amendments which were concurred in by the Legislature of 1862, and adopted by the people at the general election in 1862. The new Court provided for by these amendments consists of a Chief Justice and four Associate Justices. It has appellate jurisdiction in all cases in equity, and also in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars; also, in all cases arising in the Probate Courts; and also, in all criminal cases amounting to felony, on questions of law alone. The Court has power to issue writs of *mandamus*, *certiorari*, prohibition, and *habeas corpus*, and also all writs necessary or proper to the complete exercise of its appellate jurisdiction.

The jurisdiction of the new Court differs in several respects from that possessed by the old. The civil jurisdiction of the old Court was restricted to cases where the matter in dispute exceeded two hundred dollars, or where the legality of any tax, toll, or impost, or municipal fine, was in question. The jurisdiction of the new Court is restricted to cases where the amount in dispute exceeds three hundred dollars, but it also has jurisdiction in all cases in equity, and in all cases at law which involve the title or possession of real estate, regardless

of the amount in controversy. The old Court could only issue the writ of *habeas corpus* and such writs and process as were necessary to the exercise of its appellate jurisdiction. The new Court possesses the same power, and also original jurisdiction to issue writs of *mandamus*, *certiorari*, prohibition, and *habeas corpus*.

The first judicial election under the amended Constitution took place in the fall of 1863, and the Justices then elected entered upon the discharge of their duties on the first day of January, 1864.

The reports of all the cases passed upon by the old Court for the seven years ending December 31st, 1863, fill seventeen volumes, and end with the twenty-third. The present volume opens with the decisions of the new Court, and contains a report of the cases passed on at the January Term, and part of those decided at the April Term.

California being the first State organized on the Pacific Coast out of the territory acquired from Mexico, upon its Judiciary devolves the labor of settling and establishing many important principles not before discussed in English or American Courts. Our reports on such questions will undoubtedly be the precedent by which the young Territories and States now growing up will be guided. The present volume contains many important adjudications upon questions of this character, and also in relation to corporations, real estate titles, and constitutional law. The most important portions of briefs of counsel in these cases have been published, and the Court in its opinions has explored the whole field of judicial inquiry. A report of the decisions rendered during the year 1864 will fill three more volumes. It is my intention to give those volumes to the profession with all possible dispatch—if possible, before the close of the present year. The questions settled in the present and forthcoming volumes will go far to quiet that feverish anxiety which is always attendant upon uncertainty as to the rights of property, and will give to the legal profession landmarks which will enable it to avoid much of the litigation which has unavoidably resulted from the former unsettled state of affairs in California.

CHAS. A. TUTTLE,

Reporter.

JANUARY, 1865.

CASES REPORTED.

	Page.
Ah Yew v. Choate.....	562
Alameda County, Edmondson v.....	249
Aldrich v. Palmer	513
Alexander et als. v. Greenwood et als.....	505
Allender v. Fritts.....	447
Ashley v. Vischer.....	322
Barry v. Dorsey	449
Benton v. Williams.....	424
Bear River & A. W. & M. Co. v. Boles et al. No. 1.....	354
Bear River & W. & M. Co. v. Voies et al. No. 2.....	359
Bear River & A. W. & M. Co., Wixon v.....	367
Blum v. Robertson.....	127
Boles et al., Bear River & A. W. & M. Co. No. 1 v.....	354
Boles et al., Bear River & A. W. & M. Co. No. 2 v.....	359
Branham v. Mayor & Common Council of San José.....	335
Broder v. Willson	190
Brower et al., Minturn v.....	645
Brusso, People v.....	41
Backman v. Whitney et al.....	367
Buffendean v. Edmondson.....	94
Bugbey et al. v. Peterie.....	419
Bullock, Lubeck v.....	335
Burrell, ex parte.....	350
Camden v. Vail.....	392
Campbell et als., Cray v.....	634
Carkhuff, People v.....	640
Carpenter v. Williamson.....	609
Carpentier v. Thirston et als.....	268
Casgrave v. Howland.....	457
Central Pacific R. R. Co., Doran et al. v.....	245
Choate, Ah Yew v.....	562

	Page.
Clary v. Rolland et al.....	147
Coffman, People v.....	230
Comstock et al., Rodrigues et al. v.....	55
Cook v. De La Guerra et als.....	237
Corduan, Dane v.....	157
Crary v. Campbell et als.....	634
Cunningham v. Hawkins.....	403
Curran v. Shattuck.....	427
Dane v. Corduan.....	157
De La Guerra, People v.....	73
De La Guerra et als, Cook v.....	237
Dennis, Quirlique v.....	154
Dollarhide et al., Hastings v.....	195
Dollarhide, Long et al. v.....	218
Donahue v. McNulty et als.....	411
Dorsey v. Barry.....	449
Doran et al. v. Central P. R. R. Co.....	245
Downer v. Smith.....	114
Eastman v. Turman et al.....	379
Easterby v. Larco.....	179
Edmondson, Buffandeau v.....	34
Edmondson v. Alameda Co.....	349
Elkins, Stone v.....	125
Evoy et al., Schenk et al. v.....	104
Ex parte Gregory Yale.....	241
Ex parte Burrill.....	350
Farley et als., Willis v.....	491
Fenstermaker et al., Keyes v.....	329
Flateau v. Lubeck.....	364
Fogarty v. Kelly et als.....	317
Fore et al., Vance v.....	435
Fowler, Owen v.....	192
French v. Teschemaker et als.....	518
Frink et al., Owen v.....	171
Fritts, Allender v.....	447
Greenwood et als., Alexander et als. v.....	505
Hall, Williams v.....	156
Harlan, In matter of Estate of.....	182
Harlan, Sacramento, P. & N. R. R. v.....	334
Harlan v. Rockerby.....	561
Hastings v. Dollarhide et al.....	195
Hawkins, Cunningham v.....	403
Holman, Warner v.....	228
Hope v. Jones.....	89
Hook et als, Noble et als. v.....	638
Howland, Casgrave v.....	457
Jackson, People v.....	630

CASES REPORTED.

7

	Page.
Jackson et al., Bush et al v.....	308
Jenks, People v.....	11
Jones, Hope v.....	89
Johns et al., Lewis et al v.....	98
Kelly et als., Fogarty v.....	317
Kayes v. Fenstermaker et al.....	329
Kryenbagen, Rowland v.....	52
Larso, Easterby v.....	179
Leat v. Wilson et al.....	398
Lewis et al. v. Johns et al.....	98
Lodge v. Turman et als.....	335
Long et al v. Dollarhids.....	218
Lubeck, Bullock v.....	338
Lubeck, Plateau v.....	364
Mahoney et al., Thornton v.....	569
Maxwell, People v.....	14
Mayor and C. C. or San José, Branham v.....	608
Mearie, Terry v.....	609
Miller v. Stewart et als.....	502
Miller v. Van Tassel.....	459
McNulty et als., Donahue v.....	411
McNulty et als., Richardson v.....	389
Mier, People v.....	61
Minturn v. Brower et al.....	644
Morton et als., Owen v.....	373
Munch v. Williamson et al.....	167
Noble et al. v. Hook et als.....	638
Owen v. Morton et als.....	373
Owen v. Frink et als.....	171
Owen v. Fowler.....	192
Palmer et als., Aldrich v.....	513
People v. Brumo.....	41
People v. Jenks.....	11
People v. Maxwell.....	14
People v. Sanchez.....	17
People v. Williams.....	81
People v. Mier.....	61
People v. Sexton.....	78
People v. De la Guerra.....	73
People v. Coffman.....	230
People v. Jackson.....	630
People v. Carkhuff.....	640
Petarie v. Bugbay et al.....	419
Quarique v. Dennis.....	154
Rackerby, Harian v.....	561

	Page.
Richardson v. McNulty et als.....	330
Richardson v. Williamson et al.....	289
Robinson v. Russell et als.....	467
Robertson, Blum v.....	127
Rodriguez et al. v. Comstock et al.....	85
Rolland et al. Clary v.....	147
Rowland v. Kreyenhagen.....	52
Rush et al. v. Jackson et al.....	308
Russell et als. Robinson v.....	467
 Sacramento, P. & N. R. R. Co. v. Harlan.....	 334
Salmon v. Symonds et als.....	260
Sanchez, People v.....	17
Schenk et al. v. Evoy et al.....	104
Sexton, People v.....	78
Shattuck, Curran v.....	427
Smith, Downer v.....	114
Stone v. Elkins.....	125
Stewart et als. Miller v.....	502
Symonds et als. Salmon v.....	260
 Terry v. Megerle.....	 609
Teschemaker et als. French v.....	516
Thornton v. Mahoney et als.....	509
Thirston et als. Carpentier v.....	208
Truckee Turnpike Co., Wood et al. v.....	474
Turman et al. Eastman v.....	339
Turman et al. Lodge v.....	305
 Vall, Camden v.....	 392
Vance v Fore et als.....	485
Van Tassel, Miller v.....	459
Vischer, Ashley v.....	322
 Warner v. Holman.....	 228
Whitney et al. Buckman v.....	267
Williams, People v.....	31
Williams v. Hall.....	156
Williamson et al. Munch v.....	167
Williamson et al. Richardson v.....	289
Williams v. Benton.....	424
Williamson, Carpentier v.....	609
Willis v. Farley et als.....	491
Willson v. Broder.....	190
Wilson et al. Leet v.....	398
Wixon v. Bear River and A. W. & M. Co.....	367
Wood et al. v. Truckee Turnpike Co.....	474
 Yale, ex parte.....	 241

JANUARY TERM, 1864.

ANN

24 CAL.

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

JANUARY TERM, 1864.

THE PEOPLE *v.* JENKS.

CHALLENGES TO JURORS.—A defendant, on trial in a criminal action, may interpose a peremptory challenge to a juror, at any time after the appearance of the juror in the box and before he is sworn to try the case, until the whole number of peremptory challenges is exhausted.

Id.—RULE OF COURT.—The Court has no power to adopt a rule compelling a defendant in a criminal action to interpose his peremptory challenges to jurors at any particular time, for such rule would be clearly in conflict with the three hundred and forty-first section of the Criminal Practice Act.

Id.—AFTER JUROR IS SWORN.—After juror is sworn in a criminal case, it is the duty of the Court, upon good cause shown, to allow the defendant to use his peremptory challenges, until they are exhausted, at any time before the jury is completed.

APPEAL from the Court of Sessions of Tuolumne County.

The facts are stated in the opinion of the Court.

Rodgers and Coffroth, for Appellant, cited sections three hundred and forty-one, three hundred and forty-two, and three

hundred and sixty-one of the Criminal Practice Act, and *People v. Kohle*, 4th Cal. 198.

McCullough, Attorney-General, for Respondent.

The case of *The People v. Kohle* would support the error assigned, if the facts were the same. But in this case, the Court at the outset informed defendant of the order and manner in which to make his challenges, and the Court must of necessity be vested with a reasonable discretion in determining the preliminaries of a criminal trial, even if not strictly in accordance with statutory provisions, or to make rules and orders in its discretion, to expedite trials, and if there is no abuse, there is no error. (*People v. Stoncifer*, 6 Cal. 409; *People v. Sears*, 18 Cal. 635; *People v. Keenan*, 18 Cal. 584; *People v. Bonney*, 19 Cal. 445.)

By the Court, SANDERSON, C. J.

The defendant was tried and convicted of the crime of grand larceny.

We deem it unnecessary to notice more than one of the errors assigned by counsel for the appellant. The other errors, if they are such, will doubtless be avoided upon another trial.

After five jurors have been impanelled, the Court informed defendant's attorney "that he must exhaust all his challenges to the jury before accepting them, and that he would not be permitted to challenge afterward without assigning a sufficient reason therefor." To the rule thus prescribed by the Court counsel for the defendant excepted. The defendant's attorney then examined the remaining seven jurors for cause and passed them to the District Attorney, who expressed himself as satisfied with the jury. The Court then directed the Clerk to swear them to try the case. Thereupon counsel for defendant interposed a peremptory challenge to B. F. Gordon, one of the seven jurors last examined, and declined to assign any reason therefor except "his statutory right."

The People v. Jenks.

At the time this challenge was interposed the defendant had remaining six of the ten peremptory challenges allowed him by the statute. The Court refused to allow the challenge, and directed the Clerk to swear the jury, and Gordon was accordingly sworn as one of the jurors to try the case. To this ruling of the Court also the defendant's counsel excepted.

The refusal of the Court to allow the challenge in question was clearly erroneous. Under the provisions of the three hundred and forty-first section of the Criminal Practice Act, the defendant may peremptorily challenge a juror at any time after his appearance in the box and before he is sworn to try the case; and even after he is sworn, but before the jury is completed, it is enjoined upon the Court to permit it upon good cause shown. This plain and express provision of the statute cannot be contravened by any arbitrary rule of the Court; on the contrary, the security which the law humanely affords to the prisoner in criminal prosecutions, against public excitement and private animosity, ought in no degree to be impaired or diminished by any action on the part of the tribunal before which he is being tried. That the rule prescribed by the Court in this case might frequently operate to the prejudice of the defendant is apparent. Facts touching the competency of the juror might come to the knowledge of the defendant or his counsel after their acceptance and before the administration of the oath not known to them at the time he was accepted, which might materially affect their judgment upon the question of challenge. In such an event the defendant is not bound to disclose these facts to the Court and jury. There may be good and sufficient reasons why such a course might be prejudicial to his interests, and he may well claim the benefit of the challenge without assigning any reason therefor, as was done in the present case, except "his statutory right." A strict adherence to the rule prescribed by the statute can in no way operate to the disadvantage of the prosecution or to the incon-

The People v. Maxwell.

venience of the Court, while a failure to observe it may deprive the defendant of a right wisely provided for his protection and security.

The judgment must be reversed and a new trial ordered.

CURREY, J., expressed no opinion.

THE PEOPLE v. MAXWELL.

WHAT CONSTITUTES LARCENY.—One who does not participate in a larceny, or have any knowledge of it whatever prior to or at the time of its commission, but afterwards receives the stolen goods into his possession, does not thereby become guilty of a larceny.

INSTRUCTIONS IN CRIMINAL CASES.—Any instruction in a criminal case which is so ambiguous that conclusions clearly prejudicial to the defendant may be drawn therefrom by the jury, is erroneous.

APPEAL from the Court of Sessions, Placer County.

The defendant was convicted of the crime of larceny, and appealed.

The other facts are stated in the opinion of the Court.

Tuttle & Fellows, for Appellant.

McCullough, Attorney-General, for Respondent.

The Court did not err in refusing defendant a new trial, on the ground that the instruction of the Court was contrary to the rule laid down in criminal proceedings. (Wharton's Cr. Law, §§ 1814-15-17; 2d East's Pleas of the Crown, 767-9.)

By the Court, SANDERSON, C. J.

The defendant and one Morgan were jointly indicted for the crime of grand larceny, and, upon their application, were allowed separate trials. It appears from the testimony on the part of the prosecution, that the stolen property, consist-

The People v. Maxwell.

ing of a rifle, vest, razor, shot pouch, and shirt, was taken from the cabin of the prosecutor, near Auburn Station, in Placer County, during his absence, on the 30th day of December, A. D. 1862. No one was seen to take it, nor was the defendant or Morgan seen in the vicinity of the cabin on that day. About dusk of the same day, they were seen travelling in company, at the North Fork bridge, several miles from Auburn Station, the defendant carrying a gun upon his shoulder. They passed the night at a hotel about five miles beyond the bridge, and on the next day proceeded on to Forest Hill. When they arrived at this place Morgan had the gun in his possession, and gave it in pledge to the landlord of the hotel at which they stopped, as security for their board and lodging. At this hotel both parties were arrested. From the testimony of the officer who made the arrest, it appears that all the stolen property was found in the possession of Morgan, except the gun, which was in the possession of the landlord. Morgan, who was examined as a witness on the part of the defence, testified that he and the defendant left San Francisco in company, to go to the mines; that the road forked a few miles from Auburn, and, by mistake, they took the road leading to Auburn Station, and had nearly reached that place before they were informed of their error; that he then told Maxwell that he would go by the station, as it was not much out of the way; that he and the defendant then separated. The defendant went across the country in the direction of the Auburn road, while he took the route by the station; that on his way he went to the cabin of the prosecutor, and committed the larceny in question; that when he overtook the defendant he told him, in response to an inquiry as to where he got the gun, that he had found a friend at the station, who thought he might have use for it in the mountains, and had given it to him; that he alone committed the larceny, and without the participation or knowledge of the defendant, who knew nothing

about it until after their arrest. Such being the facts, the following instructions, among others, was given to the jury by the Court: "Should you believe, from the evidence, that the witness Morgan stole the property described in the indictment, and that the same was found in the possession of this defendant, and that this defendant and Morgan were associated together, and that the defendant knew that the property was stolen, then and in that case he is equally guilty in the eye of the law, and your verdict should be guilty." This instruction is assigned as error.

It is contended that this instruction was calculated to confuse and mislead the jury; and as the language here used seems to be unqualified by any other portion of the charge, we are inclined to the opinion that such may have been the case. It is difficult to say that the language used is not quite as applicable to a case where the offence charged is receiving stolen goods as to a case of larceny, and the jury, not knowing or clearly understanding the distinction between the two offences, may have confounded them, and to come to the conclusion that the defendant, having received a part of the stolen goods into his possession, knowing them to be stolen, by that act alone became guilty of larceny, although he may not have participated in the larceny, or had any knowledge of it whatever prior to or at the time of its commission.

The charge is also objectionable on account of the loose use of the words "*were associated together*." It is impossible to determine clearly what meaning was intended to be conveyed by these words, and the jury may have inferred from their unqualified use, that if Morgan and the defendant were associated together in *any manner*, and Morgan committed the larceny in question, and the defendant afterward knew that Morgan had stolen the property, he would be equally guilty with Morgan. Any instruction in a criminal case which is so ambiguous that conclusions

The People v. Vincente Sanchez.

clearly prejudicial to the defendant may be drawn therefrom by the jury, must be held erroneous by this Court.

The judgment is reversed and a new trial ordered.

CURREY, J., expressed no opinion.

THE PEOPLE v. VINCENTE SANCHEZ.

ADJOURNMENT OF COURT.—If the Judge or Judges of a Court do not appear by noon of the first day of a term, and the Sheriff or Clerk, at noon, does not adjourn the Court until the next day, the term does not thereby expire; but the Judge or Judges can appear and open the Court at any time during the day, and the Sheriff or Clerk can legally at any time during the day, after noon, adjourn the Court until the next day.

CONSCIENTIOUS SCRUPLES OF JUROR GROUND OF CHALLENGE.—Where a juror, in a capital case, after being sworn to answer questions concerning his competency, says that he entertains such conscientious scruples as would preclude his finding the defendant guilty of an offence punishable with death, and the District Attorney challenges him on the ground of implied bias, the challenge should be allowed.

DYING DECLARATIONS AS EVIDENCE.—Before dying declarations are admitted in evidence, it should be conclusively shown that the declarant was at the point of death; that he was conscious of approaching dissolution, and had lost all hope of a recovery, and made the declaration under the full belief that he was about to die. The existence of such belief need not be proved, however, by the express statements of the declarant, but it may be shown from the circumstances that such belief actually existed.

D.—The declarations of deceased persons in cases of homicide stand on the same footing as witnesses sworn in the case as to their admissibility, and are governed by the same rules in conducting the examination, except that in examining the declarant leading questions may be put to him, and he may even be urged with earnest and pressing solicitation—although by such a course the credibility of the declaration is impaired.

MURDER AND MANSLAUGHTER.—In case of mutual combat where a homicide is committed, in order to reduce the offence from murder to manslaughter, it must appear that the contest was waged on equal terms, and no undue advantage was sought or taken by the defendant; for if such was the case, malice may be inferred, and the killing amount to murder.

D.—When two persons have a sudden quarrel, and after a sufficient time has elapsed for the blood to cool and passion to subside, go out to fight, and one of them kills the other, the killing will be murder and not manslaughter.

The People v. Vincente Sanchez.

INSTRUCTIONS TO A JURY.—No instruction should be given to a jury which is not predicated upon some theory, logically deducible from at least some portion of the testimony.

WHAT CONSTITUTES MURDER IN FIRST AND SECOND DEGREES.—In order to constitute murder in the first degree there must be something more than malicious or intentional killing. There must be killing by means of poison, lying in wait, or torture, or some other kind of killing different from that of poison, lying in wait, or torture, which is wilful, deliberate, and premeditated, or a killing which is committed in the perpetration or the attempt to perpetrate any arson, rape, robbery, or burglary. Every other kind of murder which is murder at common law, is murder in the second degree.

APPEAL from the District Court, Third Judicial District Santa Cruz County.

The facts are stated in the opinion of the Court.

Skirm, for Appellant.

The motion to set aside the indictment, and in arrest of judgment, were improperly overruled.

The Judges did not attend until 2 o'clock P. M., of the first day of the term, and the Court could not be legally opened after the hour of noon; consequently there was no commencement of the Court of Sessions, and no order for summoning a grand jury could be legally made. (Wood's Dig., Articles 1566, 2704, and 706; Bouvier's Law Dic., Title "Court," as to performance of some public act to constitute a Court; *Wick v. Ludwig*, 9 Cal. 175.)

The dying declarations of deceased were improperly received.

The deceased showed that he still entertained a hope of life by asking his physician as he was going away if he would return again. (1st Phil. on Ev. O. H. & E.'s Notes, 293; 1st Arch. Crim. Pr. 140, Note 2.)

Dying declarations are admissible only to show the direct transactions from which death results, and not to prove former transactions, opinions, or motives. (1st Phil. Ev. O. H. & E.'s Notes, 285-6-7; 1st Greenleaf on Ev. § 159; Wharton on Homicide, 307.)

The People v. Vincente Sanchez.

McCullough, Attorney-General, for Respondent.

The Court was opened, if that be necessary, at either 9 A. M. or 2 P. M., on the day fixed by law for its meeting, and there had been no adjournment by Sheriff or any one before its meeting. (Wood's Dig. 157, 158, §§ 84, 96; *Thomas v. Fogarty*, 19 Cal. 644.)

The dying declarations were properly admitted. (1st Greenleaf on Ev. § 168; *People v. Ybarri*, 17 Cal. 168.)

To the question "what, then, did the prisoner shoot you for," the objection was rightly overruled. (*Nelson v. State*, 7 Humphrey, 543.)

By the Court, SANDERSON, C. J.

The fifty-ninth section of the Act concerning Courts of justice and judicial officers, (Wood's Digest, 147,) appoints the days upon which the terms of the Courts of Sessions are to be held; and the ninety-fifth section of the same Act prescribes what shall be done by the Sheriff or Clerk, if the Judge or Judges of the Court do not appear on the day appointed for the commencement of the term. The latter section reads as follows: "If no Judge attend on the day appointed for holding the Court, before noon, the Sheriff or Clerk shall adjourn the Court until the next day at ten o'clock; and if no Judge attend on that day before noon, the Sheriff or Clerk shall adjourn the Court until the following day; and so on from day to day for one week. If no Judge attend for one week, the Sheriff or Clerk shall adjourn the Court for the term." In the present case, Monday, the third day of February, A. D. 1862, was the day appointed for holding the Court, and on that day neither of the Judges appeared until the hour of two o'clock P. M., at which time they all appeared and opened Court for the transaction of business—the Clerk and Sheriff being present. When directed by the County Judge "to open Court," the Sheriff replied "that he had done so at nine o'clock that morning." Be-

yond this the opening of the Court was not proclaimed by the Sheriff. Neither the Clerk nor Sheriff had adjourned the Court as required by the ninety-fifth section above quoted. The Court made an order directing a Grand Jury to be summoned, which was accordingly done; and such further proceedings were had as resulted in an indictment against the prisoner for the crime of murder; upon which he was subsequently tried in the District Court of the Third Judicial District and convicted of murder in the first degree. Upon this state of facts, it is contended on the part of the prisoner, that the term of the Court of Sessions, at which the indictment was found, was not held in accordance with law, and all its proceedings were therefore *coram non judice* and void.

The presence of the Judges, or a competent number of them, and a Clerk, and the performance by the Judges of some public act indicative of a design on their part to exercise judicial functions at the time and place appointed by law, is all that is requisite to the legal existence of a Court. (Bacon's Abridgement, Title Courts.) Leaving out of view the ninety-fifth section of the Act concerning Courts and judicial officers, and this definition of a Court is fully satisfied by the facts and circumstances of the present case. The time appointed by law was the first Monday in February, A. D. 1862, and the place was the Court-house of the county — the Judges, Clerk and Sheriff were all present on that day and at that place; and the command to "open Court" given to the Sheriff, whether obeyed by him or not, was a public act indicative of a design on the part of the Judges to perform the functions of a Court. The fifty-ninth section of the statute prescribes no particular hour at which the Court must convene, and it may therefore, so far as that section is concerned, convene at any time during the *day*. If there is any obligation resting upon the Judges to convene before noon, it is imposed by the ninety-fifth section of the statute; and hence the solution of the question under consideration must be found in the construction of that section.

In effect, counsel for the prisoner contend that, inasmuch as the Judges did not appear before noon, it became necessary, in order to prevent a loss of the term, for the Sheriff or Clerk to immediately adjourn the Court until the next day; and neither of them having done so, the term had already expired by operation of law before the Judges appeared.

This is giving the section in question, we think, a construction and effect not contemplated by the Legislature. To continue the term over until the next day, an adjournment—the Judges being absent—was doubtless necessary; but it does not follow that the term was lost at noon, either because an adjournment was not had at that time, or because the Judges had failed to appear; on the contrary, we are inclined to think the term would continue during the whole of that day from the very fact that it was not adjourned, and the Judges might lawfully meet and open Court at any time before its close.

In *Thomas v. Fogarty*, 19th Cal. 644, the late Supreme Court held that the object and purpose of this section was to prevent the loss of a term in case of the absence of the Judge; and the learned Justice who delivered the opinion in that case might have added that such was its only object.

Leave this section out of the statute, and the loss of a term is the consequence of a failure on the part of the Judge to appear on the day appointed for holding the Court. (*The People v. Bradwell*, 2 Cowen, 445.) To provide against such a consequence was the obvious intention of the Legislature in making this section a part of the Act; yet under the construction contended for on the part of the prisoner, it is made to hasten rather than retard the consequence which it was designed to prevent, and to defeat rather than accomplish its purpose. Such a result could never have been intended; and while this section must be so construed as to give full force and effect to the intention of the Legislature, care must be taken not to extend its operation beyond the accomplishment of that object. From

what has been said, it follows that the term was not lost by the failure of the Judges to appear before noon, nor by the neglect of the Sheriff and Clerk to adjourn Court until the next day; that, admitting an adjournment was necessary to preserve the term until the next day, it was not lost by a failure to adjourn at noon, but continued until the close of the day appointed for its commencement, and the Judges could legally open Court at any time before the day expired. Had an adjournment taken place, it is doubtful whether the Judges could have legally held Court before the next day. It was suggested by the Attorney-General that in such a case the Judges would have the power to set aside the adjournment and proceed with the business of the term. And such may be the case; but upon this point it is unnecessary, for the purposes of the present case, to express an opinion. The motion to set aside the indictment and the motion in arrest of judgment were properly overruled by the Court below.

The next error assigned is the allowance of a challenge interposed by the District Attorney to one of the trial jurors, upon the ground of implied bias. This assignment is manifestly frivolous. The juror was asked "whether he entertained such conscientious scruples as would preclude his finding the defendant guilty of an offence punishable with death;" and his reply was that "he did." In such a case the statute expressly provides that "he shall neither be permitted nor compelled to serve as a juror."

It is further claimed by counsel for the prisoner, that the Court below erred in admitting the dying declarations of the deceased. These declarations were made to the attending physician, F. E. Bailey, on the day after the declarant was wounded, and two days before his death. The admission of the declarations was objected to upon the ground that no sufficient foundation had been laid for their introduction. Upon this point Dr. Bailey testified as follows: "I found him suffering with wounds in the face and neck, inflicted by large

The People v. Vincente Sanchez.

shot of the kind known as duck or goose shot. A number of shot had entered his mouth; several teeth were shot away, and his lower jawbone was fractured. There were wounds over the left lung, and two or three of the shot had penetrated the chest. * * * He was very low, but able to converse. I did not think he could recover. I told him he had no chance of recovery. He asked me how long I thought he would live. I replied that I could not positively tell. My own opinion was that he could not live long. He had sent for the priest, who had gone up with me when I went. The priest administered the consolations of religion to him; at least a part of the ceremonies had been performed before he talked to me about the wounding. It is the custom with that class of people (Mexican) to send for the priest before they do for the physician, when they think they are in danger. The ceremonies may have been closed after he told me about the wounding. He exhibited symptoms of approaching death, but lived, I think, two days afterward."

Then follow the declarations. At the close of the direct examination the witness said: "After I had been with him four or five hours I left. When I was going, he asked me if I would come back. I told him that I thought it would not be worth while."

On cross-examination Dr. Bailey said: "The deceased was two or three hours making the statement to which I have testified; he spoke in broken English, which I understood, and with much difficulty and pain; he spoke at intervals; he would converse for a little while and then rest."

In the case of *Rex v. Woodcock*, 2 Leach's Cr. Cases, 563, 566, the general principle on which this species of evidence is admitted was stated by Lord Chief Baron Eyre to be this: "That they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. A situation so solemn and so awful is

The People v. Vincente Sanchez.

considered by the law as creating an obligation equal to that which is imposed by a positive oath in a Court of justice." Speaking of the circumstances under which dying declarations are admitted in evidence, Greenleaf says: "It is essential to the admissibility of these declarations, and is a primary fact to be proved by the party offering them in evidence, that they were made under a sense of impending death; but it is not necessary that they should be stated at the time to be so made. It is enough if it satisfactorily appears in any mode that they were made under that sanction, whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to in order to ascertain the state of the declarant's mind." (1 Greenleaf Ev. sec. 158.)

This species of testimony should always be received with the greatest caution, and too much care cannot be observed by the Court in scrutinizing the primary facts upon which its admissibility is grounded. No person is entirely exempt from a disposition to excuse and justify his own conduct, or to inflict vengeance upon one at whose hands he has suffered a grievous wrong; and in the eye of the law this proclivity is presumed, in cases like the present, to be overcome and silenced only by the presence of almost immediate death. An undoubting belief existing in the mind of the declarant, at the time the declarations are made, that the finger of death is upon him, is indispensable to that sanction which the law exacts; and if it shall appear, in any mode, that there was a hope of recovery, however faint it may have been, still lingering in his breast, that sanction is not afforded, and his statement cannot be received. The existence of such belief, however, need not be proved by any express statement by the declarant to that effect; it is sufficient if it appears from any circumstance, or from all the circumstances of the case taken together, that such belief actually existed. The

character of his wounds — his suffering and pain — the opinion of the surgeon or other attendants as to his condition, if stated to him — his alarm and anxiety, if manifested — his final preparation for death, if any was made — his taking leave of friends — his seeking the consolations of religion and the last offices of the Church, if such was the case — are all circumstances which are frequently quite as satisfactory in determining the questions of belief as any express statement on the part of the declarant. In the present case the wounds received by the deceased were evidently mortal. He was unable to converse except at intervals, and then with much difficulty and pain. The symptoms of approaching dissolution were manifest to the eye of his physician, and he could not have been wholly unconscious of their presence. In reply to his own question, he is assured by his physician, upon whose judgment all rely under such circumstances, that his wounds are mortal, and that he has no chance of recovery. The unequivocal manner in which that opinion was expressed must have extinguished all hope. He expresses no opinion himself, but accepts that of his physician as conclusive. He asks for and receives at the hands of his priestly adviser the consolations of religion. The solemn ceremonies and last rites of the Church, appointed for the dying only, were performed and administered at his request. It might well be inferred from all these circumstances, that the declarant believed himself to be lying at the point of death at the time these declarations were made, and we are not prepared to say that the conclusion to which the Court below arrived was not correct.

In giving the testimony touching these declarations, the witness Bailey stated that he asked the deceased "why Sanchez shot him?" Counsel for the prisoner objected to the witness stating what was said in response to this question, upon the ground "that dying declarations were admis-

sible only to show the direct transaction from which the death resulted, and not to prove former transactions, opinions, or motives." The Court overruled the objection, and this ruling is the next error assigned.

As to their admissibility, the declarations of deceased persons, in cases of homicide, stand upon the same footing as the testimony of a witness sworn in the case, and are governed by the same rules, except as to the manner of conducting the examination, which may be by leading questions, and even earnest and pressing solicitation, although by such a course their credibility is impaired. They must be confined to facts, and such as are pertinent and relevant to the issue, and not speak to distinct and separate transactions, or to matters of opinion or hearsay. But in this case the declarant was relating the circumstances of the shooting, which was the "direct transaction from which his death resulted," and the question asked him referred directly in terms to that transaction. It was not calculated to elicit matters foreign to the issue, as is conclusively shown by the answer, which was, in substance, that there had been a quarrel between them, and they were going out to settle it. But, even admitting the ruling of the Court to be erroneous, we are unable to perceive how the prisoner was prejudiced thereby. The tendency of the testimony elicited was to reduce the offence from murder of the first to murder of the second degree, and perhaps manslaughter, and consequently it was more damaging to the prosecution than to the defence. It at least follows that no reversible error was committed.

The next error assigned is the refusal of the Court to give certain instructions asked on behalf of the prisoner. The first instruction is in the following words: "When, upon sudden quarrel, two persons fight, and one of them kills the other, this is voluntary manslaughter; and so if they, upon such occasion, go out and fight in a field, for this is one continued act of passion."

This instruction seems to be founded upon the theory

The People v. Vincente Sanchez.

that the killing was the result of mutual combat. It is doubtful whether such a theory is logically deducible from the evidence; but, however that may be, it is clear that the instruction was properly refused, for the obvious reason, even in view of that theory, that it is not law. It ignores entirely the doctrine that in case of mutual combat, in order to reduce the offence from murder to manslaughter, it must appear that the contest was waged upon equal terms, and no undue advantage was sought or taken by either side; for, if such was the case, malice may be inferred, and the killing amount to murder. The latter clause, which, it is presumed, was more especially intended to apply to the present case, is also erroneous, because it ignores the doctrine that such "going out to fight" must occur immediately after the quarrel; for if sufficient time elapse between the quarrel and the "going out to fight" to enable the blood to cool and passion to subside, the killing will be murder, and not manslaughter.

The next instruction refused by the Court is in the following language: "Under the indictment against the defendant, he may be found guilty of any offence the commission of which is necessarily included in that with which he is charged in the indictment; that is, he may be found guilty of murder in the first degree, of murder in the second degree, of manslaughter, of fighting a duel and killing his antagonist, and of excusable or justifiable homicide."

In determining this question of error it is unnecessary to decide whether, under an indictment for murder, a defendant may be found guilty "of fighting a duel and killing his antagonist," inasmuch as the action of the Court below must be sustained upon other and sufficient grounds. The instruction was properly overruled for several obvious reasons.

1. All of it, except that portion which relates to duelling and excusable or justifiable homicide, had already been given by the Court, and the refusal was accompanied by a statement to that effect.

2. The theory that the homicide in this case was the result of a duel has no foundation in the evidence. No instruction should be given to a jury which is not predicated upon some theory logically deducible from at least some portion of the testimony. Such instructions are only calculated to confuse and mislead the jury, and ought not to be given.

3. It announces for the first time in the history of criminal procedure, the startling doctrine that a defendant on trial for murder may be found guilty of excusable or justifiable homicide. Upon this branch of the instruction comment is unnecessary.

4. Numerous objections to the instructions given by the Court are next urged, most of which have more or less merit; and one of them is clearly fatal to the judgment in this case. The following definition of murder of the first degree is found in the charge: "Murder is divided by our law into two degrees—the first includes every unlawful killing of a human being done maliciously or intentionally."

At best this is but a lame definition of murder, and contains none of the characteristics which mark the distinction between murder of the first and murder of the second degree. In effect, the jury are told that every unlawful killing of a human being done maliciously is murder of the first degree, and every unlawful killing of a human being done intentionally is murder of the first degree. Neither of these propositions is true; for malice must and intent to kill may exist where the killing only amounts to murder of the second degree.

In order to constitute murder of the first degree there must be something more than a malicious or intentional killing. There must be a killing within one of the three classes of cases described in the statute as constituting murder of the first degree. There must be a killing by means of poison, lying in wait, or torture, or some other kind of killing different from that of poison, lying in wait, or torture which is wilful, deliberate, and premeditated; or a killing

The People v. Vincente Sanchez.

which is committed in the perpetration or the attempt to perpetrate any arson, rape, robbery, or burglary.

In dividing murder into two degrees, the Legislature intended to assign to the first, as deserving of greater punishment, all murders of a cruel and aggravated character; and to the second all other kinds of murder which are murder at common law; and to establish a test by which the degree of every case of murder may be readily ascertained. That test may be thus stated: Is the killing wilful, (that is to say, intentional,) deliberate, and premeditated? If it is, the case falls within the first, and if not, within the second degree. There are certain kinds of murder which carry with them conclusive evidence of premeditation. These the Legislature has enumerated in the statute, and has taken upon itself the responsibility of saying that they shall be deemed and held to be murder of the first degree. These cases are of two classes. First—Where the killing is perpetrated by means of poison, etc. Here the *means* used is held to be conclusive evidence of premeditation. The second is where the killing is done in the perpetration or attempt to perpetrate some one of the felonies enumerated in the statute. Here the *occasion* is made conclusive evidence of premeditation. Where the case comes within either of these classes, the test question — “Is the killing wilful, deliberate, and premeditated?” — is answered by the statute itself, and the jury have no option but to find the prisoner guilty in the first degree. Hence, so far as these two classes are concerned, all difficulty as to the question of degree is removed by the statute. But there is another and much larger class of cases included in the definition of murder in the first degree, which are of equal cruelty and aggravation with those enumerated, and which, owing to the different and countless forms which murder assumes, it is impossible to describe in the statute. In this class the Legislature leaves the jury to determine, from all the evidence before them, the degree of the crime, but prescribes, for the government of their deliberations, the same

The People v. Vincente Sanchez.

test which has been used by itself in determining the degree of the other two classes—to wit: the deliberate and pre-conceived intent to kill. Thus the three classes of cases which constitute murder of the first degree are made to stand upon the same principle.

It is only in the latter class of cases that any difficulty is experienced in drawing the distinction between murder of the first and murder of the second degree, and this difficulty is more apparent than real. The unlawful killing must be accompanied with a deliberate and clear intent to take life in order to constitute murder of the first degree. The intent to kill must be the result of deliberate premeditation; it must be formed upon a pre-existing reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation. There need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer; and if such is the case, the killing is murder of the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing.

We have carefully read the entire charge of the Court, for the purpose of ascertaining whether this objection is cured in any other part; and although we find other attempts at definition and illustration, we are satisfied that the distinction between the two degrees of murder is nowhere drawn with that perspicuity which is necessary in order to render it distinct and clear to the comprehension of a jury. This leaves to us no option but to reverse the judgment and order a new trial.

Ordered accordingly.

The People *v.* Wm. Williams.

THE PEOPLE *v.* WM. WILLIAMS.

BIAS OF JUDGE — CHANGE OF VENUE.—Bias or prejudice on the part of the Judge, constitutes no legal incapacity to sit on the trial of a cause, nor is it a sufficient ground to authorize a change of the place of trial.

ERROR OF JUDGE NOT EVIDENCE OF BIAS.—The fact alone, that the Judge, on a previous trial of the same cause, made an erroneous ruling, is no evidence of the existence of bias or prejudice in his mind.

CHANGE OF VENUE FOR PREJUDICE OF JUDGE.—An affidavit made on application to change the place of trial, which states, "that the Judge, as the affiant is informed and verily believes, has frequently stated that he believed the affiant guilty of the crime charged in the indictment, and has frequently expressed himself against and adversely to the affiant in connection with said charge," does not merit consideration, as it contains a mere charge upon information and belief, and does not show how the information was obtained, or upon what the belief was based.

AFFIDAVIT FOR CONTINUANCE.—An affidavit for a continuance, which merely shows that the desired witness resides in another county from that of the place of trial, and that a subpoena has been placed in the hands of the Sheriff of the county where the witness resides, and has been returned not served on the witness, does not show sufficient diligence to entitle the defendant to a continuance.

AFFIDAVIT ON MOTION FOR NEW TRIAL.—An affidavit made on motion for a new trial, in a criminal case, on the ground that the jury received evidence out of Court, other than that given by the witnesses who testified on the trial, which states that the affiant is informed and believes that slips of a newspaper and a law book containing the evidence given on a former trial of the same case, were left in the room where the jury deliberated on their verdict; and that the affiant is informed and believes that while so deliberating, the jury read from said newspaper slips what purported to be the evidence taken on said former trial, and from said law book the evidence of a former trial as published in the same, is not sufficient to warrant the granting of a new trial.

PERFORMANCE OF DUTY BY JURORS.—The presumption is that jurors perform their duty in accordance with the oath which they have taken, and to overthrow this presumption, there must be some direct positive testimony, tending to show misconduct on the part of the jury.

APPEAL from the District Court, Sixth Judicial District, Yolo County.

The facts are stated in the opinion of the Court.

The report of this case on the first appeal to the Supreme Court will be found 18th Cal. 187.

N. Greene Curtis and George B. Moore, for Appellant.

The People v. Wm. Williams.

In the case of *Spencer v. The State*, 8th Blackford, 281, the Court said, "the Court below erred in refusing a continuance of the case on the affidavit of the defendant, showing the absence of a material witness." (*Wade v. Milleken*, 16 Ill. 507; *Copenhagen v. The State*, 14th Geor. 22.)

"It is a rule of law well settled that if a jury, after retiring to deliberate upon their verdict, hear other testimony, it will form a ground for a new trial." (*Hudson v. The State*, 9 Yerger, 408; *Booby v. The State*, 4 Yerger, 111; 18 *B. Munroe*, Ky. 291.)

The statute regulating proceedings in criminal cases, empowers the Court to grant a new trial, when the jury have separated without leave of the Court, after retiring to deliberate upon their verdict, or been guilty of any misconduct tending to prevent a fair and due consideration of the case. (Crim. Pr. section 440.)

The burden of proof rests upon the State to show that the defendant has not suffered any injury by reason of the irregularity complained of, and that in the absence of such proof, he is entitled to the benefit of the presumption that this irregularity has been prejudicial to him. (*People v. Brannigan*, 21 Cal. 337, and cases therein cited; *Sam v. The State*, 1 Swan, p. 61; *Atkins v. The State*, 16 Ark. 568.)

"If a paper calculated to influence a jury in favor of one of the parties gets improperly before them, while considering of their verdict, and they find for that party, it is a ground for a new trial." (*Walker v. Hunter*, 17 Georg. 364; *Wilson v. Wilkins*, 3 Foster, 471.)

McCullough, Attorney-General, for Respondent.

The mere affidavit of the defendant that the Judge was biased, without specifying the facts, is not a sufficient showing to warrant this Court in interfering, or the Court below in granting a change of venue. (*People v. Fisher*, 6 Cal.

154; *People v. Mahoney*, 18 Cal. 180; *People v. Graham*, 21 Cal. 261.)

As to the affidavit for continuance, see Wood's Digest, §§ 325, 528, pages 295, 314. (*People v. Quincy*, 8 Cal. 89; *People v. Thompson*, 4 Cal. 240; *People v. Varnard*, 6 Cal. 562.)

The presumption is that the jury did their duty, and arrived at their verdict from the evidence.

Besides, it is not pretended that the people or a juror surreptitiously introduced into the jury room the papers. (*Ball v. Carley*, 3 Indiana, 578; *Bersb v. The State*, 13 Ind. 436; *Nolen v. The State*, 2 Head, Tenn. 522.)

By the Court, SAWYER, J.

The defendant was indicted for murder in the first degree, tried, and convicted. An appeal was taken to this Court, the judgment reversed on the ground of an erroneous ruling in excluding certain evidence offered by defendant, and a new trial ordered. On the second trial a verdict of guilty was also returned by the jury. From the judgment rendered on this verdict, and the order denying a new trial, the present appeal is taken.

When the case was called for trial, the defendant filed an affidavit, in which he states "That he cannot have a fair and impartial trial in the Sixth Judicial District, and before the Judge of said Court, for the following reasons, to wit: First—Because said case has once been tried before said Judge, and that said Judge has improperly ruled upon the most of defendant's evidence adversely to the right of this affiant. Second—Because said Judge, as affiant is informed, and verily believes, has frequently stated that he believed this affiant guilty of the crime charged in the indictment, and has frequently expressed himself against and adversely to this affiant in connection with said charge. Wherefore, this affiant says that he verily believes and avers the truth to

be that said Judge is biased and prejudiced against him and against his said case, and that he cannot have a fair and impartial trial before said Judge in said Court.”

On this ground, he moved for a change of the place of trial to some other county. The motion having been denied and exception taken, this ruling is assigned as error.

No authority has been cited to support the proposition that bias or prejudice on the part of the Judge constitutes a legal incapacity to sit on the trial of a cause. Our statute does not provide for any such disqualification. In discussing the subject of challenges, Wharton, in his work on American Criminal Law, sec. 2945, says: “The practice among the civilians extends the right of challenges for cause to the Judges as well as to the jurors; and the great inclination of authority is, that the same causes which disqualify one disqualify the other. Where the Judge, like a Chancellor, sits to try both facts and law, as in the case with the civilians, there is peculiar reason for the application to him of a jealous test; and the cases where he may be challenged are placed in two classes: First—Where he is disqualified by circumstances beyond his control, (*e. g.*, relationship, or previous connection with the subject matter.) Second—Where he is disqualified by misconduct, (*e. g.*, partiality or prejudice.) But by the common law of England and America, where the Judge is a statutory officer subject to impeachment, and where the jury is unimpeachable, and from its character is peculiarly susceptible to those influences which produce incompetency, it would be as absurd as impracticable to treat each as subject to the same rule. A jurymen, again, when challenged, may be readily replaced; but as a Judge could not sit to try his own incompetency, not only would every challenge involve an appeal, but it would be necessary to establish a reserved Court to sit subsequently in case a disqualification were found to exist. Under our system, therefore, there can be no such thing as the challenge of the Judge, the remedy, in case of criminal partiality, being found in impeachment.

The People v. Wm. Williams.

* * * * In this light the Judiciary are, with us, clothed with powers and discretion far more absolute than those under the civil or modern continental law; and perhaps this may tend to give additional weight to those moral sanctions which require a Judge on the bench, whatever may have been his individual relations, to religiously divest himself of those prejudices, personal, social, or political, which would be a cause of disqualification to a juror." An application to change the place of trial on the ground stated, if not technically in form a challenge to the Judge, is substantially a challenge in effect, and the principles laid down by Wharton are equally applicable to the case.

A question, similar in principle, arose in the case of *The People v. Mahoney*, 18 Cal. 185, where it was claimed that the Judge was biased against the prisoner, and a change of the place of trial asked on that ground. The Justice who delivered the opinion of the Court in that case says: "If the Judge acted illegally on the trial, or denied the prisoner his legal rights, this would be a good cause, on appeal, for reversal; but we cannot undertake to say that this consideration operated a legal disqualification of the Judge to sit." And in *McCauley v. Weller*, 12 Cal. 523, the question also directly arose in a civil case, and it was held that a manifest bias, and even an exhibition of partisan feeling on the part of the Judge, although "indecorous, improper, and reprehensible, as calculated to throw suspicion upon the judgments of the Court and bring the administration of justice into contempt," was not sufficient ground, under our statute, to authorize a change of the place of trial.

But, admitting that bias of the Judge is a sufficient ground for changing the place of trial, we are not satisfied that any such bias existed on the part of the Judge in the present instance as would justify the Court in reversing the judgment on that ground. The fact alone that the Judge, on a previous trial, made an erroneous ruling, is no evidence of such bias. Errors are often committed by the most impartial Judges. It

is not singular that the Judge, after hearing the testimony on the former trial, had formed or even expressed an opinion as to the prisoner's guilt. He must necessarily have formed one if he attended to his duties during the progress of the trial. If this were a disqualification, no Judge who has once tried a case could properly preside on a second trial of the same party for the same offence.

The Judge has nothing to do with determining the facts of the case. His province is to rule upon the admissibility of the evidence offered, and to charge the jury as to the law governing the case. If he errs in these particulars, the error can readily be corrected on appeal. The best evidence that the Judge discharged the duties impartially in this instance, and that no error was committed in these respects is, perhaps, the fact that the learned counsel of the defendant have made no point in their argument of this appeal upon the charge given to the jury, or upon any ruling made during the progress of the trial.

But the charge that the Judge had formed and expressed an opinion adverse to the appellant, and by implication that his mind was in such a condition as to render him incapable of giving the prisoner at the bar a fair and impartial trial, is made upon information and belief unsupported by any other testimony. Not even the names of the affiant's informants or the sources of his information are given; and no reason or motive is assigned why the Judge should entertain any improper bias or prejudice against the prisoner.

This charge is entirely too loosely made to merit any serious consideration by this Court.

Second — The second error relied on by the appellant is the refusal of the Court to continue the case on the ground of the absence of Ann and Mary Mathers and A. J. Harrington, witnesses on the part of the defendant.

As to the former two, the record shows that the Court postponed the trial from the 11th to the 13th of August to enable the defendant to procure their attendance, and that

they did attend and testify on his behalf at the trial of the cause. As to the witness Harrington, no sufficient diligence to procure his attendance is shown by the affidavit upon which the application was based. It simply states that a subpoena for these witnesses had been issued and placed in the hands of the Sheriff of Sacramento County on the 22d of July; that said witnesses were residents of the County of Sacramento, and that "the Sheriff has returned said subpoena not served on said witnesses." No reason is assigned why it was not served. It does not appear that the Sheriff was notified at what place in Sacramento County said witnesses resided, or that the Sheriff could not find the witnesses, or that he had made any effort to find them.

The trial was to take place in the County of Yolo. In order to compel the attendance of these witnesses in the County of Yolo it was necessary to procure an order from the Judge or a Justice of the Supreme Court, or a County Judge, requiring their attendance in that county. (Wood's Digest, page 311, Sec. 558.) It does not appear that any such order was obtained or asked for. The placing of a subpoena in the hands of the Sheriff of Sacramento County, without such order indorsed thereon, was therefore a nugatory act. Besides, the affidavit was filed on the 11th of August. The affidavit stated that all the witnesses resided in Sacramento County, and the first two above named in the Town of Folsom. Upon filing the affidavit the Court postponed the trial till the 13th, and directed a subpoena to issue for the two witnesses stated in the affidavit to reside at Folsom, and indorsed the proper order thereon requiring their attendance; and their attendance was thereby secured on the 13th, the day to which the trial had been postponed. But it does not appear that any further subpoena for Harrington was demanded, or that any order was asked for requiring his attendance. It does not appear that his attendance could have been procured had the same means been taken to secure it that were adopted in the case of the other two. He appears

to have resided in the same county, and there was the same time to find him as was allowed and as proved to be sufficient in the case of the others. No reason is shown why the attendance of Harrington could not be procured. It is worthy of remark in this connection that the two witnesses whose attendance was secured by the postponement did not testify in accordance with the appellant's expectations, as stated in his affidavit. They entirely fail to show where the prisoner was during a large portion of the evening on which the homicide was committed, and including the time at which, according to Blake's testimony, the act was perpetrated. This fact, taken in connection with the fact that those witnesses were members of the same family with the prisoner at the time of the homicide; that he had had one trial, and must be supposed to have known what their testimony would be; and the further fact that no serious effort appears to have been made to secure Harrington's testimony during the interval which elapsed between the 11th and 13th of August, has a tendency to cast a strong shade of suspicion over the good faith of the application for a continuance.

We do not think sufficient diligence was shown to procure Harrington's attendance. There was consequently no error or abuse of discretion in refusing a continuance. (*People v. Quincy*, 8 Cal. 89; *People v. Thompson*, 4 Cal. 241.)

Third — The third and last point relied on is, that the Court erred in refusing to arrest the judgment and in overruling the motion for a new trial on the ground that the jury received evidence out of Court other than that given by the witnesses who testified against him on the trial.

This ground is based upon the affidavit of the appellant, in which he states in substance that he was tried for the same offence in Sacramento County in December, 1860; that the *Sacramento Union* published what purports to be the evidence in the case; that on the trial now under consideration the attorneys, both of the people and the appellant, used the said printed evidence, in slips clipped from the *Sacramento Union*;

that after the jury had been charged by the Judge, the Judge, attorneys, witnesses, and spectators, in pursuance of an order to that effect, left the Court-room, the jury remaining to deliberate on their verdict; that he is informed and believes that said slips from the *Sacramento Union*, containing the evidence given on the former trial, and several law books, including the 18th volume of the California Reports, said volume containing a report of said cause and a large portion of the evidence taken on said former trial, were left on the bar or table of said Court where said jury remained to deliberate on their verdict; that he is informed and believes that while so deliberating the jury read, from said newspaper slips, what purported to be the evidence taken against him on said former trial, and from said 18th volume California Reports, the evidence as published in the report of said cause—all of which he believes was prejudicial to him in the finding of the verdict of the jury.

There is no direct positive statement that those slips or the volume referred to were left in the Court-room; and no direct statement that the jury read them, if left.

The affiant only states that he is informed and believes they were left in the room and read by the jury. He does not claim to have any personal knowledge on the subject. It does not appear from whom he received his information. The parties giving the information make no affidavit on the subject.

If his informants had any knowledge on the subject their affidavits could and should, and in a matter of so much importance to the prisoner, doubtless would have been produced. The sources of the affiant's information should at least have been disclosed, in order that the District Attorney might have had an opportunity of verifying or disproving the matters alleged, as the truth might be.

It does not appear by whom or how these slips and books were left in the Court-room. Admitting that they were left, as alleged, *non constat*, that they were not left by the prisoner

The People v. Wm. Williams.

himself, or by some party on his behalf, for the very purpose of vitiating the verdict in case it should be against him. It is not pretended that they were introduced surreptitiously on the part of the people for the purpose of influencing the verdict, or that the District Attorney or the Judge was aware of their being left in the Court-room. Nor does it appear that the printed matter so left was not a perfectly correct transcript of the evidence, or that it in any particular differed from the evidence given before the jury on the trial.

It does not appear, except by the affidavit of the prisoner upon information and belief merely, unsupported by any other evidence, that it even came to the knowledge of the jury that the obnoxious papers were in the room where the jury were deliberating.

It is not to be presumed that the jurors violated their duty by hunting up and reading evidence not given to them in the progress of the trial in open Court under the sanction of the Judge. The presumption is that they performed their duty in accordance with the oath which they had all taken before entering upon the trial of the case. To overthrow this presumption there must be some direct positive testimony tending to show misconduct on the part of the jurors in this particular. It is not enough that this objectionable matter was inadvertently left in the room, with other books and papers, where the jury might by chance have found it. There must be some positive testimony by some person, who has knowledge of the facts which he states, showing that the jurors, or some one of them, read the testimony referred to, or at least that they found it, or that it in some way came to their notice. No such testimony is produced in this case, and the Court therefore, did not err in denying a new trial or in refusing to arrest the judgment.

No error having been brought to the notice of the Court, the judgment is affirmed, and the District Court is directed to fix a day for carrying the sentence into execution.

The People v. Jean Baptiste Bruzzo.

THE PEOPLE v. JEAN BAPTISTE BRUZZO.

RETURNING NOLLE PROSEQUI TO USE DEFENDANT AS A WITNESS.—When two or more persons are jointly indicted, and jointly to be tried, and the District Attorney desires to use one of them as a witness for the people, and makes an application to the Court for his discharge for that purpose, the Court may, before this defendant has gone into his defence, discharge him from the indictment. But unless all these things concur, to wit: a joint indictment, a joint trial, an application on the part of the District Attorney that the defendant be discharged, to be used as a witness for the people, before he has gone into his defence, the Court has no power to direct a defendant to be discharged from the indictment.

DISCHARGE FROM INDICTMENT AN ACQUITTAL.—Should all the circumstances above stated concur and the Court discharge the prisoner, the discharge would be an acquittal in legal effect, and bar another prosecution.

DEFENDANT IN CRIMINAL CASE SWORN AS WITNESS.—Where one of two or more defendants, jointly indicted and jointly on trial, at the request of the District Attorney, but without any compulsion, takes the stand as a witness for the people, and voluntarily takes the oath, and his counsel objects to his being instructed by the Court that he need not say anything to criminate himself, and then, without any objection being made, or exception taken, voluntarily gives testimony, criminating both himself and his co-defendants; this furnishes no ground for discharging the defendant who testifies from the indictment, or for arresting the judgment, and if erroneous, as no exception was taken, the Supreme Court cannot review the error.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Taylor and Hastings, for Appellant.

The statute of 1851 (Wood's Digest, Article 1626, Secs. 368 and 370, p. 298) is the law of the land, and is not repealed nor in any manner affected by the amended statute of April 10th, 1855. (Wood's Digest, p. 330, Art. 1878, Sec. 13.)

The statute of 1851 concerns cases where there is a joint indictment *and a joint trial*. The words are—"when two or more persons are included in the same indictment, the Court may, *at any time before the defendant has gone into his defence* * *

The People v. Jean Baptiste Bruno.

discharge him, that he may be a witness for the people. These words show that this statute contemplates and provides for a person whose trial with others is then in progress.

It is further shown by the next article, (1627) which is part of the same statute. The language is—"when two or more persons are included in the same indictment, and the Court is of the opinion that in regard to a particular defendant *there is not sufficient evidence to put him upon his defence*. And yet further, by section 360, "the order mentioned in the last two sections shall be deemed an acquittal * * * and shall be a bar to *another* prosecution for the same offence."

It is, therefore, quite clear that the statute of 1851 applies where persons jointly indicted are *jointly on trial*, and Article 1626 points out the way—the only way—in which a person on trial with others can be made a witness for the people, viz. "by discharging him from the indictment."

The statute of 1855, (amendment,) Article 1878, p. 33, which was relied upon by the Court below, has no relation to such case. It is framed for different ends, and looks to different objects. Its fair construction, its plain meaning is that where one is called as a mere witness in *another's* trial or where he is jointly indicted, but is to be *separately* tried from those indicted with him, *before another jury*, such person "may be compelled to be sworn as a witness against *another*," but the testimony so given shall not be used in a criminal prosecution against himself."

The statute of 1855 finds its best illustration in cases of the character of *ex parte* Rowe, 7 Cal. 184, 185; *People v. Hackley*, 24 New York, 74.

To construe the statute of 1855 as a repeal of the statute of 1851, will be to strike down at a blow every rule of construction known to the law.

1. The statute of 1855, if it repeal the statute of 1851, does so by *implication*. Nothing is better settled than that the law does not, even in civil cases, favor repeals by implication. It is only when the two statutes are directly hostile

The People v. Jean Baptiste Bruzzo.

to each other, and the words of the one directly repugnant to that of the other, that repeal by implication is permitted. (*Crosby v. Patch*, 18 Cal. 438, 441-2.)

There is nothing repugnant or hostile either in word or idea in these two statutes.

2. The law endeavors, if possible, to uphold both statutes. If both can fairly be made to stand, it is the duty of the Court to give effect to both. (*Crosby v. Patch*, 18 Cal. 441-2.)

Both can stand; both can have effect. Neither interferes with the other. They are totally distinct in their nature and character. They move in different spheres: the one touching a prisoner on his trial—the other, touching a witness when on the trial of another.

3. A statute should be construed as a whole, and with all its parts, together with statutes on the same subject, antecedent jurisprudence, legislation, and usage. (Sedgwick's Const. and Stat. Law, p. 379.)

Almost every page of the statute book, as regards criminal legislation, contains provisions shielding the prisoner from any attempt to compel him to be a witness against himself, and preventing him from offering evidence, even the slightest, on his own trial. (Wood's Dig. p. 270, Art. 1387, § 12; *Id.* p. 282, Arts. 1480-81-82-83.)

If the construction placed on the statute of 1855 by the Court below be correct, these, equally with the statute under consideration, are all repealed.

McCullough, Attorney-General, for Respondent.

The Act of 1855, so far as enforced in this case, certainly is not unconstitutional, nor is it when enforced entirely.

Bruzzo is called to the stand by the people—he does not object—goes willingly; but is anxious to say to the Court he will ask his discharge if he testifies. At first, the Court tells him he need not in his testimony criminate himself; he objects to *that*—wants to testify, and then the Court tells him if he answers, he must answer all questions in regard

The People v. Jean Baptiste Bruzzo.

to the matter. If a man proffers his testimony—is willing to criminate himself—no constitutional objections exist to receiving it; he may not be compellable, but is undoubtedly competent, and when thus offered he subjects himself to cross-examination like any other witness. (*Udal v. Walton*, 14 Mees. & Wels. 256; 1 Greenleaf Ev. § 451; *East v. Chapman*, 1 Mood. & Malk. 46; *State v. K.*, 4 N. H. 562, and cases cited; *Low v. Mitchell*, 18 Maine, 374; Appleton on Ev. p. 126, note p.) This is Bruzzo's case: He did not object; more, he objected to the Court objecting to his incrimination of himself. There is certainly nothing unconstitutional in a man confessing his own guilt—if he be sane; he can do it out of Court—why not in?

But second: Even though Bruzzo had been *compelled* to go on the stand and to testify against others, he was, and is, indemnified against the consequences by the very terms of the Act of 1855, and the principle of the constitutionality of such an Act is sustained by the authorities cited by appellant. (*People v. Mather*, 4 Wend. 229, and cases; *People v. Hackley*, 24 N. Y. 82, 83; and the case of *People v. Wenehamer*, 13 N. Y., 443-4, was where, if the defendant did not testify, the Act assumed his guilt, and of course there was no indemnity.) And in this State the constitutionality of this very Act is upheld. (*Ex parte Rowe*, 7 Cal. 184-5.)

The Court charged the jury here that Bruzzo's evidence must not be used by them in making up their verdict against him. In *ex parte Rowe*, the petitioner was compelled to testify against himself before a grand jury. Why not here the defendant be compelled to testify against himself on a trial jury, when in each case the testimony cannot be used against the witness?

By the Court, SHAFER, J.

Jean Baptiste Bruzzo, the appellant, was jointly indicted with Pasquelena Lecari, and Francisco Pizzano, for the murder of one Pietro Lecari. On the morning of the day the

The People v. Jean Baptiste Bruzzo.

trial began, 21st of September, 1863, the District Attorney moved for separate trials, desiring to try Madame Lecari and Pizzano separately from Bruzzo. This motion was opposed by counsel for Bruzzo, and the same was denied by the Court—the Court ordering all the defendants to be tried together, which was accordingly done. A jury having been impanelled, evidence was elicited from various witnesses strongly implicating Bruzzo, consisting of confessions, admissions, etc. Toward the close of the case, and before the defendants had gone into their defence, the District Attorney called Bruzzo as a witness against Lecari and Pizzano. This was objected to by counsel for Lecari and Pizzano, “for that he, Bruzzo, was jointly indicted with the others, and was with them jointly on trial.” The objection was overruled by the Court. The counsel for Bruzzo then requested the District Attorney to apply to the Court for the discharge of Bruzzo from the indictment, which request was refused. The counsel for Bruzzo then gave notice, in open Court, that if Bruzzo was made a witness he should himself apply for Bruzzo’s discharge. The Clerk then swore Bruzzo in the case of Pizzano and Pasquelena Lecari. The counsel for Bruzzo, and also the counsel for the other two defendants, objected that Bruzzo was not sworn in the case; which objection was sustained, and Bruzzo was sworn “to tell the truth, the whole truth, and nothing but the truth, in the matter wherein The People of the State of California were plaintiffs, and Pizzano, Lecari, and Jean Baptiste Bruzzo, were defendants.” The District Attorney then requested the Court to instruct Bruzzo that he need not say anything to criminate himself; that if he did it would be voluntary on his part. To this the counsel for Bruzzo objected. The Court instructed Bruzzo as requested; but before any question was asked Bruzzo, the Court sustained the objection of his counsel, and at the request of counsel withdrew the instruction, telling Bruzzo that “he must answer all questions in regard to the matter;” holding “that the law did not pro-

The People v. Jean Baptiste Bruzzo.

vide that the witness should not answer questions criminating himself, but only that his testimony should not be used against him." Bruzzo then testified fully in regard to the whole affair, and, in so doing, he criminated himself without stint. As soon as he had been examined, his counsel again requested the District Attorney to apply to the Court for Bruzzo's discharge from the indictment, which request was refused. The counsel for Bruzzo then himself moved for Bruzzo's discharge, and the motion, after argument, was denied, the counsel of Bruzzo excepting.

The case having been argued to the jury, the Court charged that Bruzzo's testimony, given on the stand, must not be used against him in making up their verdict, but only as against Pizzano and Lecari. The jury found all guilty of murder in the second degree.

October 17, 1863, the prisoners were brought into Court for sentence. A like motion was again made for the discharge of Bruzzo, but it was denied by the Court; to which ruling the counsel for Bruzzo excepted. To the question of the Court, whether the prisoners had anything to say why sentence should not be pronounced against them, Bruzzo, by his counsel, replied: "That having been made a witness on the part of the people, he deemed himself entitled to be discharged from the indictment, and that no sentence ought to be passed upon him." The Court, however, proceeded to pass sentence upon all of the prisoners, and Bruzzo, with the others, was sentenced to confinement in the State Prison for the term of his natural life. Bruzzo appeals from the judgment.

It is insisted, upon the part of the appellant, that the Court erred in denying the motion of Bruzzo's counsel for a discharge. The right of Bruzzo to be discharged is based in argument, upon the 368th section of the Criminal Practice Act; it not being claimed that on the fact of this record the Court had any power to discharge him at common law. The section is as follows: "When two or more persons are

included in the same indictment, the Court may, at any time before the defendant has gone into his defence, on the application of the District Attorney, direct any defendant to be discharged from the indictment, that he may be a witness for the people."

After citing the foregoing section, counsel proceeds to argue, and with much force, that this section has not been repealed by section 13 of an Act passed in 1855, (Wood's Digest, page 330,) which section is as follows:

"In all cases where two or more persons are jointly or otherwise concerned in the commission of any crime or misdemeanor, either of such persons may be sworn as witnesses against the other in relation to such crime or misdemeanor; but the testimony given by such witness shall in no instance be used against himself in any criminal prosecution, and any person may be compelled to testify as provided in this section."

It is insisted for the appellant that these sections are not at all in conflict with each other — that the first applies to one class of cases, and the second to another and distinct class; and that inasmuch as there is no express repeal of the former section, there can be no repeal wrought out by implication, under the well understood rules of construction by which such implications are governed. All this may be conceded, but it would not follow that Bruzzo was entitled to be discharged, as the argument for the appellant seems to assume. On the contrary, the only direct result that could be claimed would be that section 368 of the Act of 1851 is still in force.

This brings us to the only question which the case presents, viz: Was Bruzzo entitled to be discharged, under section 368 of the Act last mentioned?

The section contemplates the case of a joint indictment of two or more persons, a joint trial under the indictment, and an application by the District Attorney to the Court for the discharge of one of the defendants before he has gone into

The People v. Jean Baptiste Bruzzo.

his defence. On the happening of these contingencies the Court is authorized, and, it may be, becomes bound, to discharge the particular defendant from the indictment, "that he may be thereafter a witness for the people." The foregoing series of facts and occurrences being found or given, the section in question dictates the rule of judicial conduct. Should the Court, in obedience to the rule, discharge the prisoner, the discharge would be an acquittal in legal effect, and bar another prosecution. (Wood's Dig. 298, Sec. 370.)

From the moment of a discharge so secured, the party becomes a stranger to the proceedings, and cannot only be called, but, on general principles, can be compelled to take the stand as a witness for the people against the remaining defendant or defendants; and being no longer on trial or liable to future indictment, he may be compelled to criminate himself. So much as to the scope and uses of section 368. It is merely a law unto itself. It dictates a rule governing the case which it creates or recites, and it does no more.

Now, the record before us does not find the series of emphatic particulars upon which the duty and power of the Court to discharge is, by the section, made implicitly to depend. It is true that some of them are found in the record, but it is equally true that others of them are not. The record not only fails to show an application to the Court by the District Attorney, but, on the contrary, it shows affirmatively that he persistently refused to make such application whenever requested so to do by Bruzzo's counsel. True, the record shows that when the testimony of Bruzzo was completed, his counsel, in pursuance of notice given by him before Bruzzo took the stand, moved for his discharge; but it cannot, in our judgment, be successfully contended that an application by the counsel of the prisoner, particularly when made after his client's testimony had been given, was the legal equivalent of a like motion by the attorney for the people, made before the testimony had been commenced. In other words, the District Attorney and the counsel of a

The People v. Jean Baptiste Bruzzo.

defendant have not, under section 368, concurrent power to make the application to discharge. Should the doctrine of concurrent power pass for law, it is apparent that the rule in its practical workings would be attended with very anomalous results.

But, again: Bruzzo was not compelled to take the stand. The District Attorney called on him, and to the call no objection was taken by Bruzzo. Instead of an objection addressed to the Court, followed by a judicial ruling, the counsel of Bruzzo limited himself to a request addressed to the District Attorney, that he (the attorney) should make an application to the Court for Bruzzo's discharge, and on the refusal of the District Attorney to comply with the request, counsel merely superadded a verbal notice of motion to discharge, to be made by him when Bruzzo's testimony should be concluded; and thereupon Bruzzo, solicited indeed, but certainly not compelled by the "call" of the attorney for the prosecution, took the stand without demur. Throughout this entire scene the Court was silent, making no decision, and expressing no opinion. That Bruzzo went from the dock to the witness stand voluntarily is beyond controversy. Being upon the stand, he was sworn in the first instance to testify in the *People v. Lecari and Pizzano*; and on objection by his counsel that the oath was improper and valueless, for the reason that there was no such case pending, the Court made its first ruling, sustaining the objection. Thereupon and without any objection by counsel, or any ruling or intimation from the Court, and without any manifestation of unwillingness on the part of Bruzzo, he was sworn generally in the case as made in the indictment. As Bruzzo did not take this oath by judicial direction, and as he was not misled by any suggestion from the bench as to his duty in the matter of taking it, and as he must be presumed to have known his legal rights, we

The People v. Jean Baptiste Bruzzo.

hold that he took the oath voluntarily and without misapprehension. After the oath had been thus accepted by Bruzzo, the Court instructed him, at the instance of the District Attorney, that "he need not say anything which would criminate himself, and that if he did it would be pure and voluntary on his part." This instruction, in effect, limited the obligation of the oath by judicial interpretation, so as to relieve Bruzzo from the necessity of self-accusation, leaving him, indeed, without motive for disclosing his own participation in the alleged murder other than the relief which guilt always finds in confession, and the hope that if the conviction of the other defendants should be secured by his testimony, he could rely upon that fact as a ground of pardon in the event of his own conviction. But Bruzzo, apparently dissatisfied with the exemption so extended to him, objected to the exemption, through his counsel, and thus insisted in effect that the exemption should be canceled or recalled. The Court, at his instance, withdrew the instruction, or rather recalled the lawful and humane monition that it had given him, "telling him that he must answer all questions in regard to the matter; holding that the law did not provide that the witness should not answer questions criminating himself, but only that his testimony should not be used against himself." Admitting that, disassociated from the context of facts, this instruction would be erroneous, still, when considered in connection with the events that immediately preceded it, we hold that it was an instruction given in effect at Bruzzo's solicitation. When he objected to the instruction "that he need not criminate himself," he virtually requested the Court to give the opposite exposition of the oath he had voluntarily taken. Should it be admitted that the instruction was not only erroneous, but also that the error is now before the Court for review, it would furnish no reason why Bruzzo should be finally discharged, but a reason simply why a new trial should be awarded. But no exception was in fact taken to the i

The People v. Jean Baptiste Bruzzo.

struction on Bruzzo's behalf, and therefore the jurisdiction in error does not attach.

We add, that the case at bar not only does not fall within the Act of 1851, but is, in our judgment, equally foreign to the Act of 1855. It differs from the cases for which these Acts respectively provide, and in governing particulars. The record shows a case of joint indictment; joint trial; a request or call by the Prosecuting Attorney for one of the defendants for the purpose of examining him against the other two; he takes the stand voluntarily in answer to the call; he invites and without objection takes the oath in its most comprehensive form, and, under instructions which he has previously solicited, and to which he takes no exception when given, criminales his associates and himself; and on these antecedents the counsel of the witness, in pursuance of a notice previously given, moves the Court not merely to discharge the witness from the particular prosecution, but to finally acquit him, in effect, of the crime alleged against him. Power in the Judiciary to grant such a motion under such circumstances will be looked for in vain under any provision of our criminal code, and as vainly in the rules of the common law. An acquittal under such circumstances would be a species of judicial pardon, rescuing the prisoner on his own motion, and against the express or virtual protest of the Government, from a conviction made morally certain by evidence previously adduced.

The results are as follows: First—The Court has no power to discharge Bruzzo at common law, nor under the Act of 1851, on the motion of his own counsel. Second—Admitting that, on the facts of this case, the Court had no power to compel Bruzzo to take the stand as a witness, yet the record shows that Bruzzo was not subjected to such compulsion; and if the converse should be held to appear, still, as no exception was taken, we cannot review the error.

The judgment is affirmed.

Rowland v. Kreyenhagen — Kreyenhagen v. Rowland.

FRANCIS ROWLAND *v.* GUSTAVUS KREYENHAGEN, LOUIS LEUDEN, PATRICK BRODERICK *and* JACOB RICH, *AND* GUSTAVUS KREYENHAGEN *v.* FRANCIS ROWLAND, W. M. BURGOYNE, JOHN V. PLUME, AMIDEE PASTARE, THERESA GEONNI, FERDINAND CERESA, *and* ROBERT MILLS.

DISMISSAL OF APPEAL — EFFECT OF.—A dismissal of an appeal by the Supreme Court is, in legal effect, an affirmance of the judgment of the Court below, as conclusive and binding upon the parties and the Court as a direct judgment of affirmance, unless the appellant obtains an order setting aside the dismissal and reinstating his appeal before the adjournment of the term.

REMITTITUR — EFFECT OF ISSUANCE.—When a remittitur has been duly and regularly issued from the Supreme Court, and filed in the Court below, and all the proceedings have been regular, the Supreme Court loses all jurisdiction over the case, and from that time can exercise no further control.

FRAUD IN PROCURING DISMISSAL OF APPEAL.—If, however, any fraud or imposition has been practiced upon the Court or the opposite party by the party procuring the dismissal, or the order of dismissal has been improvidently granted upon a false suggestion, or under a mistake as to the facts of the case, the appellate Court will recall the remittitur and stay proceedings in the Court below, and assert its jurisdiction even after the adjournment of the term, upon the ground that its jurisdiction cannot be divested by an irregular or an improvident order, and that the order is a nullity.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

On the 10th day of October, 1863, the following certificate were filed in the Supreme Court:

“In the District Court of the Fourth Judicial District, and for the City and County of San Francisco, and State of California.

“FRANCIS ROWLAND *v.* GUSTAVUS KREYENHAGEN *et al.*

“I, William Loewy, Clerk of said Court, do hereby certify, that the judgment in this action was rendered on the 17th day of September, 1862, in favor of the plaintiffs, for

Rowland v. Kreyenhagen — Kreyenhagen v. Rowland.

the possession of real estate described in the complaint, with \$2,132.10 damages and costs; that a motion for a new trial was made on the 21st of November, 1862, and on the 27th of April, 1863, the same was denied by the Court; that on the 3d of June, 1863, an appeal was perfected herein by the defendants; that no statement on appeal has been filed; that no transcript of the record has been made out; that the attorney for the appellants requested said transcript on the 9th of June, 1863; that the fees therefor have not been paid or tendered, and the same has not been made.

"In witness whereof, I have hereunto set my hand and the seal of the said Court, this 9th day of October, 1863.

"WM. LOEWY, Clerk,

"Per JAMES E. ASCHOOM, D. C."

"In the District Court of the Fourth Judicial District, in and for the City and County of San Francisco, and State of California.

"GUSTAVUS KREYENHAGEN v. FRANCIS ROWLAND *et al.*

"I, William Loewy, Clerk of said Court, do hereby certify, that the judgment in this action was rendered on the 15th day of September, 1862, against said Kreyenhagen and in favor of said Rowland, dismissing the complaint, and for the costs; that a motion for a new trial was made herein on the 21st of November, 1862, and on the 27th of April, 1863, the same was denied by the Court; that an appeal herein was perfected by the plaintiff on the 3d of June, 1863; that no statement has been filed on appeal; that no transcript of the record has been made out; that the attorney for the appellant requested said transcript on the 9th of June, 1863; that the fees therefor have not been paid or tendered, and the same has not been made.

Rowland v. Kreyenhagen.—Kreyenhagen v. Rowland.

"In witness whereof I have hereunto set my hand and the seal of the said Court, this 9th day of October, 1863.

"WM. LOEWY, Clerk,

"Per JAMES E. ASHCROFT, D. C."

Upon these certificates the appeals were dismissed. The appellants made no motion to reinstate the cases on the calendar during the October term, nor on the first Tuesday in November, as they were allowed to do by the order made at the close of the October term.

The remittiturs were regularly issued in accordance with the 22d rule of the Court.

The following is the order made by Mr. Justice CROCKETT and Mr. Justice NORTON, in San Francisco:

"In the Supreme Court of the State of California.

"FRANCIS ROWLAND v. GUSTAVUS KREYENHAGEN.

"GUSTAVUS KREYENHAGEN v. FRANCIS ROWLAND.

"On reading and filing the affidavits of Herman Michel, George E. Whitney, Benj. S. Brooks, Wm. Loewy, Wm. F. Satterlee, and L. J. Lee, and on motion of B. S. Brooks Esq., of counsel for the appellants, it is ordered that the Clerk of the Fourth District Court return to the Clerk of this Court the remittiturs or certified copies of the orders heretofore made, dismissing the appeals in these two cases, and it is further ordered, that the attorneys of the respondents show cause before the Supreme Court of the State of California, at the Court-room thereof, in Sacramento, on the 29th day of December, 1863, at 11 o'clock A. M., or as soon thereafter as counsel can be heard, why the said orders should not be vacated, and the said causes reinstated and placed upon the calendar of said Court, on the ground that the said orders were obtained upon false suggestion and mistake, and were improvidently granted, and on the ground of the merits.

Rowland v. Kreyenhagen — Kreyenhagen v. Rowland.

set forth in said affidavits; or why such other or further order should not be made as to this Court shall seem meet; and in the meanwhile let all proceedings be stayed.

“CROCKER, J.,
“NORTON, J.”

The other facts are stated in the opinion of the Court.

Brooks & Whitney, for Appellant.

It never has been decided by any appellate Court that the appellate Court had not power to reinstate an appeal which had been dismissed for want of filing the return or transcript in due season. (*Waters v. Travers*, 8 Johnson, 566; *Chamberlain v. Fitch*, 2 Cowen, 243; *Wynn v. Wyatt*, 11 Leigh, 584; *Knight v. Bean*, 1 Appleton, 259; *Reynolds v. Stansbury*, 20 Ohio, 344; *Scott v. Scott*, 5 Mich. 106; *Rochester v. Roberts*, 5 Post. N. H. 495; *Holtenback v. Martin*, 28 Geo. 73; *King v. Hampton*, 3 Haywood, 60; *Thornton v. Ceryn*, 3 Cal. 332; *Crocker v. West*, 4 Munf. 299; *Craig v. Thorn*, 3 H. & M. 269; *Allen v. Joice*, 3 Halst. 135.)

And note the distinction between an order of dismissal and a judgment. (*Lightstone v. Laurencel*, 2 Cal. 106; *Slack v. Edwards*, id. 162; *Haight v. Gay*, 8 Cal. 300; *Swain v. Naglee*, 19 Cal. 127; *Norriega v. Knight*, 20 Cal. 172; *Real Estate B'k v. Rizzel*, 4 Pike, 189; *Gilmore v. Brenham*, 4 La. Ann. 414; *Furgerson v. Rays*, 1 N. J. 431; *Culvert v. Walker*, 3 Texas, 14; *Hannon v. The State*, 9 Gill. 440; *Marysville v. Buchanan*, 3 Cal. 214; *McMillan v. Richards*, 12 Cal. 467.)

Edward Tompkins, for Respondent.

This Court has lost all jurisdiction. The appeal was regularly dismissed pursuant to rules three and four of this Court. The certificate of the Clerk corresponded with the rule precisely, and no application was made to restore the appeal during the same term. By statute, the term continued, or might do so, until the fourth Saturday after its commence-

ment on the first Monday of October. (See Act concerning the Courts of Justice, etc.; Bancroft's Practice Act, page 545, § 9; Wood's Digest, page 148, § 9.) This motion was not made until the 29th of December, two months after the term had ended.

The filing of the remittitur in the Court below transferred the cause back to that Court, and this Court had as much power over any other cause pending there, as over this one. If two Justices of this Court, absent from Sacramento, where the law requires this Court to hold its terms, may make an *ex parte* order staying proceedings in any cause in the Fourth District Court, they may in every cause. If by an order of the Clerk of that Court, they may, without any concurrence or action of that Court, divest it of its jurisdiction over an action that is pending before it, or in which it has entered judgment, and issued process to enforce it, in any case, they may in every case, and instead of an appellate Court, it becomes a Court of summary and general jurisdiction, or rather, the Justices thereof become vested with a migratory and arbitrary power greater than has ever been claimed by the Court itself.

That an *appellate* Court has no jurisdiction over actions *except while they are in it*, would seem to be too clear to require an authority. The cases are numerous. (*Blanc v. Bowman*, 22 Cal. 23; *Leese v. Clark*, 20 Cal. 387; *Martin v. Wilson*, Comstock, 240; *Delaplaine v. Bergen*, 7 Hill, 591; *Legg v. Overbaugh*, 4 Wendell, 188; *Browden v. McArthur*, 7 Wheaton, 58.)

By the Court, SANDESSON, C. J.

On the 3d day of June, 1863, appeals were taken in these actions from the Fourth District Court. On Saturday of the first week of the following October term of this Court, the transcripts not having been filed, the appeals were dismissed upon the certificate of the Clerk of the Fourth District Court that the fees for making up the transcripts had not

been paid or tendered, and the transcripts had not been delivered to appellant's attorney. As this Court was about to adjourn, an order was made and published that motions to reinstate cases dismissed, pursuant to the third and fourth rules of the Court, might be made on the first Tuesday in November following, and directing that remittiturs, in such cases, should not issue until after that time. About the last of November the remittiturs in the two cases under consideration were issued, and filed in the Court below, and judgments were entered thereon and executions issued. On the 20th day of December following, Mr. Justice Crocker and Mr. Justice Norton, being in San Francisco, signed an order directing the Clerk of the Fourth District Court to return the remittiturs to the Clerk of this Court, and further directing the attorney for respondent to show cause before this Court, at a time therein designated, why the orders dismissing the appeals should not be vacated, and the cases reinstated and placed upon the calendar of this Court, on the ground that said orders were obtained upon false suggestion and mistake, and were improvidently granted; and further directing that all proceedings in the Court below be stayed until the further order of the Court. At the hearing the late Supreme Court vacated the orders of dismissal, and reinstated the appeals. A petition for a rehearing was filed, which was granted by the present Court, and has been had.

The third rule of this Court provides, that if the transcript be not filed within the time prescribed by the second rule, the appeal may be dismissed, *ex parte*, during the first week of the term, and that such dismissal shall be final and a bar to any other appeal in the same case, unless the appeal be restored during the same term upon good cause shown, and upon notice to the opposite party.

Under this rule a dismissal, in legal effect, must be held

to be a judgment of affirmance, which becomes final upon the failure of the appellant to obtain an order setting it aside, and reinstating his appeal, before the adjournment of the term. Unless a final judgment, it could not be held, as expressly provided in the rule, to be a bar to any other appeal in the same case. Therefore, the power of the Court over such an order cannot be greater than its power over other judgments which are, in form, judgments of affirmance or reversal.

After adjournment the orders of dismissal are placed in the same category as other judgments, and are equally conclusive and binding upon the parties and the Court, and can be vacated only upon like principles. Such being the case, we have only to determine whether, after the adjournment of the term and the going down of the remittitur, this Court has any further jurisdiction over its judgments, and if so upon what grounds it rests and under what circumstances it will be exercised. In *Grogan v. Ruckle*, 1 Cal. 193, the general rule was laid down that this Court loses jurisdiction of the cause when the remittitur has been sent to and filed in the Court below; but that its control over the cause does not cease until that has been done. In that case the remittitur had been sent to the Court below after a rehearing had been granted, and the Court held that it had been improperly sent, and, therefore, could not supersede the order granting a rehearing. The rule in this case was afterwards affirmed in *Matee v. Brown*, 1 Cal. 231. So in *Leese v. Clark*, 20 Cal. 387, it was held that this Court has no appellate jurisdiction over its own judgments, and cannot review or modify them after the case has once passed from its control by the issuing and filing of the remittitur in the Court below.

The same doctrine was held in *Blanc v. Bowman et al.* 22 Cal. 23, in which case Mr. Justice Crocker cites and approves all the cases now referred to.

In *Martin v. Wilson*, 1 Comstock, 240, a motion was made to open a judgment of affirmance, rendered at the previous

term of the Court, and affidavits excusing the default were read in support of the motion; but it appearing that the remittitur had been sent to and filed in the Court below, the Court held that it had lost jurisdiction, and denied the motion upon that ground.

In *Delaplaine et al. v. Bergen*, 7 Hill, 591, a like motion was made, and affidavits, showing merits, and that the writ of error was brought and prosecuted in good faith, were read in support of the motion, yet, it appearing that the default was regular, the motion was denied.

It is apparent from these authorities (and many others of like import which might be cited) that, as a general rule, this Court cannot exercise any jurisdiction over a cause in which the remittitur has been issued by its order and filed in the Court below. The office of the remittitur is to return the proceedings which have been brought up by the appeal to the Court below, and when the remittitur has been duly filed, the proceedings from that time are pending in that Court, and not in this; and, in regard to them, it is not competent for this Court to make any further order.

But this general rule rests upon the supposition that all the proceedings have been regular, and that no fraud or imposition has been practiced upon the Court or the opposite party; for if it appears that such has been the case, the appellate Court will assert its jurisdiction and recall the case. Against an order or judgment improvidently granted, upon a false suggestion, or under a mistake as to the facts of the case, this Court will afford relief after the adjournment of the term; and will, if necessary, recall a remittitur and stay proceedings in the Court below. This is not done, however, upon the principle of resumption of jurisdiction, but upon the ground that the jurisdiction of the Court cannot be divested by an irregular or improvident order. In contemplation of law, an order obtained upon a false suggestion is not the order of the Court, and may be treated as a nullity. If, under color of such an order, the proceedings

Rowland v. Kreyenhagen — Kreyenhagen v. Rowland.

have in part found their way back to the Court below, yet in law they are considered as still pending in the appellate Court and that Court may take such steps as may be necessary to make the fact and law agree.

These views are fully sustained by the numerous authorities cited on the argument by counsel for appellant.

In all of those cases, where the order or judgment was vacated, and the appeal reinstated, the reason assigned by the Court for its action is, that the order or judgment had been *irregularly* made; that is, made upon a false suggestion or under a mistake as to the facts of the case. The views here expressed seem also to have been entertained by counsel for appellant when he drew the order directing the respondent to show cause why the order of dismissal should not be vacated, and the cases reinstated; for he asks that the order may be set aside on the ground that they were obtained upon *false suggestion* and mistake, and were improvidently granted.

Voluminous affidavits in support of and in opposition to the motion are presented. We deem it unnecessary to discuss them for the purpose of showing the process by which we have arrived at a conclusion upon them adverse to the appellant. It is sufficient to say that we are satisfied that the orders dismissing the appeals in these cases were not irregularly or improvidently granted.

From what has been said, it follows that the order recalling the remittitur, and staying proceedings in the Court below must be vacated, and the motion to set aside the orders of dismissal and reinstate the appeals, denied.

Ordered accordingly.

Mr. Justice SAWYER expressed no opinion.

The People v. F. Mier et al.

THE PEOPLE *v.* F. MIER, J. T. MIER, AND JOHN STUBER.

SUIT FOR TAXES—JURISDICTION OF.—An action brought under the Revenue Act of 1861, to recover judgment for unpaid taxes, is not a case in equity, but an action at law; and where the amount is less than three hundred dollars the District Court has no jurisdiction.

TAX SUIT—IN EQUITY.—If, however, the action is brought under the provisions of the Act of May 12th, 1862, it is a case in equity, and the District Court has jurisdiction, although the amount claimed is less than three hundred dollars.

SUITS FOR TAXES—ACTS OF 1861 AND 1862.—The Acts of 1861 and 1862 prescribe the same form of complaint, but the Act of 1861 contemplates a mere money judgment, while the Act of 1862 authorizes a judgment foreclosing a lien for taxes, with an order of sale, etc., so that the character of the action, whether it is a case in equity or at law, will be determined by the prayer of the complaint. If the prayer of the complaint is for a money judgment, the District Court will not have jurisdiction where the amount claimed is less than three hundred dollars; but if the prayer is for the foreclosure of a lien, order of sale, etc., the District Court has jurisdiction, regardless of the amount claimed.

TAXES—JURISDICTION OF JUSTICES OF THE PEACE.—If, in an action to recover a money judgment for unpaid taxes, commenced in a Justice's Court, an answer is filed which puts in issue the legality of a tax, the Justice of the Peace is ousted of his jurisdiction.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

This action was commenced on the 8th day of January, 1864. The following is a copy of the prayer of the complaint:

“Wherefore said plaintiffs pray judgment against the said persons defendants herein, for the sum of \$65.60, and for damages and costs, and separate judgment against the said real estate and improvements for \$65.60, and the damages and costs aforesaid, and that the said lien be enforced, and that the said real estate and improvements be sold to satisfy such separate judgment, and that the interest and claim of each person aforesaid, defendant herein, and all persons claiming any interest in said real estate or improvements, be forever barred and foreclosed.”

The People v. F. Mier et al.

The other facts are stated in the opinion of the Court.

Robert Robertson, for Appellant.

No brief on file.

W. W. Upton, District Attorney, for Respondent.

This is an action to foreclose a lien for taxes levied on the real estate described in the complaint in the year 1862, for State and county purposes, under the General Revenue Law (Statutes 1861, page 419.)

The statute last cited makes the tax a lien upon the property assessed, (§3,) and directs that an action be commenced to foreclose the lien, giving the form of the complaint, and providing for a decree and sale of the premises (§§3, 39, 40). The proceeding is by complaint and summons, and the proceedings in the action are governed by the Civil Practice Act, except as to the form of the complaint, and some statutory provisions as to the manner of the sale and the effect of the deed (§45.)

The Legislature of 1862 provided that a summons containing a description of the premises might be issued and be served by publication. Under the late organization of Courts in this State, actions were brought in Justice's Courts and in the District Court to enforce liens of this character, and the late Supreme Court invariably sustained the jurisdiction of each of these Courts, it then not being a material question whether they were law or equity cases. (*People v. Pica*, 1 Cal. 595; *Mills v. Tukey*, 22 Cal. 373; *People v. Rains*, 2 Cal. 128; *People v. Todd*, 23 Cal. 181; *People v. Leet*, 2 Cal. 161; *Moss v. Mayo*, 23 Cal. 481.) Under the present judiciary system it becomes material whether they are equity cases.

It seems that, except for the purposes of discovery and account, the ground of equity jurisdiction depends upon the final relief sought. In cases of accident, mistake, and trust

the real ground of the interposition of a Court of equity is that of the inability of a Court of law to furnish an adequate remedy.

"A foreclosure is not within the province of remedies at law," (6 John. Ch. R. 248; *Dimkley v. Van Buren*, 8 ib. 330,) and for this reason, Judge Story, in speaking of mortgage, says: "From its very nature, the jurisdiction over it belongs peculiarly and exclusively to Courts of equity." (Story's Eq. Jur. 485.) The rights and duties of the parties plaintiff and defendant in this case differ from that of mortgagor and mortgagee, vendor and vendee, only in the manner of the creation of the right sought to be enforced

When an equitable right exists, the power of the Court to afford a remedy does not depend upon the origin of the right.

Equity affords relief in case of vendor's lien, although the lien and the vendor's right "stands independent of any such supposed argument." (Story's Eq. Jur. 1220.) And if a devise is made of real estate, charged with the payment of debts generally, it may be enforced by any one or more creditors, although there is no privity of contract between him and them. (Ib. 1244.)

These liens, as well as that of a mortgage, can be enforced only in Court of equity. (Ib. 1217.)

The citizen, as a member of the body politic, holds his property, and has it and his person protected, upon a trust that he will contribute his rateable proportion of the expense of such protection. He, like the vendee, owns the property — holds the fee.

At least, it is a charge upon the land, and the enforcement of it is a ground of equity jurisdiction. "A Court of equity holds pleas of all debts, incumbrances, and charges, on land, that affect it, or issue thereout." (3 Black. Com. 439.)

If this is an equity case, it can no more be dealt with by the County Court than by that of a Justice of the Peace; for by the Constitution the District Court has jurisdiction of all

The People v. F. Mier et als.

cases in equity. And if it were a proper subject, the Legislature has not conferred the jurisdiction.

The cases of *Parsons v. Tuolumne County Water Co.*, 5 Cal. 431, *Brock v. Bruce*, 5 Cal. 279, *McNeil v. Borland*, 23 Cal. 144, and *Van Winkle v. Stow*, 23 Cal. 457, establish the position that even when the Legislature have attempted to confer such jurisdiction—if there is a remedy by action—if by filing a complaint and issuing summons, the ordinary Courts, either of law or equity, can afford the relief; it is not a “special case” within the Constitution.

These actions proceed upon complaint and summons under the ordinary machinery of the District Court, and the fact that the statutes (Laws 1862, p. 520, §§ 1, 8) provide an additional summons, to issue out of the same Court, in the same case, with the ordinary one, does not tend to make it a special case.

In Iowa, Courts of equity take jurisdiction of sales of land for taxes. (6 Clark, 179; 7 Clark, 512.)

And the same is done in Arkansas. (21 Howard, S. C. R. 381.)

H. H. Hartley, also for Respondent.

The enforcement of taxes is a proceeding in equity under our system.

It is not a common law action, because the common law Courts can only give judgment for the plaintiff or defendant in general terms. (Story's Eq. Juris. section 25, p. 22.)

And because in equity an answer is under oath, and generally not at law. (Id. section 31.)

Statute also requires an answer under oath in tax cases.

The most general if not precise description of a Court of Equity, in the English and American sense is, that it has jurisdiction in cases of rights recognized and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in Courts of common law. (Story's Eq. Juris. section 33.)

The People v. F. Mier et al.

ase the Legislature has recognized the right and
medy to the District Court, and declared that the
should apply.

reement of the collection of taxes in a Court of
alogous to the collection of tithes, and Courts of
ngland exercise extensive jurisdiction in cases of
(Story's Eq. Juria. section 219; 2 Vesey, 565;
l. 148.)

te gives a general lien upon property for taxes, and
he District Court is only a suit *in rem.* to enforce
all liens and the enforcement thereof are implied
cognizable by Courts of equity. (Story's Juris-
ctions 1215, 1216, 1231, 1250.)

urt, SAWYER, J.

was brought in the District Court for the County
nto, under the Revenue Act of the State of Cali-
cover the sum of \$62.50, taxes assessed upon the
described in the complaint, and made a defendant

adants demurred to the complaint, on the ground,
rs, that the Court has no jurisdiction of the sub-
for the reason that the amount claimed is less than
demurrer was overruled; and the defendants de-
nswer, judgment was entered in pursuance of the
e complaint; from which judgment this appeal is

te provides that "the action may be commenced
y where the assessment is made, before any Jus-
Peace or Court in said county having jurisdiction

Article VI, of the Constitution, as amended since
of the Revenue Law of 1861, provides that "the
rt shall have original jurisdiction in all cases in

equity." And section 9 provides that the power of the Justice of the Peace "shall not in any case trench upon the jurisdiction of the several Courts of record."

It is insisted by the respondents that this action is a proceeding in equity, and as the District Court has jurisdiction in all cases in equity, and no jurisdiction in equity cases is expressly conferred by the Constitution upon any other Court, the jurisdiction is exclusive in the District Court, without regard to the amount in dispute, and that this action is therefore prosecuted in the proper Court.

If this action is a case in equity within the meaning of the constitutional provision under consideration, we think the conclusion of the respondents is correct. It becomes necessary, therefore, to determine the character of the action in this respect. It is not pretended that this particular action was known to Courts of equity; but it is claimed that although this is a statutory right, and the remedy for enforcing it is prescribed by the same statute giving the right, yet the character of the action is to be determined not from the origin of the remedy, but from the nature of the relief sought; and if the relief sought is analogous in form to the relief granted in Courts of equity, that then is a case in equity within the meaning of the Constitution. That under the statute the tax is a lien on the land; that the object of this proceeding is to foreclose the lien and procure a sale of the premises under a decree of the Court the nature of a decree to foreclose a mortgage, or to enforce a vendor's lien; and the form of the decree and nature of the relief sought being such as, under the old system, could have been obtained in a Court of Chancery only, the case must be one of equitable cognizance. It was assumed in the argument of this case that this action was brought under the Act of 1861 alone. The action contemplated by the Act referred to does not, in our view, embrace any element of equity jurisdiction, either in substance or in form. The Act does not appear to us to contemplate any special decree for t

property, or any specific direction upon the sub-
 judgment. The land, as well as the owner, is
 owing the amount of the tax levied; and the
 as the owner, is made a defendant in the action
 purpose of enforcing the liability. Both the owner
 and are to be served with process. The prayer of
 plaint, prescribed by the Act, is for a judgment for
 money. If both owner and land are served with
 judgment may be rendered against both for such
 they may be respectively liable to pay. "Such
 when rendered in the District Court, are to be
 and when docketed, they (the judgments) "be-
 upon all the property against which judgment is
 from the date of such assessment, and against all
 estate of the person assessed subject to execution,
 amount of the judgment against him from the time
 docketing, as in other civil cases." If the judgment
 Justice's Court, a transcript may be filed with the
 clerk, "who shall thereupon docket such judgments,
 shall become liens from and after such docket entry,
 manner as judgments rendered in the District Court,"
 county Clerk may issue executions on such Justice's
 as on judgments rendered in the District Court.
 31, pages 432-4, sections 39, 40, 41, 44.) All this
 that an ordinary money judgment, which is to be
 execution in the usual way, is all that is contem-
 The judgment may be against the land, if the land
 defendant and served with process, but it is only a
 judgment for the amount of the tax due—the same
 judgment that is rendered against the owner. The
 becomes a lien like all other money judgments;
 en, by relation, dates back to the time when the lien
 attached, and continues "against the property owing
 ' until the delinquent taxes are paid thereon. If
 is not served with process, probably the judgment
 y bind the interest of the person served, and con-

The People v. F. Mier et al.

stitute such a lien only as the judgment would create upon the other real estate of the party served; but if the land is served, the judgment against the land would be a lien upon it as against all claimants, whether known or unknown, and it is to secure this result that the land is authorized to be made a defendant. There would seem to be no good reason why any special order or direction for a sale of the premises made defendant in the action should be inserted in the judgment, any more than in a case where an attachment has been levied before judgment, and a specific lien on the property attached acquired for the security of the judgment when obtained; and none seems to be required or contemplated by the provisions of this Act.

The lien for taxes thus fixed and rendered certain by a judgment takes precedence of all other claims of every kind whatsoever. There are no conflicting claims to be determined or equities to be adjusted between the parties. No more land is to be sold on the execution than is sufficient to pay the judgment and costs, and there are no surplus proceeds to be distributed. The issues formed by the pleadings prescribed by the statutes are few and simple. There is nothing to be done in the proceedings except to try the few issues raised by the pleadings, and render a money judgment for the amount found due, either against the owner or the land, or both, as the exigencies of the case may require; and the judgment is to be enforced by execution, as in ordinary civil cases. If, then, the action depends upon the Act of 1861, without reference to any other, it is not a case in equity, and the amount claimed, being less than \$300, the District Court would have no jurisdiction of the case. But it will be necessary to consider a subsequent Act.

In 1862 a second Act was passed relating to this subject. It does not purport to be an amendment to the Act of 1861 yet from its terms it evidently had some relation to that Act and was doubtless intended to be supplementary to it. It makes some further and different provisions in relation to

The People v. F. Mier et al.

and provides for a different mode of service of summons. The District Attorney is at liberty to pursue in these Acts of 1861 or 1862, at his option; for section 9 of the Act of 1861 provides that "the remedies authorized by this Act are cumulative and shall not be construed as prohibiting any remedy, or proceeding heretofore authorized."

The Act of 1862 prescribes no form for a complaint, but contemplates the various actions and proceedings already authorized by law, and doubtless contemplates that the pleadings provided for in other Acts may be used in connection with such actions as to the parties and service of process as are provided for in this Act, at the option of the District Attorney. Section 10 of the Act of 1862 also provides that "in hearing and trying an action for *enforcement of a lien* for taxes, in which it is pending shall have and exercise all the powers that pertain to Courts of equity in foreclosure of mortgages and liens; but when the decree of the Court contains special directions as to the mode of selling, no more property shall be sold than is necessary to pay the judgment and costs, nor shall the property be sold for less than the value of the judgment and costs." (Laws 1862, p. 523.) This provision seems to contemplate that under the several Acts authorizing a decree foreclosing the lien for taxes already provided for with specific directions for selling the land, and prescribing the mode of sale, or that a money judgment, without special directions, may be had at the option of the District Attorney.

It also contemplates that, in some cases where special directions for a sale are given in the decree, more property shall be sold than sufficient to pay the taxes, and that there may be a surplus to be distributed. It was the province of Courts of equity to take cognizance of liens on real estate. The forms of proceedings in those Courts were adapted to this purpose, and to adjusting the conflicting and cross equities of the different parties. In decrees of foreclosure provision was made foreclosing and enforcing the

lien already existing, with specific directions for a sale of the land, and the application of the proceeds in satisfaction of the lien, according to the exigencies of the case. But at law, only a money judgment could be entered. The judgment, when entered, might become a lien upon real estate in modes prescribed by law, to be enforced by execution. The different jurisdictions proceeded upon different theories. In equity cases, there was a specific lien already existing, which was to be perfected and enforced by a decree peculiar to that Court, containing special directions for a sale of the property. At law, there was only a general money demand, which was to be ascertained by the judgment; and when so ascertained, the judgment itself might become a lien upon land, to be enforced by execution. In one of the cases contemplated by the several Acts under consideration, the proceeding goes upon the former theory, and the Court, in rendering its decree, is to "have and exercise all the powers that pertain to Courts of equity in the foreclosure of mortgages and liens;" and the proceeding is essentially, in substance and form, a "case in equity." In the other case, the proceeding is upon the latter theory, and is in substance and form a case at law. At this day, under our system of practice, these distinctions may seem of little moment, and they doubtless were so at the time these several Acts were passed. So far as the recovery of the taxes is concerned, the same result is sought in either mode, and probably the judgment in either form of the proceeding would be equally efficacious in attaining that result. It would seem to be a matter of little practical consequence whether a lien already existing is foreclosed and enforced as such, or whether a money judgment becomes an original lien taking effect by relation from the time of the assessment, or even at what period of time the lien commences to operate, since from the moment the lien for taxes attaches, whether by judgment or otherwise, it takes precedence of all other liens or claims upon the land, and can only be discharged by payment.

But in adopting the amendments to the Constitution, the

The People v. F. Mier et als.

It seems fit to retain the terms *law* and *equity* in that case, and to make the principles upon which these departments proceed, the test of jurisdiction. In this view, the distinction becomes important. The result under the constitution and the several statutes as they now stand, the District and Justices' Courts, in tax cases, where the amount claimed is less than \$300, have or have not jurisdiction, depending upon the nature of the judgment sought by the District Attorney in his complaint. The form of complaint is prescribed by the statute, and the facts required to be alleged in that form are all that are necessary to authorize either a judgment foreclosing the lien already existing, with an order of sale and special execution, as authorized by the Act of 1862, or a money judgment, as contemplated by the Act of 1861. The character of the case, therefore, must be determined by the prayer of the complaint.

In the present case, the prayer of the complaint is for a declaration of the lien, and for a sale of the premises. The same also follows the prayer of the complaint. We are correct in the view we have taken of the several provisions of the Constitution under consideration, that this is an equity case, and the District Court has jurisdiction.

When the question is not presented by this record, it is well before leaving this branch of the case to consider some other provision of the Constitution, which, under certain circumstances, may also determine the jurisdiction in the collection of taxes under the revenue laws of this State.

Section 3, Article VI, also provides that "the District Courts have original jurisdiction * * * in all cases at law and equity to enforce the legality of any tax, impost, assessment or municipal fine," etc.

The revenue Act of 1861 provides that in the answer to the writ in a suit for taxes, only certain matters specified in

The People v. José Ramon de la Guerra.

filed his petition in the County Court, in pursuance of the statute, for the purpose of contesting the election. The hearing of the case was set for the 12th of December, and a special term of the Court appointed for that purpose. On the 12th of December an affidavit was filed on the part of the relator, showing that the relator and respondent are first cousins of the wife of the Judge before whom the proceeding was pending; and on this affidavit the relator moved the Court for a change of the place of trial to the County of Los Angeles, or some other county on the ground of disqualification of the Judge to hear the case by reason of this relationship.

On the same day the respondent filed his answer, in which among other things, he alleged that a similar proceeding had before been commenced by the same party in the same Court and for the same object; that upon the motion of respondent the said proceeding had been dismissed; that the relator had appealed from the judgment and order of dismissal; that said appeal was still pending and undetermined, and that there was, therefore, another suit pending between the same parties for the same cause of action. Upon which answer he prayed that the petition of the relator be dismissed. In the answer the respondent refers to the record of the former proceeding and prays that he may have leave to make the original or certified copies of the same a part of his answer; but he does not annex copies, or in any other mode than as above stated make them parts of the answer. The answer also contained defenses on the merits of the case. There does not appear to have been any trial of the issues thus formed. On the 12th of December, the day previously appointed for the hearing, when the relator's counsel moved for a change of the place of trial as above stated, the respondent's counsel made a counter motion to dismiss the case on the pleadings, upon the ground that there was another action pending between the same parties for the same cause. Both motions were argued and submitted at the same time, and taken under advisement. On the 19th of December the Judge filed his decision

The People v. José Ramon de la Guerra.

in which, referring to the two motions, he says: The petitioner moves a change of venue on the ground of the incompetency of the Judge of this Court to both parties. The respondent claims that 'a change of the place of trial in which on its face discloses there is nothing to try, is oppressive,' and further insists that 'an examination in bar has nothing to do with a trial of the action.' A careful examination of the statute which gives the trial jurisdiction in the case, section 63, it appears to be between an examination of the pleadings and a trial of the case."

The Judge then states the former proceeding, and that the same was made a part of the answer — that from this it appears that the appeal in that proceeding is still pending — and adds: "In the present position of the case, the rule must be that where two suits are commenced for the same action, the former may be pleaded in abatement of the latter."

The action is dismissed."

The foregoing quotation and order contain all that was said, and is the only order entered in the case after the arguing to the motion for change of the place of trial.

The notice of appeal filed on the same day states "that the respondent appeals * * * from the judgment and order refusing to change the place of trial therein made and entered in said case * * * in favor of said respondent and against said petitioner and from the whole thereof."

The order in form was made refusing to change the place of trial. The Judge did not formally pass upon the motion. In the case and ordering it to be dismissed, the Judge, as appears from the foregoing quotations from his decision, does not imply, if he does not directly admit, his incompetency to the parties, and adopts the theory of the case to the effect that there is a distinction between a change of venue and examining the pleadings to see if there is anything to be tried which would render it necessary to send the case to another county for trial; and that, although he

The People v. José Ramon de la Guerra.

was not qualified to sit in the former case, yet he might determine the latter question. Having satisfied himself that there was nothing to try, he concluded that it was unnecessary to send the case to another county, and dismissed the action. The dismissal of the action, under these circumstances, necessarily involved the refusal to transfer, although no formal order denying the motion was entered. There were two motions pending—a motion to change the venue, and a cross-motion to dismiss. Both were argued and submitted at the same time. The latter motion was granted, and the case dismissed without any formal order as to the former. This was a virtual denial of the motion to change the venue. But whether it is or not, the relator claims that it was error in the Court below to render a judgment of dismissal in the case when it was made to appear on the record that the Judge was prohibited from acting by reason of relationship to the parties, and while a motion for a change of the place of trial was pending. This is one of the errors assigned. The affidavit in the record, showing that the wife of the Judge is cousin to both relator and respondent, is uncontradicted—and the Judge, for the purposes of his decision, assumes it to be true.

For the purposes of this decision we must, therefore, assume the relationship to exist. The relator claims that the degree of relationship must be computed by the canon law, which is followed by the common law; while the respondent insists that the computation shall be by the rules of the civil law. If the former rule is adopted, the parties are within—if the latter, without—the prohibited degree. At an early day the common law was adopted as the rule of decision in this State; and the rule of the common law prevails except as to those particulars in which modifications have been made by statute. In the statute relating to descent and distribution, the rule of computation which prevails under the civil law has been adopted; but the statute does not purport to extend the rule beyond the purposes contemplated by that Act. The late Supreme Court so held in several cases, and we are satisfied

The People v. José Ramon de la Guerra.

rule as laid down by them is correct. (*Ord v. De*, 18 Cal. 67; *De la Guerra v. Burton*, 23 Cal. 592.) Eighty-seven of the Act concerning Courts of Justice that "a Judge shall not act as such in any of the following cases: * * * When he is related to either by consanguinity or affinity within the third degree. But this section shall not apply to the arrangement of the docket or the regulation of the order of business." These are the only exceptions mentioned in the Act. Section twenty-four of the Practice Act authorizes the Court to change the place where, when, from any cause, the Judge is disqualified from sitting in the action." These are mere formal matters, and determine no question in dispute between the parties in affecting the merits of the controversy. But, beyond this, the Judge is totally disqualified from sitting in the case. Even if no objection is made, he has no right to act, and, of his own motion, to decline to sit as Judge. In *Aspinwall*, 4 N. Y. 514, where a Judge sat in the case at the earnest solicitation of the party most interested in the result, and with the consent of both parties, it was held that the judgment which depended upon his concurrence was void.

In the present case, the Judge thought the section of the Act under which he was proceeding made a distinction between trying the case and examining the pleadings and deciding from them the question whether the action ought to be dismissed or not, and upon this ground thought himself authorized to make the order of dismissal. But in this he was mistaken.

His act was a judicial act — one that required consideration and the exercise of his judgment. It was, therefore, an act that he was not competent to perform. The dismissal of the proceeding was void on the ground of incompetency of the Judge to act, and the refusal to change the order of trial erroneous. But, conceding the action of the Judge in dismissing the case to be void on the ground stated, he insisted that if he determined the case correctly upon

The People v. Warren T. Sexton.

the merits this Court will order the same judgment to be entered. If the proceedings below were void for want of jurisdiction in the Judge to act in the case, this Court could hardly be expected to assume original jurisdiction and order a judgment. But there is nothing before this Court to enable it to determine the right of the matter. The record of the former case forms no part of the answer in this proceeding. Records and papers cannot be made a part of a pleading by merely referring to them, and praying that they may be taken as a part of such pleading, without annexing the originals or copies as exhibits, or incorporating them with it so as to form a part of the record in the case.

But, if considered as a part of the answer, still, the question cannot be determined upon the pleadings. The pleadings raised an issue. The new matter in the answer, under the Practice Act, is deemed to be controverted, and, in this case, the new matter set up in abatement raised an issue, which required proof, like any other issue. The issue must be tried, and the facts found, before the answer can be assumed to be true. In the trial of one case the Court can no more take judicial notice of the record in another case in the same Court, without its formal introduction in evidence, than if it were a record in another Court; much less can this Court take notice of the existence of a record not introduced in evidence in the Court below. There was no trial in this case, but the question was determined upon an inspection of the pleadings — and the proceedings in the first case are improperly in the record.

The judgment is reversed and the cause remanded.

THE PEOPLE *ex rel.* MEMINGER v. WARREN T. SEXTON, JUDGE OF THE SECOND JUDICIAL DISTRICT.

ORDER CHANGING VENUE OF ACTION.—Although the affidavit upon which the application to change the venue of an action is made may not show any legal cause for such change, still, if the Court grants the application it has acted

The People v. Warren T. Sexton.

upon a matter within its cognizance, and where it was clothed with discretion, and by the order the place of trial becomes changed.

CONCURRED, *IN ERROR*.—Mandamus will not lie to compel a party to proceed with the trial of an action after an order has been made for the place of trial. The remedy, if an injury is sustained, is by writ from the final judgment.

OF MANDATE WILL BE ISSUED.—A writ of mandate will lie to compel a subordinate tribunal to perform a duty enjoined by law, if it refuses to perform; but when the act to be done is judicial or discretionary, the writ will not direct what decision shall be made, nor will it be granted after the inferior tribunal has acted for the purpose of review of its decision.

from the Second Judicial District, Butte County.

are stated in the opinion of the Court.

Walader, for Relator.

question is a plain one, and is, "Had the District Judge the right or power to change place of trial?"

And, of course that ends the matter—while if he had been entitled to a direction from this Court to the Judge to proceed with the cause, notwithstanding his illegal conduct, per force, he would set aside in the exercise of his legitimate power than that used by him in granting it.

There is no question of discretion in this case, because the facts are that the defendant had failed to bring himself within the statute, and we urged that a mistaken notion of the law was not either a cause for a change of venue, or a reason why the plaintiff should incur the expense and delay incident to a removal out of his county.

We do not understand that it is possible to review this order after judgment, or that if we could, it would afford any relief.

The remedy lies when the remedy by appeal is not plain, and is inadequate.

And, at the trial in the new county, get judgment for the damages which we claim, or we may get as much as we can by law warrants, or as much as we could get on a re-

The People v. Warren T. Sexton.

In the first event, we would not appeal, nor in the second or suppose the defendant should satisfy the claim just before the trial in the new county, no appeal would lie.

The fact is, that there is no remedy but that of mandamus to compel the observance of plaintiff's right, and I have not seen any case that decides to the contrary.

The cases cited upon the brief of opposite counsel do not touch the point. (7 Cal. 253.)

The life of the objectionable order in this cause was attacked when we moved the Court below to disregard it. It has no more foundation in law than if a Judge, having the power to punish a litigant for contempt by a limited fine or imprisonment, should order him hung; all that could be said against such an order applies to the order in this cause; in one case the Judge would exceed his statutory authority, and so it would be in the other.

These questions of venue at common law always went to the jurisdiction. (1 Chitty's Pleadings, 284; 12 Wendell, 51, 265; 6 Hill, 475.)

H. H. Hartley, for Respondent.

By the Court, CUREY, J.

An action was commenced in November, 1863, in the District Court in and for the County of Butte, by L. Meminger plaintiff, against Joseph Gluckauf, defendant, for the recovery of a debt of about two thousand dollars. The plaintiff had applied by petition to this Court for a writ of mandamus to be directed to the Judge of said District Court, commanding him to proceed to the trial of said action, in its order, in the County of Butte. The petition shows that the action was commenced and the Court acquired jurisdiction of the parties in the mode provided by law, and that, after an issue of fact was joined in the suit, at a term of the District Court held in said county, in December, 1863, the defendant applied to the Court, on an affidavit, to change the place of the trial of

The People v. Warren T. Sexton.

from the County of Butte to some adjoining dis-
trict ground that he could not obtain a fair and impar-
tial trial in said county, because the plaintiff and others, con-
sidering "to prejudice the public mind in Butte County
and vicinity" respecting the matters in issue joined between the
plaintiff and defendant, had been busily circulating a report in such county,
deemed injurious and prejudicial to his interests and
dignity as litigant in said District Court; and because, second,
of his opinion and belief, he could not have a fair
and impartial trial of said cause before the Judge of said Dis-
trict Court, either on questions of law or fact, on account
of the prejudice of the Judge against the defendant.
The plaintiff held the affidavit on which the defendant based his
application for the change of the place of trial to be insufficient,
stating that he was not conscious of any bias or
prejudice on the part of any reason or fact on which the defendant could
rely, and such an opinion or belief, decided that under the
circumstances of the imputation thus made, though general in
character, he was unwilling to try the cause, and, therefore, granted
the application and ordered the place of trial changed from the
County Court for Butte County to the District Court for the
County of Yuba.

After changing the place of trial having been made,
the plaintiff, by his attorney, requested the Court to set the
trial; whereupon the Judge thereof refused to com-
ply with the request, and declared that he would not try the
cause, nor at any other time. To the decision granting
the application for changing the place of trial, and to the refusal of the
Court to try the cause, the plaintiff duly excepted.
The facts here stated are set forth in the petition and papers
annexed, as a part thereof.

In this state of facts and circumstances the question is
presented:

Is the petitioner entitled to the writ for which he prays?
Provided by statute that the writ of mandamus may be
issued by any inferior tribunal, corporation, board, or person,

The People v. Warren T. Sexton.

to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station; and that the writ shall be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. (Practice Act, sections 467 and 468.)

The duty of a District Judge to proceed with the trial of causes pending in his Court is a duty resulting from the office which he holds; and whenever it appears that he refuses so to do, it is not to be doubted that this Court possesses the power to require him, by mandamus, to proceed to the performance of such duty. But the exercise of this jurisdiction depends upon conditions which must be found to exist in every case before the Court will issue its mandate. If the subordinate officer or tribunal has refused to perform a positive duty resulting from his office, or by some act equivalent to a refusal has manifested such an intention, it becomes the duty of this Court, upon proper application, to issue its mandate to compel the performance of such duty, provided there is not open to the party aggrieved a plain, speedy, and adequate remedy in the due course of law.

In the matter before us it is necessary to determine, in the first instance, whether or not the action above entitled was pending in the District Court for Butte County when the defendant presented to this Court his petition; for if the action had then been transferred by lawful authority to Yuba County for trial, it follows that the Judge against whom the writ of mandamus is sought is under no duty to try such action. This seems to be conceded on the part of the petitioner; but it is argued that the order changing the place of trial was not warranted by the proof of any facts whatever as cause for the change; and that, therefore, the order was a nullity, leaving the action still pending in the District Court where it was commenced. This position is for the petitioner a necessity, as a surrender of it would be an abandonment of his application. It may be admitted that the defendant in the action did not by his affidavit show any cause for a change of the place of trial,

The People v. Warren T. Sexton.

does not result from this that the Court had not to grant the change upon the defendant's applica-

ing the order changing the venue, the Court acted upon a matter within its cognizance. By this order, the trial of the action became changed from Butte county. If, thereby, error intervened, to the petitioner, it cannot be corrected by means of the writ of (*The People v. The Judges of Duchess County*, 20)

v. Blackstone Canal Company, 10 Pick. 244, the applied for a mandamus to County Commissioners, to n to allow him certain legal costs, to which he was on an assessment of damages to his land by reason of construction of a reservoir to the Blackstone Canal. denied the application, holding, in effect, that when the tribunal had acted in a judicial capacity upon a matter properly before it, its determination could not be corrected by means of the writ of mandamus. In that case the Court said: "The writ lies either to compel a subordinate tribunal to exercise their functions and render some judgment in cases before them, when otherwise there would be a denial of justice from delay or refusal to act. But when the act done is judicial or discretionary, the Court will not interfere, and that decision shall be made."

case of *The King v. The Justices of Monmouthshire*.

Ryl. 334, a petition was made to the Court of Common Pleas for a mandamus to the Justices of Monmouthshire to compel them to enter continuances and hear and determine an appeal which the Justices, being equally divided upon one trial, had failed to decide; and having thus refused, an application was made to them to continue the trial to the next sessions. The Justices refused to grant the continuances, but instead thereof quashed the appeal.

J., with whom Justices Bayley and Holroyd concurred, refused the application for a mandamus, saying:

The People v. Warren T. Sexton.

"When the sessions forbear to give any judgment at all, the Court will interpose to compel them to go on and pronounce judgment; but when they have actually given judgment, even under a mistake of law, this Court has never yet interposed to disturb their decision. In form, this is an application to enter continuances and hear and determine the appeal; but it is in substance an application to expunge the proceedings which the Justices have already taken." (See, also the following authorities: 18 Wend. 89; 1 Denio, 645; 3 Binney, 273; 5 id. 103; Halstead, 58; 2 Bibb, 573.)

The writ of mandamus, which, under our statute, may be directed to a subordinate judicial tribunal to compel performance of a duty enjoined by law, is like the writ of *procedendo ad iudicium* at common law, which issued out of the Court of Chancery, commanding, in the name of the sovereign, the Judges who failed to give judgment in any suit before them when it was their duty so to do, to proceed to judgment. But the command was not to give any particular judgment; for that, if erroneous, could be set aside in the course of appeal, or by writ of error, or false judgment. (1 Black. Com. 109.)

If the Court should grant the writ in this case, it would, in effect, be a reversal of the order granted changing the place of trial, or the expunging of the order, as a judicial proceeding, from the records where it is entered. This we cannot do. The defendant, upon an affidavit, made in the action in which the Court below had jurisdiction, applied for a change of the place of the trial of the cause. The application being made, it was the duty of the Court to hear, consider, and decide it. This duty the Court performed, and in so doing acted judicially. If, by the decision made, the plaintiff in the case sustained injury, the remedy for it is, in legal contemplation, plain, speedy, and adequate, by appeal after final judgment. (*People v. Stillman*, 7 Cal. 117; *De Barry v. Lambert*, 10 Cal. 503.)

The application for a writ of mandamus must be denied.

Pedro Rodriguez et al. v. Samuel Comstock et al.

RODRIGUEZ *et al.*, EXECUTORS OF THE
WILL AND TESTAMENT OF SEBASTIAN
GUEZ, DECEASED, *v.* SAMUEL COMSTOCK

is GROUND OF NEW TRIAL.—Where a party to an action, to the trial of the same, is told by a witness that he will testify in manner in relation to a fact material to the issue, and the party the declaration is made, relying on the same, neglects to procure imony, and secures the attendance of the witness, and when called and the witness, either by collusion with the party against whom ed, or by reason of any fact or occurrence for which the party m is not responsible, testifies contrary to what he had previously should do; this is a surprise in the sense in which that word is he law of new trials, and a new trial will be granted provided the lying for the same shows that he will be able on the new trial to e testimony required. In such case it is not necessary for the prised to move for a continuance at the time.

from the District Court, Third Judicial District,
County.

s are stated in the opinion of the Court.

Cadwalader, for Appellants.

ockham, for Respondents.

nkenny, for Appellants in reply.

Court, SHAFTER, J.

s an action of ejectment. The defendants, in their nished all the allegations in the complaint, and further effect, that the legal title to the premises demanded and the plaintiffs, jointly. The answer, in addition m of legal title, contains a diversity of allegations, und of which the defendants claim, alternatively, aintiffs hold the land in controversy in trust for them, nt of one undivided half thereof.

he view which we have taken of the case presented ord, it is unnecessary for us to pass upon the ques- e equitable rights of the defendants, and it would,

Pedro Rodriguez et al. v. Samuel Comstock et al.

therefore, be improper to do so. The case was tried by the Court, and on the findings of fact as presented in the record the alleged trust, confessedly, cannot be upheld. Neither of the findings of the Court contain any facts showing by conclusion that the legal title to the premises is in the defendant, and we are therefore confined to the appeal from the order refusing a new trial.

The motion for a new trial was based upon surprise, newly discovered evidence, and errors of law occurring at the trial.

We shall limit ourselves to the single point of "surprise."

The plaintiffs, at the trial, to make out their title as the representatives of Sebastian Rodriguez, relied upon a patent issued to him by the United States, based upon an inchoate title or grant made to him by Governor Alvarado in the year 1837.

The defendants, who claimed an older and better title than that—derived from Alexander Rodriguez, brother of Sebastian—introduced a certain petition, signed by Sebastian and Alexander, addressed to Governor Gutierrez, and dated September 30th, 1836, tending to prove that they had been in the joint possession of the premises in controversy for eight years prior to said date; and further, tending to prove that such possession had been taken and held by them under a grant made in their favor; and also introduced a certain other petition of Sebastian to Governor Alvarado on the 27th of September, 1837, together with the deposition of Maximo Martinez, both tending to prove that the written evidence of such concession by Governor Arguello had been lost, and that such grant was made by him to Alexander and Sebastian jointly, in the year 1823. Thereafter, the defendants called Victorine Martin to the stand, for the purpose of proving a delivery of juridical possession to the two brothers jointly, in 1823, by Maria Estrada, Commander of Monterey, he acting therein by order of Governor Arguello.

The witness, on being interrogated, testified that many years ago, and during the time that Arguello was Governor

Pedro Rodriguez et al. v. Samuel Comstock et al.

itness, was present at a delivery of juridical possee-
 Sebastian Rodriguez, by Estrada, of the Balsa del
 ne premises in dispute. On being inquired of if the
 Alexander Rodriguez was made use of at the time
 possession was delivered, the witness replied that
 's name was not used. The trial was thereupon pro-
 th, and it resulted in a judgment for the plaintiffs.

port of the motion of defendants for a new trial, a
 of affidavits were filed, and were read in the Court
 the hearing. From these affidavits it appears as
 fact that Comstock, one of the defendants, had been
 by the witness, some time before the trial, that he,
 ss, was present at the time when juridical possession
 ered by Estrada of the Balsa del Pajaro, and that the
 was to Alexander and Sebastian; and it further ap-
 t the defendants relied upon Martinez as a witness
 to prove that fact on the trial of this action. It
 appears that a short time before the witness was
 his head became greatly disordered," and so much so
 was not fit to testify," and that he communicated
 to the interpreter at the time he was required to be
 That the witness, before the trial, had always said
 delivery of possession was to the two brothers jointly,
 he still asserts the fact so to have been. It further
 that the defendants at the time of the said trial had
 witness in attendance by whom to prove the point
 y so expected to establish by Martinez, though it
 that since the trial they have discovered other testi-

as state of the record we hold that the fact to prove
 e witness was called, was one material to the issue.
 use of *Leese v. Clark*, 18 Cal. 536, it was held "that
 grant was made by a Governor, and received by the
 there remained another proceeding to be taken for
 titution of a complete title. The proceeding was a
 delivery of the possession. This proceeding was an

Pedro Rodriguez et al. v. Samuel Comstock et al.

essential ceremony when there was any uncertainty as to the precise bounds of the land granted, and involved a definite ascertainment of the land to be delivered, and for that purpose required a survey and measurement—in other words, a location of the land.”

We furthermore consider that the defendants were surprised by the failure of their witness, and in the sense in which the term “surprise” is used in the law of new trials. The parties applied to the witness seasonably in advance, and he then asserted that within his personal knowledge and recollection the fact in relation to which he was interrogated was with them. The defendants secured his attendance at the trial, together with that of an interpreter. When the witness was needed he was called to the stand, and on being inquired of, he completely defeated the just expectations that he had previously excited. It is of no moment, in our judgment, that the defendants did not, at that stage of the trial, move for a continuance; for at that time they did not know, and therefore could have given no assurances to the Court, that a continuance would enable them to retrieve the disaster that had befallen them.

In *Wilson v. Brandon*, 8 Geo. 136, after verdict for the plaintiff, defendant moved for a new trial because his witness, by mistake, failed to prove a fact to make out his defense, (the witness having previously assured the defendant that he could and would do so,) whereby the defendant was prevented from procuring other testimony to prove the same fact. Held, that such mistake operated as a surprise on the defendant, and that he was entitled to a new trial.

In *Levy v. Brown*, 11 Ark. 16, in a trial on a note, a witness for defendant swore that it was usurious. On appeal, the same witness testified to a different state of facts, and a verdict was rendered for the plaintiff. Held, that the defendant was entitled to a new trial on the ground of surprise.

McFarland's Administrators v. Clark, 9 Dana, 134. Upon the trial a witness testified as to the execution of a certain

Thomas Hope v. D. W. Ap Jones.

ctly contrary to the version she had given prior to
d a new trial was awarded.

e other cases to the effect that the mere fact that
of a party swears contrary to the party's expecta-
t furnish adequate ground for granting a new trial;
cases agree that if the witness suddenly changes
ollusion with the party against whom he is called,
testify in accordance with his previous assurances,
f any fact or occurrence for which neither the wit-
e party calling him is in any measure responsible,
trial will be granted *ex debito justitiæ*.

not advised that the question here presented has
irectly decided by this Court, but in *Taylor v. The*
Stage Company, 6 Cal. 230, the rule as we have pre-
s incidentally recognized. "Surprise at the testi-
witness called by the adverse party is no ground
trial, it not appearing that the party against whom
ny was given had been misled by previous state-
e witness as to what he would testify."

s by the record that the claim of Alexander Rodri-
pending in the District Court of the United States
ation.

remains to be added, that the affidavits show that if
should be granted, the defendants will have it in
to introduce not only the evidence of Martinez, in
the parties to whom the possession of the Balsa was
y Estrada, in 1823, but other testimony also, dis-
se the trial.

t reversed and new trial ordered.

THOMAS HOPE v. D. W. AP JONES.

— RELATION TO EACH OTHER.—The partnership relation does not
een co-executors, and they have no joint interest in the commis-
ved by law for their services in administering upon the estate.

IONS OF.—The share of the commissions to which co-executors

Thomas Hope v. D. W. Ap Jones.

are respectively entitled is not ascertained by any established rule of law but upon the principles of equity.

ID.—SEPARATE ACCOUNT.—Each co-executor may keep a separate account, and present the same for final settlement, and each is chargeable with the full amount of assets that have come into his hands, and is entitled to be credited with all disbursements legally made by him on behalf of the estate; and the Probate Court should fix the compensation of each in proportion to the service rendered.

EXECUTOR WHO DOES NOT ACT.—A co-executor who takes no care or charge upon himself touching the estate or any part thereof, collects no debts, makes no disbursements, and thus renders no service whatever, is not entitled to any share in the commissions.

SUIT FOR COMMISSIONS OF EXECUTOR.—The District Court has no jurisdiction over the allowance or apportionment of the commissions of executors and administrators.

APPEAL from the District Court, Second Judicial District Santa Barbara County.

On the 12th day of December, 1860, one H. C. Peters died leaving an estate, mostly in Santa Barbara County, of which at the time of his death, he was a resident, and also leaving a will, in which the plaintiff and the defendant were named as joint executors.

On the 6th day of February, 1861, the will was admitted to probate in the Probate Court of Santa Barbara County, and the executors qualified soon after, and entered upon the discharge of the duties of their trust. On the 2d day of January 1862, the defendant, D. W. Ap Jones, filed in the Probate Court his final account, and notice of the time and place of settling the account was duly given. On the 30th day of January, 1862, the Probate Court settled the account, and allowed the defendant the sum of \$674.42 for commissions as executor, and the sum of \$337.21, for extraordinary services, which it seems the defendant retained out of funds that came into his hands from the estate.

No one objected to defendant's account in the Probate Court, nor was the plaintiff's name mentioned, either in the petition or decree.

The plaintiff did not file any account in the Probate Court, nor did he appear in the Probate Court and claim any allowance for commissions or services in the settlement of the estate.

Thomas Hope v. D. W. Ap Jones.

the settlement of the estate, the plaintiff demanded at one half of the allowance made in the Probate commissions and services, and upon his refusal to defend an action in the District Court to recover. The Court below gave judgment against defendant, and he appealed.

E. Huse, for Appellant.

of the Probate Court, allowing the final account of the executor, Jones, was a judgment of a competent Court, and the subject matter and of the parties, could only be attacked in a direct proceeding by appeal in error, and could not be attacked collaterally. (*Wes-berlain*, 3 Comstock, 831; *Cowen & Hill's Notes* Evidence, part 2, page 946; *Austin v. Lamar*, 23 *State v. Roland*, 23 Mo. 95; *Whittlesey v. Dorset*, 7; *Jones v. Brinker*, 20 Mo. 87; *Smith v. Hurd*, 7 188; *Caldwell v. Lockridge*, 9 Mis. 362; *Jacobs v. eo*. 346; *Singleton v. Garrett*, 23 Mis. 195.)

a direct proceeding, a Court of Chancery does not new settlement. It only sets aside the settlement, and the parties to make a new settlement in the Pro-

(*Jamison v. Hapgood*, 7 Pick. 1; *Saunders v. . & M.* 94.)

portionment of commissions among executors is a within the discretion of the Probate Court. Such a settlement could not be re-examined in the District Court. (*n v. Phillips*, 1 New Jersey, 70.)

several co-executors has a right to settle a separate account for his administration; each charging himself with the debts, etc. (*Patterson's Estate*, 1 Watts & Serg. Appeal, 23 Penn. 206.)

portions are to be divided among executors according to the services rendered by them; and in the absence of other evidence the amount which each is to receive is to be determined by the amount stated in the decree to have been received and

Thomas Hope v. D. W. Ap Jones.

paid by them respectively. (*White v. Bullock*, 20 Barb. N. Y. 91.)

When an executor has done nothing, and has borne no responsibility, he should not share in the commissions. (Same case; *Kenan v. Hall*, 8 Geo. 417; *Hall v. Wilson*, 14 Ala. 295; *Fall v. Simmons*, 6 Geo. 265.)

Eugene Lies, for Respondent.

We attack no part of the decree of the Probate Court. The question of compensation was adjudicated, but not the proportional share of each executor. The act of one executor in obtaining compensation is the act of both. (Probate Practice Act, §49; see §47, Act of 1857.) Co-executors are one person. (Williams Ex. 201.) Probate by one inures to the benefit of all. (Ib. 318.)

The case of *Stephenson v. Phillips* is not in point. There the question of proportional share of commissions was directly adjudicated in the Court of Orphans. (1 N. J. 70.) Co-executors are jointly liable. (*Lees v. Sanderson*, 4 Sim. 28; *Lomax on Executors*, 2, 491.)

Their bond is joint and several. (Probate Act, §73.) Appellant cannot claim that he alone administered. He had no right to do so. (Probate Act, §49.)

The decree of Probate Court only adjudicates one thing—that is, the amount of compensation. (Williams Ex. 201.)

By the Court, SANDERSON, C. J.

The partnership relation does not exist between co-executors, and they have no joint interest in the commission allowed by law for their services in administering upon the estate. They are not each entitled to an equal share merely upon the naked ground of their relation to each other. The share to which they are respectively entitled is to be determined on entirely different considerations. In other words, their respective portions are not ascertained by any established rule of law, but upon the principles of equity. The

Thomas Hope v. D. W. Ap Jones.

compensation and of service must be the same, or as the circumstances of the case will permit. Each is to be paid with the full amount of the assets which may be in his hands, and is entitled to be credited with all disbursements legally made on behalf of the estate. Each may keep a separate account, and present the same for final settlement. They are only entitled to share and share alike where their contributions and services have been equal. One who takes charge upon himself touching the estate or any part thereof collects no debts, makes no disbursements, and thus he who takes no service whatever, is not entitled to any share in the allowance.

The appellant seems to have rendered some service, and was entitled to some portion of the commissions, but sought his relief in the wrong forum. He should have applied to the Probate Court. If, as he contends, the allowance to the appellant inures to his benefit, and the decree of the Probate Court does not assume to pass upon the question of apportionment, but only determines the amount of allowance, it follows that the question of apportionment is still open, and he might and should have applied to the court for a further and supplemental decree, designating the share to each his proper share. Then, upon the refusal of the appellant—the money being in his hands—to pay his share, he might have maintained this action.

The Probate Court has no jurisdiction over the allowance of the commissions of executors and administrators, and if it can interfere at all with the decree of the court, it can only do so as a Court of Chancery, and not further than to set aside the decree on the ground of error or other like ground of equitable interference, and direct the parties to make another settlement in the Probate Court. See *Searles et al. v. Scott, Administrator, etc.*, 14 S. & M. 1. It is doubtful whether it could interfere, even in such a case, unless all opportunity to move in the Probate Court to open the account, or appeal from the decree, has been exhausted. Until this has happened, it would seem the power

Eugene B. Buffendeau v. Powhatten E. Edmondson.

of the Probate Court and the right of appeal are adequate to the relief sought.

Under the view we have taken of this case, it becomes unnecessary to pass directly upon the question as to whether the decree of the Probate Court awarding all of the commissions to the appellant was a bar to this action.

There may be some doubt as to whether the respondent was a party to that decree or not. The appellant filed, as he has a right to do, a separate account, in which the existence of co-executor was entirely ignored. The respondent did not appear, and, consequently, took no part in the proceedings and it is possible that he is not included among the persons described in the 237th section of the Probate Act, against whom the settlement and allowance of the account is there declared to be conclusive. It is sufficient to say that the whole subject matter belongs to the jurisdiction of the Probate Court, and the Court below ought to have dismissed the case upon that ground.

The judgment is reversed, and the Court below directed to dismiss the action.

EUGENE B. BUFFENDEAU v. POWHATTEN E. EDMONDSON.

NOTICE OF APPEAL—WHEN SERVED.—An appeal will be dismissed on motion if a copy of the notice of appeal is served on the opposite party before the day on which the original is filed in the Clerk's office.

SAME—WHEN FILED.—The filing of a notice of appeal must precede or be contemporaneous with the service of a copy of the notice on the adverse party.

UNDERTAKEN ON APPEAL—WHEN FILED.—A copy of the notice of appeal filed must be served on the opposite party before or at the time of filing the undertaking. The third section of the Act of 1861, entitled "An Act to regulate appeals in this State," was intended to relieve appellants from defects of form and deficiencies in substance apparent on the face of notice of appeal.

APPEAL from the District Court, Third Judicial District, Alameda County.

Eugene B. Buffandeau v. Powhattan B. Edmondson.

deau, the plaintiff, recovered judgment in the Court and the defendant appealed. The other facts are stated in the opinion of the Court.

Brooks, for Appellant.

ary, for Respondent.

Court, CURREY, J.

This case was called in its order on the calendar, the day, by his counsel, in pursuance of notice given for the purpose, moved the Court to dismiss the appeal, on the ground that the copy of the notice of appeal was served on the respondent's attorneys two days before the notice was filed in the Clerk's office of the Court wherein the appeal was made, and order from which it was desired to appeal were made. The record shows that the notice of appeal was filed on the 23rd day of July, 1863, and that a duplicate thereof was served on the respondent's attorneys on the 25th day of July, 1863, and that on the day of the filing of the notice of appeal, executed on the 25th of July, was

three hundred and thirty-seventh section of the Practice Act provides that an appeal in a civil case shall be made by filing with the Clerk of the Court in which the judgment appealed from is entered a notice stating the appeal, and the part thereof, or some specific part thereof, and serving a copy of the notice upon the adverse party or his attorney. This section of the statute the filing of the notice of appeal is made a constituent element of its character as a condition precedent and consequently must precede or be contemporaneous with the service of a copy of the notice on the adverse party, and that which may purport to be a copy of a notice, or a copy thereof, fails to be such for the want of an original copy. This section of the Act does not provide, in addition, within what time the copy of the notice must be served; but is ordered in connection with sections three hundred and

Eugene B. Buffandeau v. Pewhatten B. Edmondson.

forty-eight, three hundred and forty-nine, three hundred and fifty, and three hundred and fifty-two of the Act, requiring an undertaking to be executed and filed, or a deposit made as therein specified, to render the appeal effectual, and also in connection with section three hundred and fifty-five, which gives to the respondent five days after the filing of the undertaking within which to except to the sufficiency of the sureties therein named, it follows that the copy of the notice filed must be served on the proper party before or at the time of filing the undertaking. This construction is rendered imperative in order to secure to the respondent the full five days from the filing of the undertaking within which to except to the sufficiency of the sureties. To comply with these provisions of the Act is a matter of no inconvenience because of the residence of the attorneys of the respective parties in different places, inasmuch as the Act provides a mode of service by mail in such case, at once convenient and effectual. (Practice Act, Sections 520, 521, 522.)

In *Warner v. Holman*, 24 Cal. 228, the late Supreme Court first determined that the judgment in that case ought to be affirmed, and then proceeded to consider the objection made by respondent's counsel, after having argued the case upon its merits, to the effect that the copy of the notice of appeal was served three days before the notice itself was filed with the Clerk of the Court below. The record disclosed the fact to be in accordance with the objection; upon which the Court ordered the appeal dismissed. On a rehearing, this Court, doubting the correctness of the judgment dismissing the appeal, directed the judgment to be vacated, on the ground, though the opinion in the case does not express it, that the respondent, by counsel, had appeared and argued the case upon its merits, whereby he became estopped from denying that a copy of the notice of appeal had been served at the proper time, notwithstanding the record failed to show a copy of the notice duly served. In this case the respondent has not become concluded by his appearance, which is only for the purpose of making an application to dismiss the appeal for the cause stated;

Eugene B. Buffendeau v. Powhattan E. Edmondson.

decision of this Court in *Warner* against *Holman* is correct, when understood, inconsistent with the rule laid down in this case.

Appellant having failed to serve on the respondent a copy of the notice of appeal filed on his behalf, and by the statute, the motion should be granted, and dismissed, and it is accordingly so ordered.

Court, CURREY, J., on petition for rehearing.

Defendant, by his counsel, has applied to this Court to rehear the motion heretofore made on behalf of defendant to dismiss the appeal in this case. This application is based on the third section of the Act of 1861, entitled "to regulate appeals in this State," which reads as follows: "No appeal shall be dismissed for insufficiency of the notice of appeal or undertaking thereon; *provided*, that a good undertaking, approved by a Judge of the Supreme Court, be filed in the Supreme Court before the motion to dismiss the appeal, and upon payment of reasonable costs as the Court may adjudge; *provided*, that the respondent shall not be delayed, but may move when he is regularly called for the disposition or dismissal of the appeal, if such undertaking be not given." (Laws of 1861,

as amended by defendant's counsel that this Court has not refused to dismiss an appeal for insufficiency of the notice, and that on that reason the judgment of dismissal should be reversed and the cause restored to the calendar. The section of the Act of 1861 above cited presupposes the existence of an appeal, to which the word *insufficiency* stands in no relation. The question of the insufficiency of the notice is not involved in the determination of the motion to dismiss the appeal; but the point made by the party moving, that the notice was considered by the Court, was that the proceeding under the 337th section of the Practice Act requires that an order to constitute an appeal, had not been taken.

Anita Lewis and Joseph W. Chard v. S. D. Johns et. al.

The construction which the counsel claims for the Act of 1861 would give it the effect to abrogate the conditions which the fact of a subsisting appeal must of necessity depend upon. In our view, the Act of 1861 was intended to relieve appellants from the results which, without it, would be likely to happen in consequence of defects of form and deficiencies of substance apparent on the face of notices of appeal; but we cannot find in this Act any authority for excusing, in any case, the performance of the acts necessary to effect an appeal in accordance with the provisions of the 337th section of the Practice Act—viz: the filing and service of notice—and without the performance of which acts the appellate Court could not acquire jurisdiction.

The petition for a rehearing must be denied.

Mr. Justice SHAFER, having been of counsel in another case involving a like question, did not sit on the trial of this.

SAWYER, J., expressed no opinion.

ANITA LEWIS, AND JOSEPH W. CHARD BY HIS GUARDIAN, WM. G. CHARD, v. S. D. JOHNS, J. L. SIMMONSON, J. B. GALLAND, M. LEVENSOHN, AND J. DOLL.

WIFE — SEPARATE PROPERTY OF.—All property which can be shown by satisfactory testimony to belong to the separate estate of the wife, whether real, personal, or mixed, and all the rents, issues, profits, and increase thereon, are, under section fourteen of Article XI, of the Constitution, sacred to the use and enjoyment of the wife, and cannot be held to answer for the debts of the husband.

HUSBAND — RIGHT TO WIFE'S PROPERTY.—No legal or beneficial interest in the use or enjoyment of the wife's separate property passes, by the fact of marriage, to the husband, and the wife's right of property in the same is as complete after marriage as while a *feme sole*.

SAME.—The husband cannot by any independent act of his acquire an interest in the separate estate of the wife, nor by his supervision or labor can he acquire any interest in the increase of the same.

HUSBAND'S LABOR ON WIFE'S PROPERTY.—In the absence of an express agreement to that effect, there is no implied obligation on the part of the wife to compensate the husband for his supervision of and labor bestowed upon her separate property.

Anita Lewis and Joseph W. Chard v. S. D. Johns et al.

from the District Court, Fifteenth Judicial District,
County.

acts are stated in the opinion of the Court.

Long, for Appellants, cited *George v. Ransom*, 15 Cal.
Pinzer v. Ward, 20 Cal. 674, and *Mahone v. Grimshaw*,
75, 176.

K. Rhodes, for Respondent.

ly question presented is this:

the products of a wife's lands, not of spontaneous
but resultant from a husband's industry solely,
by the statute of California from the husband's cred-

pellants contend that they are not, whilst the respond-
cate the contrary doctrine.

uch products are liable for the husband's debts con-
curring coverture, is sufficiently settled by the follow-
rities, to wit: Wood's Dig. p. 488, §§ 9, 14.

preme Court of California has recognized the civil
ine on this subject in the following cases: *Dye v.*
Cal. 167, *Meyer v. Pinzer*, 12 Cal. 253, *Tryon v.*
3 Cal. 493. (See also, *Snyder v. Webb*, 3 Cal. 86,
Castro, 5 Cal. 110, *Van Maren v. Johnson*, 15 Cal.
v. Smith, 16 Cal. 556, *Smith v. Smith*, 12 Cal. 223,
Jones, 1 Cal. 575.)

regoing cases certainly establish the doctrine con-
r, beyond controversy.

ere is one case reported which, on a superficial exam-
would seem to advocate another view of the law. I
he case of *George v. Ransom*, 15 Cal. 323. There
grave doubts as to whether this case is law. But,
de for the present those doubts, it is sufficiently clear
fact that that case has no analogy with the present.
profits of the stock were in a measure spontaneous—
nts, without any active labor or agency of the hus-

Anita Lewis and Joseph W. Chard v. S. D. Johns et al.

band. In the case at bar, however, the crop produced upon the wife's land was the direct result of the work and labor, the enterprise and credit, of the husband. Hence, the case can have no bearing on the one at bar.

But, not only is the doctrine contended for by respondents the law of California, but equally so in all civil law countries whose systems are identical, or nearly so with ours. Such is the French, Spanish, and Mexican civil law; such the law of Louisiana, and such the law of Texas. Domat White, in his Nov. Recop., Brown, in his Civil Law of Spain and Mexico, and innumerable decisions in Louisiana and Texas, affirm the principle, whilst there is really nothing to cause us to doubt it.

By the Court, SANDERSON, C. J.

William G. Chard—the father of Anita Lewis and Joseph W. Chard, the first being a married woman, and the latter a minor, plaintiffs and appellants in this case—in consideration of natural love and affection, conveyed to his said children the tract of land described in the complaint, in December, 1860. After the conveyance, Anita Lewis, and her husband, E. J. Lewis, moved upon the land in question, and resided on it from that time until the commission of the trespass alleged in the complaint, cultivating and farming the same. In 1862, a crop of wheat was raised upon about one hundred and thirty acres of the land, amounting, as charged in the complaint, to about four thousand bushels. At the time of the alleged trespass, about forty acres of this crop was cut and lying on the field, and the remainder standing ready to be harvested. When in this condition the crop was levied upon by the respondent S. D. Johns, Sheriff of the county, at the suit of his co-defendants against the husband, E. J. Lewis, alone, and upon his separate liability. Anita Lewis and Joseph W. Chard, by their guardian *ad litem*, William G. Chard, sued for damages laid in the complaint at \$3,675. The case was tried by the Court without the intervention of a jury.

In addition to the facts already stated, the Court found that

Anita Lewis and Joseph W. Chard v. S. P. Johns et al.

ing business was carried on ostensibly in the name of E. J. Lewis; that he employed men, purchased seed, and made contracts to be paid out of the proceeds of the growing crop; that he superintended the farm labor, and did some himself; that there was no showing of any interest by Joseph W. Chard in the business of the farm, and the statement of the husband, Lewis, 'that the farm was run on by his wife and Joseph W. Chard.'"

The judgment was for defendants, and plaintiffs appeal. The court below does not find as a fact that the suits against the defendants, under which the Sheriff made his levy, arose out of transactions connected with the farming business, and for the purposes of this opinion we shall assume that they did.

The story of the respondents is that the crop of wheat in question although raised upon land which was the separate property of the wife, was the common property of both, and therefore to be taken in execution for the husband's debts; that the common property of both, the husband at least had an interest in the crop, which could be seized and sold in execution; and unless one branch or the other of this theory be maintained, it is evident that the judgment must be reversed.

In *Wright v. Ransom*, 15 Cal. 322, the late Supreme Court held so much of the 9th section of the Act defining the rights of husband and wife as declares the rents and profits of the real estate of the wife to be common property as is in violation of the Constitution. Justice Baldwin, who delivered the opinion of the Court, said: "We think the Legislature has exceeded its constitutional power to say that the fruits of the labor of the wife shall be taken from her, and given to the husband and his creditors. If the constitutional provision be construed in favor of the wife against the exercise of this power, there would seem to exist of a right of property in one half of all beneficial interest; the barren right to hold in fee and the beneficial right to enjoy in the husband. The object of the provision was to protect the wife against

Anita Lewis and Joseph W. Chard v. S. D. Johns et als.

the improvidence of the husband; but this object would wholly fail, in many instances, if the estate of the wife were reduced to a mere reversionary interest, to be of no avail to her except in the contingency of her surviving husband." There the property, which it was sought to subject to the payment of the husband's debts, was dividends, due from a corporation to the wife, upon certain shares of stock held by her as separate estate. Although the property in the present case is different in kind, it has a common origin, and is likewise the fruit of a separate estate.

We are unable to perceive any difference in principle between the two cases. Carried to its logical conclusions, the doctrine announced in *George v. Ransom* must afford a shield to the separate estate of the wife, in whatever form it may assume, against the attacks of the husband or his creditors. Under that doctrine, all property which can be shown to belong to the separate estate of the wife, by satisfactory testimony, whether the same be real, personal, or mixed, and all the rents, issues, profits, and increase thereof, whether the same be the fruit of trade and commerce, of loans and investments, or the spontaneous production of the soil, or wrested from it by the hand of industry, is, under the Constitution, sacred to the use and enjoyment of the wife, and cannot be held to answer for the debts of the husband.

The manifest object of the framers of the Constitution was to protect the wife, as well during the lifetime of the husband as after his death, should she survive him, against the consequences of his improvidence or misfortune, by securing to her separate and apart from him, such property as she may hold in her own right at the time of marriage, and such as she may afterwards acquire by gift, devise, or descent. The Constitution, therefore, to that end, departs widely from the rules of the common law, and, in effect, provides that the relation of the wife to her property, so far as title, use, and enjoyment are concerned, shall not be prejudiced by the fact of coverture, and that no legal or beneficial interest therein shall thereby pass and vest in the husband. In this respect it does away

Antia Lewis and Joseph W. Chard v. S. D. Johns et al.

common law results of marriage, and preserves and in the wife the rights of a *feme sole*, and thus pre-er, already drafted and engrossed, a marriage settle- h is more solemn than private compacts, and is be- each of legislative interference. Nor can the rights d be frittered away by a judicial construction which no better reason than a lingering fondness for the s of the common law.

ie's right of property in her separate estate after is co-extensive with that which she possessed as a and the Legislature may, as it has done, enact laws ther assurance, (by throwing safeguards around the *endi*,) but cannot so legislate as to impair it in any

vs from what has been already said that the husband any independent act of his, acquire an interest in te estate of the wife. It is even doubtful whether ature can confer upon him, against her consent, a over her property sufficient for the purposes of man- r control. However that may be, it cannot go be- point, as we have already seen. That the hus- ot, by his management, supervision, or labor, acquire st in the estate itself, is conceded, and by parity of cannot acquire any interest in the increase, for that so, and upon the same terms—the latter being a f the former proposition. There is no magic in the manipulation of the husband by force of which sepa- nsformed into common property. If he acquires, as ed by respondents, any right whatever as against his rtue of his supervision and labor, it is not a right, ure of a lien, in the thing supervised, or upon which s bestowed, but merely a right to compensation, and rs could only proceed by the process of garnishment. ence of an express agreement to that effect, there is d obligation on the part of the wife to compensate d for his services, and in either case there would be mperfect obligation which neither the husband nor

Augustus Schenk et al. v. John Evoy et al.

his creditors could enforce. The doctrine contended for would banish the husband from the premises of the wife, and deprive her of his counsel and guidance, for his presence there might bring ruin instead of affording protection. No such alternative is contemplated by the provision of the Constitution, so wisely intended for her benefit.

The judgment is reversed and a new trial ordered.

AUGUSTUS SCHENK AND ADOLPHUS SCHWARTZ v. JOHN EVOY AND JOSEPH MULLIKEN.

DESCRIPTION OF LAND IN DEED.—Where a deed conveys a given quantity of land, parcel of a larger tract, and the deed fails to locate the quantity so conveyed by a sufficient description, the grantee, on the delivery of the deed, becomes interested in all the lands embraced within the larger area as tenant in common with his grantor. The grantee has no right to locate the quantity called for by his deed on any portion of the larger area, against the will of his grantor, unless such right is conferred upon him by some stipulation to that effect in the deed.

SEGREGATION OF LAND SOLD.—Where the calls of such a deed do not identify the land with certainty, the mere fact that at the time of the delivery of the deed the grantee paid to the grantor the purchase money, raises no presumption that the grantor segregated and placed him in the possession of a particular tract as the land conveyed.

ISSUE IN PLEADINGS.—The complaint charged that on a day mentioned the plaintiffs were lawfully seized and possessed and had the right of possession of a certain tract of land, and that defendants afterwards entered into and upon the said tract, and ousted plaintiffs therefrom. The answer in response to these allegations averred, that the defendant was not guilty of the supposed trespasses and ejectment in the complaint mentioned, nor of any part thereof: *held*, that the answer raised no issue.

CONFESSION OF ALLEGATION OF COMPLAINT.—The complaint in ejectment was filed on the 27th of January, and averred that the defendants were in possession of the demanded premises. The answer was filed on the 8th day of February, and the only response to this averment was as follows: And "this defendant further says, that he is not in possession of the land and tenements described in the complaint, or any part thereof;" *held*, that the allegation of the complaint must be taken as confessed.

APPEAL from the District Court, Fourth Judicial District, Contra Costa County of Contra Costa.

The complaint averred that on and after the first day of January, 1860, the plaintiffs were lawfully seized and po

Augustus Schenk et al. v. John Evoy et al.

had the right to the possession of a certain tract consisting of about one thousand acres, situate and in Contra Costa County of Contra Costa, and being particularly as follows, to wit:

A certain piece of land, situate, lying, and being in the County of Contra Costa, and being part of the rancho known as the "Sobrante," on the western side of San Pablo about seven miles from San Pablo town, in a valley known as Cruzito Valley. [Then followed a description by the plaintiff of the demanded premises.] The complaint alleged, that "the defendants, afterwards, and before the commencement of this action, to wit: on or about the fourteenth day of January, one thousand eight hundred and sixty, at said place, unlawfully entered into and upon said tract of land, and ejected the plaintiffs therefrom, and have hitherto unlawfully withheld, and now do unlawfully withhold the possession of said tract of land at the commencement of this action by the plaintiffs," etc.

It was the separate answer of defendant Mulliken: That the said defendant, Joseph Mulliken, comes and says, that he is not guilty of the supposed trespasses and ejectment mentioned in the complaint mentioned, or any part thereof. He further alleges that he is not in possession of the lands and tenements mentioned in said complaint, or any part thereof, nor does he unlawfully withhold the same from the plaintiffs, as alleged in their said complaint, wherefore he prays that he go hence without delay," etc.

On the 18th, 1856, Frisbie and De Zaldo sold to Germon one thousand acres. The description of the land as contained in the complaint is found in the opinion.

On the 11th, 1857, Germon sold to plaintiff Schenk, by the same description. December 18th, 1859, Schenk sold to Schwartz one half of his interest in the one thousand acres. On April, 1857, Frisbie and De Zaldo sold to Adams one half of the entire Sobrante claim, and to Hepburn one half of the same tract. In January, 1858, Hepburn sold to Sanders one eighth of one half of the Sobrante.

On the 21st of February, 1859, Frisbie and Adams executed to plaintiff Schenk a deed of one thousand acres, in which the land is located and described by metes and bounds, as in the complaint, and as surveyed by the witness Whitcher.

At this time, Hepburn and Sanders had become tenants in common with the other owners in the Sobrante, and they did not join in this deed, nor was there any proof that they had consented to the segregation of the one thousand acres.

The plaintiffs recovered judgment in the Court below, and the defendants appealed.

M. S. Chase, for Appellant.

The complaint was sufficient in ejectment, and the answer of this defendant (Mulliken) denied the allegation neither of seizin, entry, ouster, or damage, and traverses the *character* only, and not the *fact* of the detention.

"Every material allegation of the complaint not specifically controverted by the answer shall, for the purposes of this action be taken as true." (Civ. Prac. Act, sec. 65; *Dewey v. Bowman*, 8 Cal. 145; *Busenius v. Coffee*, 14 Cal. 91.)

A grant of a specified number of acres, to be taken out of a larger quantity of land, passes title to them as an undivided portion, and a subsequent location of the acres, pursuant to the right of election given, followed up by possession, is good as a partition by parol. (*Corbin v. Jackson*, 14 Wen. 619; *Jackson v. Livingston*, 7 Wen. 136.)

Besides, there is no uncertainty on the face of the deed, and "*certum est quod certum reddi potest.*"

There could be but *one* survey which could be *correct*, and that survey could be *precisely* made from the calls in the deed. Those calls were for one thousand acres in the Cruzito Valley on the west side of the San Pablo Creek, "to be laid out *near as possible* in a *square* form," having for its eastern boundary the course of the creek, and the other three boundaries to be all straight *lines*," etc.

There was, therefore, on the line following the course of the creek (say for six or eight miles through the valley,

Augustus Schenk et al. v. John Evoy et al.

testifies,) a *certain part* of said line where this one acre tract, with three straight lines for its three sides, if not squared, at least, "laid out *as near as possible* in form," and it is equally clear and mathematically that there was but *one* portion of that line on which to be done. For it is axiomatic in nature, and the so judicially notice, that no natural stream or creek is *straight* for a distance of six or eight miles, but the contrary, through such a distance, every one will more or less, and vary from a straight line somewhat, little be the variation, and the Court will not fail to in the case at bar, that *where* in this valley this under the least, and where, at the same time, this last meander would so conform with the other three given of the one thousand acre tract, that the same laid out in a form *nearest square*, *there* was the easterly corner by the deed.

A. Brown, for Respondent.

Description of the premises in the deed of the 13th March, in Frisbie & De Zaldo to Germon (under which the claim the premises in controversy) is indefinite and (if the deed is not absolutely void for uncertainty of description of the premises intended to be conveyed.) The the grantees can claim, under the deed, is an undivided the Sobrante Rancho to the extent of one thousand and, to be located on the west side of the creek in the valley.

Apparent from the language used in the deed, taken testimony of the surveyor, that the land conveyed be located at any particular place without some furtherment between the parties. The tract could as well located at any other point on the San Pablo Creek, *Sanito Valley*, within a distance of six or eight miles, it was located. The effect of the deed is to be located in as near a square

Augustus Schenk et al. v. John Evoy et al.

form as possible; this would give each side of the square length of one mile and one fifth of a mile, and according to Whiteher's testimony, the Cruzito Valley contains about six times as much land as was conveyed, and the grantees took, if anything, an undivided portion of the land in that valley, and the other tenants in common own the remainder.

The cases of *Jackson ex dem. Gamsey*, 7 Wendell, 136, and afterwards affirmed in *Corbin v. Jackson*, 14 Wendell, 619, cited in appellants' brief, do not support appellants' case.

In those cases, six hundred acres of land was sold, to be surveyed or taken off of a large tract, and the right of election was given to the grantees, which they subsequently made. It was held, that "though by the deed the grantees became tenants in common with the owners of the tract, the election, followed up by possession, operated as a *parol partition*."

In the case at bar, no right of election was given to the grantee, nor can any location of the land conveyed in the deed to Germon be made except by consent of all the tenants in common, or by partition.

The portion conveyed, not being set forth by metes and bounds or other description, from the remainder of the land on the west side of San Pablo Creek, in Cruzito Valley, by means of which it can be separated or distinguished from the remainder, the grantee, Germon, takes the one thousand acres as tenant in common with the other owners of the land. (*Lick v. O'Donnell*, 3 Cal. 63.)

The case may be stated thus: The plaintiffs own an undivided interest, to the extent of one thousand acres, in the Sobrante Rancho, to be located in the Cruzito Valley. The defendants own an undivided interest in all the land on the Sobrante Rancho. Both parties, as tenants in common, are entitled to the possession, and neither has the right to disturb the other. The possession and seizin of one tenant in common is the possession and seizin of the other. Both parties trace title from the same source—Frisbie and De Zalda.

By the Court, SHAFER, J.

Augustus Schenk et al. v. John Evoy et al.

from judgment in ejectment, and from order over-
tion for new trial.

other questions presented by the record, we are
to determine the legal effect of a deed executed by
and De Zaldo to Adolphus Germon, March 13th, 1856.
undry mesne conveyances, all the rights of Germon
by this deed passed to and became vested in Augustus
ne of the appellants, on the 11th day of November,
he following description of the premises conveyed is
all of the deeds referred to:

granted, bargained, and sold, aliened, remised,
conveyed, and confirmed, and by these presents do
sell, alien, remise, release, convey, and confirm, unto
party of the second part, and to his heirs and assigns
all that piece or parcel of land described as follows:
upon the western side of San Pablo Creek, in a valley
the 'Cruzito Valley,' which is a part of the tract
known as the Sobrante claim, and situated in Contra
nty, and State of California, bounded and described
s: Having for the eastern boundary thereof a line
the course of San Pablo Creek, as it now runs,
the centre thereof from the northern to the southern
of said valley, and extending back westward from
so as to include one thousand (1000) acres of land,
more, on the western side of said valley; said land to
nt, as near as possible, in a square form; all the lines,
e first mentioned line, to be straight, conforming with
nal points by true meridian."

pellants contend:

t the deed from Frisbie and De Zaldo to Germon, of
th, 1856, conveyed to the grantee one thousand acres
together with the absolute right of locating the same
ace in the Cruzito Valley, on the western side of San
ek.

t the calls of the deed referred to identified the land
icient certainty to enable a surveyor to survey it

correctly; and it is claimed as a fact that the land was so surveyed by the procurement of Schenk, in 1859 or 1860.

3. That the deed, being for a valuable and sufficient consideration, raises the presumption that the grantors were in possession, and that they, at the date of their execution of said deed, gave possession of the particular one thousand acres in controversy to the grantee Germon.

Where a deed is of a given quantity of land, parcel of a larger tract, and the deed fails to locate the quantity so conveyed by a sufficient description, the grantee, on delivering of the deed, becomes interested in all the lands embraced within the larger area, as tenant in common with his grantor; and as such tenant, the grantee can claim a partition under proceedings instituted for that purpose, or, alternatively, a partition may be made by amicable agreement between the parties. The grantee has no right to locate the quantity called for by his deed on any portion of the larger area, as against the will of his grantor, unless such right is conferred upon him by some stipulation to that effect in the deed.

These principles are fully recognized in *Jackson ex dem Gamsey v. Livingston*, 7 Wendell, 136. The plaintiff claimed to recover a certain lot known as No. 6, part of a tract of fifteen thousand three hundred and sixty acres of land granted to Malachi Treat and William W. Norris by letters patent. The plaintiff claimed under the patentees by a deed calling for six hundred acres, to be surveyed or taken off the aforesaid tract by the grantee at his election; the grantee elected to take the lands in controversy. It was held by the Court, that by the deed the grantee became tenant in common with the owners of the fifteen thousand three hundred and sixty acres and that an election on his part to take Lot No. 6, followed up by possession, operated as a parol partition.

The judgment for the plaintiff was affirmed in the Court of Errors. Chancellor Kent, who delivered the opinion, in discussing the question, remarked as follows: "The title to the undivided six hundred acres passed immediately to the grantees under the deed, with the right to elect in which pa-

Augustus Schenk et al. v. John Evey et al.

act it should be located as soon as the patent was
The testimony shows that the grantee exercised the
election, and took possession of the six hundred acre
ly as 1793. This location, in conformity with the
of the deed itself, rendered that certain and defi-
a was before uncertain, and gave a good legal title
' (14 Wendell, 619.)

ctrine of the foregoing cases was recognized in *Lick*
ell, 3 Cal. 63.

is claimed for the appellants that inasmuch as the
rs a money consideration of three thousand dollars
s to be presumed that Frisbie and De Zaldo put
n possession of the one thousand acres sued for at
when the deed was delivered, March 13th, 1856.
sel for appellants has presented no authorities in
this position, nor has he adduced any principle on
d of which its correctness can be vindicated. There
ly no necessary nor is there any natural cus-
nnection between the payment found and the segre-
dispute. The two facts may have transpired at the
t of time — March 13th, 1856 — but the mere pay-
he purchase money at that date has no appreciable
to prove that they did.

pellants further insist that the calls of the deed in
identify the land with sufficient certainty to enable a
o survey it correctly. In other words, it is claimed
deed is a deed by metes and bounds, and took effect
om the moment of delivery.

of this conclusion, reference is made to extraneous
ented in the record.

Valley is seven or eight miles long, and runs, in its
course, north and south. The one thousand acres
by the deed lies in the valley, and on the west side
ablo Creek; and by the deed, they are to be laid out
y as possible in a square form," the eastern side of
e resting upon the creek, "as it runs through the

centre of the valley;" the other sides of the square "to be straight, conforming with the cardinal points by true meridian

We shall here assume the facts which the testimony of the surveyor, Whitcher, tended to prove. He surveyed the one thousand acres, claimed in the complaint, in 1859 or 1860, and his survey was according to the calls mentioned in the deed; but the land, according to his testimony on cross-examination, "could, perhaps, as well have been located to answer the calls of the deed at any other place on the western side of San Pablo Creek, within a distance of six or eight miles from one end of the valley to the other, as at the place where it was located."

If the stream was perfectly straight, then five perfect squares of a thousand acres each might have been erected on the western side of the creek on the 13th of March, 1859, each square having the stream for its eastern boundary. If the stream meandered through the valley, and the meanderings were perfectly uniform, a like number of perfect squares could have been formed at that date; but if the meanderings were unequal, then a square erected upon that section of the creek which approximated most nearly to a straight line would have been the square called for by the deed. But under the latter hypothesis, even, there might have been two or more sections of the stream whose respective variations from a straight line were precisely the same. Whether the course of the stream was straight or otherwise, does not appear—nor, in the light of the surveyor's testimony, is it material to inquire. While his testimony tended to prove that the square formed by him in 1859 or 1860 answered the calls of the deed, it also tended to prove that five squares, at least, might have been formed upon the stream, each of which would have filled the calls of the deed quite as well. It is true that the witness says "perhaps as well;" but the witness was a surveyor of long standing, and was intimately acquainted with the valley. The burden was upon the plaintiffs in proving that the thousand acres could be located within the calls of the deed *only* at the place where it had been located by the surveyor in 1859

Augustus Schenk et al. v. John Evoy et al.

view of the numerous decisions of the late Supreme Court familiar to require citation, we are not at liberty to try a new trial on the ground that the Judge who tried the case failed to find on the testimony of Whitcher (which was the only testimony bearing on the question) that there was a spot only in the western half of the valley to which the law could be applied.

The relation established between Frisbie and De Zaldo and Evoy by the deed of March 13th, 1856, was the relation of tenants in common, and that relation now subsists between the plaintiffs who have succeeded to the rights of German, defendant, Evoy, who has succeeded, in part, to the rights of Frisbie and De Zaldo.

Respondent, Mulliken, answered separately. In his answer he says "that he is not guilty of the supposed trespass and ejectment in the complaint mentioned, nor of any part thereof." This, at the best, amounts to a general denial of the charges as the complaint was sworn to, the traverse raised. The answer proceeds as follows: "And this defendant says, that he is not in possession of the lands and premises described in said complaint, or any part thereof." The answer was filed on the 8th of February, 1860, and the traverse was taken on the 27th of January of the same year. The defendant charges that the defendants were in possession at the commencement of the action, and to this allegation the plaintiff makes no response, and therefore the truth of the charge must be taken as confessed. The further allegation in the plaintiff's answer—"nor does he withhold, nor has he ever made the same from the plaintiffs"—is not a sufficient answer to the charge that he was in possession at the time the action was brought.

The general judgment in favor of Mulliken is reversed, and a new trial is ordered, and the judgment in favor of Evoy is

Justice Rhodes expressed no opinion.

Hugh H. Downer v. William Smith.

HUGH H. DOWNER v. WILLIAM SMITH.

ALCALDE'S BOOKS.—WHEN RECEIVED AS EVIDENCE.—An entry of a grant of land in the Pueblo de San José, made in the Book of Alcalde's Grants, is entitled to be received in evidence upon proof that the persons by whom it is signed were the Alcalde and Clerk of said pueblo at the time it bears date, and that their signatures are genuine, and that the book was one of the books of the Alcalde's office in which Alcalde grants were entered, and that the book belonged to the Recorder's office of Santa Clara County.

ALCALDE'S GRANTS.—The statement of an Alcalde's official character, in the commencement of a grant signed by him, is sufficient to show that he acted in his official capacity, without a *descriptive officio* appended to his signature.

SAME.—DELIVERY OF.—Where the original grant of an Alcalde is contained in the book of grants kept by him, no proof of a delivery of the grant is required. The production of the book has the same force and effect upon the question of delivery as the production of an original deed or grant would have by one claiming under it.

QUITCLAIM DEED.—A quitclaim deed will enable the grantee to maintain ejectment for the land it conveys if his grantor could have done so.

JURISDICTION OF PROBATE COURTS.—Probate Courts have no jurisdiction to administer upon the estates of deceased persons who died prior to the adoption of the Constitution.

RECORDS OF PROBATE COURTS.—Where a Probate Court administers upon the estate of such deceased person, its proceedings are not entitled to be received in evidence.

EQUITABLE DEFENSE TO BE PLEADED.—If a defendant in an action of ejectment desires to avail himself of an equitable defence as a bar, he must set it up in his answer with the same particularity which is observed in a bill of equity.

COURT MUST PASS ON EQUITABLE DEFENSE.—The Court, and not the jury must pass upon the equitable title set up in the answer, and it must be sufficiently pleaded to warrant the Court in granting a decree which will estop the further prosecution of the action. The Statute of Limitations does not begin to run against the title to land derived from the Government of Mexico until a confirmation by a patent from the Government of the United States.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

This was an action of ejectment to recover possession of a lot in San José, Santa Clara County, commenced October 9th, 1861.

The complaint averred, that on the 20th day of September, 1861, plaintiff was seized in fee as the owner of the demanded premises, and that on said day defendant entered upon the premises and ousted and ejected him therefrom, and still detains the same.

Hugh H. Downer v. William Smith.

wer, after denying the allegations of the complaint, new matter that as long ago as 1852, one Redman of the demanded premises, claiming to be the owner d remained in possession of the same until his death, rred in April, 1858. That said Redman left a will, ne appointed R. A. Redman his executor, and said robated in the month following the death of the tes- the executor received letters from the Probate Court lara County, and entered upon the discharge of his as such, took charge of the property, and continued the same until August 1st, 1861, when the defend- d into possession under a lease from the executor, nce continued to occupy as his tenant. That while r Redman, in his lifetime, occupied the premises, tz, Public Administrator of Santa Clara County, ed upon the estate of one J. W. Jenkins, who had died intestate in said county, and on the 23d day 1853, procured an order of sale of the lot from said ourt, and on the 3d day of August, 1853, sold the one Jordan became the purchaser. That the pro- confirmed the sale, and on the 15th day of Novem- the Administrator executed to Jordan a deed of the and that Jordan sold to Redman the testator. The to set up the Statute of Limitations of three years, d in case of sale of lands by order of the Probate also the Statute of Limitations of five years. . intiff, in support of his title, offered in evidence the e Alcalde to Jenkins the intestate, of which the fol- a copy:

del Pueblo de San José de Gda.:

as, John Jenkins has applied to this office for Lots n Block No. 1, and Range No. 2, north of the base aid lots being vacant: therefore, is to certify, that I, John Burton, First the Pueblo de San José de Gde., on the part of the r and in consideration of the sum of what is spe-

Hugh H. Downer v. William Smith.

cified by law, receipt whereof is hereby fully confessed and acknowledged, have bargained, sold, and conveyed unto said John Jenkins, and to his heirs and assigns forever, two certain messuages or lots of land, lying and being in the Pueblo de San José de Gde., and known on the plat of said town as Lots Nos. 8 and 9, in Block No. 1, and Range No. 2, north of the base line, and containing each fifty varas square; to have and to hold the same, with all the rights and privileges thereto belonging, conditioned and provided, that the said John Jenkins will fence said lots with redwood, or erect a dwelling thereon, on or before the expiration of twelve months from date.

"In witness whereof, I have hereunto set my hand and seal this 9th day of August, A. D. 1847.

"JOHN BURTON

"CHARLES WHITE, Clerk."

Jenkins, at his death, left as heirs, brothers and sisters, and the plaintiff's quitclaim deed from them was dated July 15th, 1847.

The proceedings in the Probate Court relative to the administration upon the estate of Jenkins bear date at the time averred in the answer, and the deed of the administrator to the grantor of defendant's lessor was executed as therein set forth. Defendant's lessor claimed the title to the demanded premises by virtue of the administrator's deed, as well as Sheriff's deeds, executed under sales made on executions against one Curl, who, defendants claimed, was Jenkins' partner at the time of the grant, and that the grant was made for the joint benefit of the two.

Plaintiff recovered judgment in the Court below, and defendant appealed.

P. L. Edwards, for Appellant.

The testimony of Curl was admissible and relevant, because an equitable defense was set up, and even though it may have been inartistically pleaded, the trial proceeded upon the merits and without specific objection to the pleadings. It appeared

Hugh H. Downer v. William Smith.

was entitled to at least the undivided half of the such, to enforce a conveyance from the heirs of J. s. Besides, the testimony was appropriate under pleadings for the purpose of showing that the had an equitable defense, or it may be, rather, that ff, resting upon the strength of his own title, could c. For the same reasons, the judgments and the eds in the several actions against Curl, under which educed additional title, were admissible in evidence. ute of Limitations of 1855, relied on by the counsel, ifestly relates only to cases in which one party er a Mexican grant, and another claims under some le. It cannot be construed to embrace cases in parties deduce title from the same common source. interests affected by the papers, it therefore makes ce whether the conflicting titles asserted under the been finally confirmed or not, nor whether one of f J. W. Jenkins was under the disability of infancy or not.

e of *Johnson v. Van Dyke*, 20 Cal. 225, is not at his proposition—in fact, confirms it. That was the e in possession, and claiming under a *mere color* of ding against one claiming under a grant from Mex- had not been finally confirmed, the main question ther the statute would run from the judgment of on or only from the perfection of the survey by land was definitely segregated. It cannot affect because the defendant has the possessory and older title, and if he cannot set up the lapse of time in action of the plaintiff, *a fortiori*, the latter cannot his action in virtue of the alleged grant, and if he all, he must do so upon his *mere title*, and this title, to his own showing, is inchoate and unconfirmed. ts preclude the defendant from the benefits of the limitation, they must, *a fortiori*, and of necessity, the plaintiff's right of recovery upon the strength

Hugh H. Downer v. William Smith.

of his own case. His own assumed title is inchoate and unfirmed, and wholly unfortified by possession, and, according to his own theory, he can have no title upon which ejectment can be maintained.

If we understand the counsel, the proposition is stated, because J. W. Jenkins died in 1848, the Probate Court of this State, succeeding the Mexican *regime*, could have no jurisdiction over his estate, and that all of the acts of his several administrators were therefore void. In support of the proposition, *Grimes v. Norris*, 6 Cal. 624, *Tevie v. Pitcher*, 10 Cal. 477, and *De la Guerra v. Packard*, 17 Cal. 182, are cited. Unfortunately, however, for the argument, none of these cases are of the least aid. They recognize the doctrine that the law of the forum governs the remedy, and are wholly antagonistic to the position that because a man died before the inauguration of the new government, therefore there could be no administration of his estate. The cases cited are all in reference to questions of real estate, and the questions were as to the validity of devises in view of the Mexican law, without probate under the succeeding State law.

The counsel having assumed that the sale was without jurisdiction and void, then, as a corollary, asserts that the statute of Limitations could not run. We conclude the reverse from our antagonistic point of view. Besides, we hold the defendant, and those under whom he claims, having been in all the time in the adverse possession, may successfully rely upon the statute. He may rely on either or both statutes. In our view of the case, there is no necessity for invoking the aid of the Act of 1860, page 16; but we have a right to rely on it in aid of irregularities in the proceedings of a Court administrator with full jurisdictional and functional powers. In our view, these proceedings were, at most, irregular, and we maintain they were not even that. If merely irregular they might have been attacked by a direct proceeding, but not collaterally.

The cases of *Smith v. Morse*, 2 Cal. 542, and *Billing v. Hall*, 7 Cal. 13-6, are in harmony with our theory. The

Hugh H. Downer v. William Smith.

decides that a deed, void by reason of fraud, cannot be
as to third persons by an Act of the Legislature;
second fully recognizes the power of the Legislature
and direct as to the remedy. It may be remarked,
7, however, that the counsel came to a singular con-
when he says that the Act of 1860 was intended only
the difficulty considered in *Becket v. Selover*. It is
that the decision itself had provided the specific rule
very difficulty. The Act must have been intended
thing more.

the hypothesis, then, that the proceedings were not
at most, voidable, it results that the Legislature,
vice, had competent power to pass the Act in ques-
at all the proceedings of all the administrators in this
valid, and that all the record evidence offered by the
is admissible.

is a long series of decisions to the effect that an Act
legislature is not void simply because retroactive. It
addition, divest a vested right, or impair the obliga-
contract. The records in the several cases against
the proper evidence, because in equity he was at least
her, or at least a tenant in common, with the dece-
d the proceedings in those cases vested all the title
mer in J. W. Redman. This is putting the defend-
e upon its humblest grounds. Was not Curl, in
s surviving joint tenant or co-partner in equity,
to the whole property? and, if so, did not J. W.
succeed to that whole equitable title? If we are
our position that the proceedings in the Probate
not void, it results from the counsel's own argument
several Statutes of Limitation operated as a bar to
tiff's recovery. As between her own citizens, the
a perfect right to determine what shall constitute
of title to lands within her boundaries. (*Mims v.*
Cal. 13.)

der of the Probate Court directing the sale was a

judicial act, and, as such, is entitled to the benefit of all legal presumptions. (*Halleck v. Grey*, 9 Cal. 195.)

The title of the purchaser does not depend upon the return or other mere ministerial acts of the officer over which he has no control. (*Cloud v. El Dorado County*, 12 Cal. 133.)

In our view, nearly all the questions hitherto presented including the effect of the statute of 1860, have been decided by this Court. (*Hart v. Burnett*, 15 Cal. 616.)

The defendant and his grantors having had the possession and at least an equity, the plaintiff, when he purchased, was bound to take notice of that title. (*Bryan v. Ramirez*, 8 Cal. 467.)

Neither is the defendant's case weakened if it should be held that his paper title is defective. He still has his possessory title unimpaired, and that is all that is necessary. (*Morton v. Folger*, 15 Cal. 278.)

The deed under which the plaintiff seeks to deduce his own claim of title, is a mere release or quitclaim, without any words operative as a conveyance. It is only equivalent to the vendor saying, in a legal form, that as against the vendee he would not thereafter assert any claim. It operated as an estoppel only.

It could not pass such a title to the plaintiff as would enable him to maintain ejectment against another in possession and claiming adversely. By the common law there could be no conveyance of land valid as against one in adverse possession. We concede that the rule has been modified in some of our States by statutes, and in others by decisions; but with hazard the opinion that in none has it been so modified as to authorize an ejectment upon a mere deed of release and quitclaim, without words of grant, or a positive enabling statute. Here, we have no such statute — not even a Statute of Uses. (*Mesick v. Sunderland*, 6 Cal. 297; Washburn on Real Estate 596, 606, 620; *Jackson v. Dermont*, 9 Johns. 55; *Jackson et al. v. Todd*, 2 Caine. 182.)

Such a deed is not sufficient even to catch a title by the vendor subsequently acquired. Its highest effect is by way of

Hugh H. Downer v. William Smith.

personam. (See particularly, *Valle v. Clemens*, 18 86; *Jackson v. Hubble*, 1 Cow. 613; *Jackson v. Cow. 13*; *Bogy v. Shoab*, 13 Missouri, 366.)

Moore and A. L. Rhodes, for Respondent.

issues in this cause arise upon the denial of the alle-
the complaint and the answer of the Statute of

matter set up by the defendant is not sufficiently
entitle him to any equitable relief, he having failed
at the estate of Redman, or any person, held any
tle or interest in the land; but, on the contrary, he
at the time of the sale by Yontz, *Redman held the*
possession of the lot.

Jenkins having died in 1848, his estate was not
administration, and therefore the grant of letters of
ion was void. (*Grimes v. Norris*, 6 Cal. 624-5;
itcher, 10 Cal. 477; *De la Guerra v. Packard*, 17

being *void*, the limitation of actions expressed in
of the Act to regulate the settlement of estates of
ersons, can have no application to this case, for a sale
be denominated an administrator's sale unless the
jurisdiction to order the sale, and the administrator
wer to sell.

Court, SANDERSON, C. J.

ction to the introduction of the book, called in the
ok No. 3," containing what purported to be Alcalde
ntenable. The book purported to contain the grant
kins, under whom the plaintiff claimed title to the
n controversy. The grant in question, as appears
ook, was signed by one John Burton, and attested
Charles White as Clerk. It was shown by the witness
who was sworn for that purpose, that at the time
ears date, Burton was the Alcalde of the Pueblo de

Hugh H. Downer v. William Smith.

San José de Guadalupe, in which the land in controversy located, and that White was his Clerk; that both Burton and White were dead; that the signatures of Burton and White appended to the grant, were genuine, and that the book was one of the books of the Alcalde's office in which Alcalde grants were entered. It further appears, from the testimony of the witness Tisdall, who was Deputy Recorder of Santa Clara County, (the county in which the land is located,) that the book belonged to the Recorder's office of that county. From these facts, we think the Court was warranted in finding that the book was one of original entries, and therefore entitled to be admitted as evidence upon that ground; but whether upon that ground or not, the evidence was sufficient to entitle the book to admission under the provisions of the Act to legalize certain records in the Recorder's office of the County of Santa Clara. (Statutes of 1861, 507.)

The further objection to the grant itself, on the ground that Burton had not appended to his signature his official designation, is, in our judgment, without merit. The Alcalde's signature, in his official character at the commencement of the grant, which together with the fact already proved that he was the Alcalde at the time the grant bears date, was sufficient to show that he acted in his official capacity notwithstanding no *descriptive* of his office was appended to his signature.

The objection that there was no proof of delivery is untenable. The grant contained in the book being the *original grant*, it follows that there could have been no delivery to the grantee other than such as the entry of the grant in the book kept for that purpose imports, except by duplicate. The production of such duplicate, if any was given by the person claiming under the grant, would be *prima facie* evidence of delivery.

The second section of the Act above cited provides that books of record mentioned therein (of which Book No. 3 is one) " * * * may be offered in evidence in the same manner with the same force and effect in all cases as if they had been produced from the custody of the person claiming under

Hugh H. Downer v. William Smith.

deed, conveyance, or other instrument in writ-
language was obviously intended to give to the
of the book in question the same force and effect
ession of delivery which would ordinarily attach
ction of an original deed or grant by one claiming
that is to say, make it *prima facie* evidence of

ned that the Court erred in admitting the deeds of
Jenkins to the plaintiffs, upon the ground that
nly quitclaim deeds, and therefore insufficient to
e. In *Sullivan v. Davis et al.*, 4 Cal. 291, which
n of ejectment, the plaintiff claimed under a quit-
and it was there held that it was sufficient to
rantee to maintain ejectment if his grantor could
o.

claimed that the Court erred in excluding the pro-
the Probate Court of Santa Clara County, in the
estate of Jenkins, through which the defendant
have become vested with the title of the original
t appears from the record, that Jenkins died in
8, prior to the existence of California as a State.
Estate v. Norris, 6 Cal. 621, it was held that the
urt had no jurisdiction over the probate of the will
who died before the organization of the State Gov-
The doctrine there laid down was subsequently
Tevis v. Pitcher, 10 Cal. 465. There is no differ-
nciple between those cases and the present, so far
ion under consideration is concerned.

to regulate the settlement of the estates of deceased
es no express provision for an administration upon
of persons who died prior to the adoption of the
, and in the absence of any such provision it can-
onstrued as to embrace such cases. It was the evi-
on of the Legislature to leave such estates to be
nd under the law as it stood prior to the Consti-

s that the Probate Court could assume no jurisdic-

 Hugh H. Downer v. William Smith.

tion over the estate of Jenkins, and that all its proceedings and their consequences, being, therefore, null and void, were properly excluded.

The next error assigned is, that the Court erred in excluding a mass of evidence tending to prove in the defendant's favor, that he held an equitable title to one half of the premises in controversy, derived from one Curl, who was the surviving partner of Jenkins, and claimed that the lot in question had been purchased by Jenkins with partnership funds, and that by reason thereof he held in trust for him to that extent. A sufficient answer to this assignment is found in the fact that no equitable title is set out in the answer. The name of Curl is nowhere mentioned in the answer, nor his claim of title is referred to, nor are any other facts upon which an equitable title could be based intelligibly stated. Under the pleadings, the parties are compelled to hold that the parties stood upon their legal rights only. If the defendant in an action of ejectment desires to avail himself of an equitable defense as a bar, he must set it up with the same particularity which is observed in a bill of equity. The equitable title is for the Court, and not the jury, and must be sufficiently stated to warrant the Court in granting a decree which would estop the further prosecution of the action; and, unless this is done, the defendant must be regarded as relying solely upon his legal title. For these reasons, the Court did not err in excluding the evidence in question.

Under the view we have taken, the defendant is forced to rely upon his possession, which cannot stand in the presence of the plaintiff's title. Nor can that possession be aided by the Statute of Limitations. The title of the plaintiff is derived from the Mexican Government, and being yet unconfirmed, the statute does not run against it.

Judgment affirmed.

Mr. Justice RHODES, having been of counsel, did not sit at the trial in this case.

E. T. Stone v. A. Elkins.

E. T. STONE v. A. ELKINS.

AL CONSTRUCTION.—The seventy-fourth section of the Act to elections, which confers upon the Boards of Supervisors of the counties the power to try a contest in relation to the office of Judge, is unconstitutional.

from the Board of Supervisors of Stanislaus County.

nt recovered judgment before the Board of Super-
Plaintiff appealed.

d Cobb, for Appellant.

& Spaulding, for Respondent.

Court, SAWYER, J.

ellant and respondent were candidates for the office
Judge, in the County of Stanislaus, at the late
The appellant contested the election of the respon-
at office before the Board of Supervisors of said
this is an appeal from the judgment rendered by the
nst the appellant in that proceeding.

ndent moves to dismiss the appeal on the grounds,
rs—first, that this Court has no jurisdiction of the
the reason that the Board of Supervisors is not a
that this is, therefore, not an appeal from the judg-
y Court; second, that no appeal can be taken from the
a Board of Supervisors.

ections are substantially the same, or, if not, they
on the same principles. The Election Law (found
Dig. p. 381, Secs. 51 to 73 inclusive) prescribes the
ntesting the election of various officers.

isdiction is conferred upon the County Court; the
s in these sections prescribed are essentially judicial
aracter; pleadings are to be filed; a citation to the
e election is contested is to be issued and served;
re to be subpoenaed and examined; the fact as to
y was actually elected is to be litigated and deter-

E. T. Stone v. A. Elkins.

mined in accordance with "the rules of law and evidence governing the determination of questions of law and fact" in other cases, so far as the same may be applicable; and, "after hearing the proofs and allegations of the parties, the Court shall pronounce judgment in the premises, either confirming or annulling and setting aside such election, according to the law and right of the case." Judgment is also to be rendered against the losing party for costs, "which may be collected in the same manner in which similar costs are collected in the District Courts;" and, by section 69, "either party feeling himself aggrieved by the judgment of said Court may appeal therefrom to the Supreme Court, as in other cases of appeal thereto from the County Court."

There can be no doubt that such proceedings are purely judicial in their character, and being so, and the case being special, the County Court has jurisdiction. (*Saunders v. Haynes*, 13 Cal. 152.)

Section 74 is as follows, to wit: "In case of any contest regard to any election to fill the office of County Judge, such contest shall be tried in like manner by the Board of Supervisors of said county." This is the only section specifically referring to the matter in the case of contesting the election of a County Judge. According to this provision, the Board of Supervisors are to proceed in the same manner as the County Court and to exercise functions purely judicial in their nature, not such as are appropriate to that body. Article III of the Constitution provides that "the powers of the Government of the State of California shall be divided into three separate departments: the Legislative, the Executive, and Judicial; no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases hereinafter permitted."

The case under consideration is not found among the exceptions. Here, there is an attempt to confer purely judicial powers upon the Board of Supervisors—the power to judicially hear and determine the title of parties to an office, and

Elías Blum v. J. R. Robertson.

nal judgment both upon the subject matter and for
provision of the statute purporting to confer this
the Board of Supervisors is clearly in conflict with
of the Constitution cited, and is therefore void.
performance, 5 Cal. 73; *People v. Nevada*, 6 Cal. 144,
ited.)

ws that the Board of Supervisors, in hearing and
g the contest between these parties and rendering a
n the proceeding, assumed powers which, under the
n, they were not competent to perform, and that
proceeding is a nullity. There is, then, no judg-
ere is nothing of which this Court can take cogni-
Cal. 175.)

on of the Board of Supervisors being void, and the
e contestant unaffected thereby, he probably has his
a proceeding upon an information in the nature of
anto. (Practice Act, section 310; 10 Cal. 376; 20
But it is unnecessary to determine the question in

d against misapprehension, it is proper to remark
we do not intend to be understood as holding that
of Supervisors cannot, under any circumstances,
ties that in some respect partake of a judicial char-
ere may be many duties relating to the police and
lations of counties of a *quasi* judicial, or of a
acter, which properly belong to the Board of Super-
was held in the case of the *People v. El Dorado*
Cal. 62. But the case at bar involves no question
ure.

deal is dismissed.

e, J., expressed no opinion.

ELIAS BLUM v. J. R. ROBERTSON.

FACT.—When one is appointed, by written instrument, the attor-
act of another, his power to bind the principal must be ascer-
one from the language of the instrument by which he is clothed
ority to act for and in the name of the principal.

Elias Blum v. J. E. Robertson.

SAME—HIS POWER.—The agent cannot, in the exercise of the power delegated, bind the principal by any act beyond the power, or beside it, though it is competent for him to perform such subordinate acts as are usual, incidental to or necessary to effectuate the object expressed.

ONE DEALING WITH ATTORNEY IN FACT.—The party dealing with an attorney in fact is bound to know at his peril what the power of the agent is, and to understand its legal effect.

CONSTRUCTION OF POWER OF ATTORNEY.—V., the owner of an unconfirmed Mexican grant, executed to B. a power of attorney, which, after reciting appointment, read as follows: "I give him full, complete, and perfect power, as my said attorney in fact, to do any and everything to secure title to said rancho, and to prosecute the pretension of the same in the Courts of the United States; and by this I ratify, confirm, and approve all the doings of my said attorney in fact concerning said rancho." *Held*, that the power did not confer on the agent any authority to sell the land or any part of it, or enter into any contract which would bind the principal to convey the same or any part thereof.

WHEN EQUITABLE TITLE MUST BE PLEADED, AND HOW.—If the defendant, in an action of ejectment, relies on an equitable title to the demanded premises as a defence, it must be pleaded, and the answer setting it up must in substance at least, possess all the elements and essential qualities of a bill in equity, and the equity presented must be of such a character that it may be ripened by the decree of the Court into a legal title to the premises, or such as will estop the plaintiff from the prosecution of his action.

PAROL AGREEMENT TO SELL LAND.—A party who claims a right to a conveyance of land under a parol contract on the ground of part performance must make out by clear proof the agreement as alleged; and the actual performance proved must be unequivocal evidence of such agreement, and the agreement must be certain in its terms, and just and fair in all its parts.

TENANCY AT WILL—HOW CREATED AND TERMINATED.—A tenancy at will cannot exist without express grant or contract, and when it does exist, the tenant is entitled to a reasonable notice of his landlord's intention to terminate the estate before an action can be maintained against him to recover the possession.

APPEAL from the District Court, Fourth Judicial District, Contra Costa County.

The facts are stated in the opinion of the Court.

E. A. Lawrence, for Appellant.

The objection was taken, upon the argument, that if this were an equitable defense, defendant does not *ask for specific performance* in his answer, in compliance with *Lestrade v. Banks*, 19 Cal. 660.

But the answer to this is obvious. Agard is not yet entitled to *specific performance*, and will not be until after the patent

Elias Blum v. J. R. Robertson.

the payment of one thousand dollars. These events
future. He cannot compel them to convey to him
time fixed in the contract, and they cannot by these
s compel him to pay the one thousand dollars to
re the time they have specified—that is, before his
ade secure by the issuance of the patent. But he is
y the contract with the *immediate right of possession*,
ursuance of that contract, he was *put in possession*
alencia. Hence, defendant *could* not pray for a spe-
rmance, and *should* not have prayed for an injunc-
use an injunction presupposes a right of action in
iff, and may, at some future time, be set aside, and
proceed; whereas, upon the facts set forth, defend-
be entitled to have the cause dismissed, with his
use *there was no right of action in the plaintiff at the*
suit brought. Hence, the prayer of his answer was
d this case does not come within the rule of *Lestrade*

It is a *perfect equity* united to possession, which,
system, is equivalent for all the purposes of defense
title. (*Morrison v. Wilson*, 13 Cal. 497.)

oparent, from the very general, comprehensive, and
anguage used in the power of attorney, that Mrs.
intended to invest her son, Casimero, with as full
lete authority as she herself possessed, to *make con-*
h lawyers, without placing any limitation upon the
method of compensation, and also, to “provide the
expenses” to employ lawyers and to pay the costs of
d of procuring the attendance of witnesses, and all
es incidental to the prosecution of such claims.

othes Casimero with all the powers necessary to suc-
accomplish the purpose intended by his appointment.
e v. *Muldrow*, 16 Cal. 512—overruling *Billings v.*
(7 Cal. 173.)

thority to accomplish a definite end carries with it
ity, so far as the constituent can confer it, to execute
legal and appropriate measures proper to accom-

Elias Blum c. J. R. Robertson.

plish the object proposed." (*Fogarty v. Sawyer*, 17 Cal. 58; *Valentine v. Piper*, 22 Pick. 85.)

Similar language has frequently undergone construction, in chancery, in cases where powers of appointment have been created by deed or will.

Thus, in *Bateman v. Bateman*, 1 Atk. 421, it was held that a power to raise money out of a copyhold estate, authorized sale of the estate. So, a power to pay debts out of rents and profits, has been held to authorize a sale or mortgage of the estate. (*Bostle v. Blundell*, 1 Meriv. 193, 232; 2 Story Eq. §§ 1064, 1064a.)

So, in the case of *Kenworthy v. Bate*, 6 Vesey, 793. The Master of the Rolls says: "The case of *Long v. Long*, 5 Vesey, 445, determines this: that to enable a person to sell land, it is not necessary to have that authority expressly given to him. There the party had no right to sell, but had a right to charge."
* * * But it was held that, as there was nothing to restrain him in the amount, and he might have charged the utmost value, he had done only what was equivalent to that" (by sale of the premises.) * * * "That is, therefore, a direct determination that a power to charge includes a power to sell."

2. If the power of attorney did not authorize a conveyance, it authorized Casimero to give possession of the land, or in other words, to give a lease at will.

The principal is bound by the action of the agents in matters left to the agent's judgment and discretion, although he acts erroneously. (*Ruggles v. Wash. Co.* 11 Mo. 496.)

3. But if the Court is of opinion that the power of attorney is insufficient to authorize the execution of the deed or contract, or to give possession of the premises to Bates, Lawrence, and Hastings, then we must look elsewhere for the power.

Counsel cannot say that because Mrs. Valencia had authorized her son to employ counsel to prosecute her claim by written instrument, that therefore she did not authorize him to convey the land by another power of attorney, or even by parol. She might have done so at another time, or by a

Ellas Blum v. J. R. Robertson.

instrument. The two powers do not clash, and
tly competent to show a power to convey *aliunde*.
t that there is anything inconsistent in the same
ng both authorities under two separate powers of
(*Page v. Sheffield*, 2 Curtis C. C. Rep. 377.)

Following cases it was held that a parol authority to
make a contract for the sale of land is equivalent
sale by the principal himself: 18 Ill. 160, 250,
v. *Frick*, 6 S. & R. 90, *Workman v. Guthrie*, 29

Valencia told Davis, one of the grantees, that she
her son a power of attorney; and in the case of
Woodrich, 12 Wend. 535, 9 Wend. 68, it was held
parol acknowledgment by the principal that the
authority to enter into a sealed contract was com-
evidence of his authority.

v. Jackson, 14 Wend. 619, where a party claimed
ed executed under an alleged power of attorney
wner, it was held in an action of ejectment for the
e might give in evidence as proof of the power the
of such owner that such power was valid and as
he deed, such declarations being made previous to
g of defendant's interest.

Valencia told Davis, one of the grantees holding under
," that her son Casimero had a power of attorney
nd he had informed her that he had entered into a
th myself and the lawyers, giving us half of the
she was satisfied with the contract, * * * and was
he business had got into our hands," is not only
evidence of the power of attorney, but is *prima*
ce that she had given him the authority, by power
to do the act which she declared he had done to
tion.

Valencia ratified the deed or contract with Bates, Law-
Hastings, of 1854, by conveying to Davis, in 1859,
of the ranch by a valid deed under seal, upon the

Elias Blum v. J. E. Robertson.

same consideration, and solely for the purpose of ratifying same.

This Court has repeatedly held that a subsequent ratification is equal to an original authority. (*Taylor v. Robin* 14 Cal. 400; 13 Cal. 230; *McCracken v. San Francisco*, 16 623; 1 Hilliard Vend. 436; Story on Agency, §§ 242, 244, 3

The deed to Davis, being intended as a ratification or firmation of the contract with Bates, Lawrence, Hastings *et al.* it will be a ratification of the *whole* contract, for there can be no ratification by halves. (See *Newton v. Bronson*, 8 K. 594; *Tilton v. Nelson*, 27 Barb. 595; *Powell v. Gasson*, 18 Monroe 179; 1 Hilliard Vend. 338, § 27; Story on Agency § 250.)

E. W. F. Sloan, for Respondent.

The letter of attorney, though under seal, grants no power to the agent either to sell or convey the estate of the principal, or any part of it. The power is limited to the employment of counsel to prosecute her claim of title to the Rancho de San Felipe. (*Berrien v. McLane*, 1 Hoff. Ch. R. 4; *Billings v. Morrow*, 7 Cal. 173.)

There was no ratification or confirmation of such conveyance on the part of the principal. A ratification could not have been by deed. (*Hunter v. Parker*, 7 Mees. & Wels. 343; *Hanford v. McNair*, 9 Wend. 54; Story on Agency § 242.)

There is no executory agreement contained in the deed in question on the part of M. M. Valencia, who is there made to figure as the party of the second part.

If it is her deed, then it took effect as a present immediate conveyance to Bates et al. of an undivided half of the rancho.

If it is not her deed, it could not have had any operation upon her estate at all.

The only executory agreement contained in the instrument is on the part of Bates and others, parties of the first part.

The answer does not allege that she ever made any o

Ellas Blum & J. R. Robertson.

for the conveyance of her land, or any part of it, to
 ., to Agard, or to the appellant, either orally or in
 Nor does it charge that she ever agreed, in any form,
 to such contract with them, or any of them.

dent of the absence of any such allegation in the
 there is no proof tending to show that either by
 ing without seal, or otherwise, she ever made an
 agreement with them, or any of them, to sell or
 to cause to be sold or conveyed, her land, or any

for the appellant insists that the deed in question,
 tive or void as a conveyance, must be treated as an
 agreement to sell, and professes to cite cases in sup-
 proposition.

principles upon which those cases proceed do not
 e case at bar.

by letter of attorney, *not under seal*, an agent is
 expressly to sell and convey the land of the princi-
 he attorney does sell, and executes and delivers a
 d of conveyance in the name of his principal, there
 not good as a conveyance of the legal estate, because,
 language of the letter of attorney may be compre-
 ough, yet, inasmuch as it is not under seal, the
 a fact could not execute a deed. If, however, the
 money were paid by the purchaser, and received by
 al, it being his clear intent to bestow the power,
 deed would be good as a contract of sale, no seal
 ssary in a power for that purpose.

he attorney, having sufficient power to sell and con-
 d, executes the conveyance in his own name, instead
 ne of the principal, describing himself, however, as
 ne in the capacity of agent for the other, then the
 een treated as a valid executory contract of sale.

iling proceeds upon the ground that there was no
 wer in the agent, but there was defect in the execu-

And, inasmuch as the agent could contract to sell,
 , and a written memorandum of the sale, signed by

Elias Blum v. J. R. Robertson.

him, in his own name, for his principal, would answer the demands of the Statute of Frauds, there is no impropriety in holding the sale to be good, though the deed could not operate as a conveyance of the legal estate.

This is all that can be deduced from the numerous authorities cited by appellant's counsel.

The principles are plain enough, but cannot be made to apply to this case, where no power, either to sell, convey, or to contract to sell or convey, is to be found in the letter of attorney, with or without seal.

There is no pretense for saying that the letter of attorney in question constitutes or creates an "universal agency." No general expressions can make it so. (Story on Agency, § 21.)

Davis, having taken from Brady an assignment of his interest, procured from M. M. Valencia, in 1858, a formal conveyance of two tenths of the ranch.

It is not, nor does it purport to be, a deed of ratification. It contains no reference to the deed made by Casimero Briones.

It seems to vest Davis with a legal title of two undivided tenths of the ranch.

Neither the appellant, nor any one under whom he claims to hold, has any connection with it.

By the Court, CUREY, J.

This is an action of ejectment, brought to recover the possession of a certain tract of land in the County of Contra Costa, known as the Rancho "Boca de la Cañada del Pinole" or San Felipe, containing three square leagues of land. The plaintiff alleges that on the 20th day of March, 1860, he was the owner in fee simple and in the possession of the undivided one sixth part of said rancho, and that on the day following while he was so the owner and in possession of said land, the defendant unlawfully entered thereon and ousted him therefrom, and has, from that time to the commencement of this action, which was the 21st day of April, 1861, withheld, and still withholds, said land from plaintiff, to his damage in the

Elías Blum v. J. R. Robertson.

twenty-five thousand dollars. The plaintiff then prays
 ment for the recovery of the possession of the land,
 damages, etc.

complaint, the defendant filed an answer, first deny-
 erally and specifically, each and every allegation
 contained; and, in the second place, alleging affirma-
 at one William B. Agard became the owner of the
 d three tenths of said tract of land by conveyances
 and delivered to him prior to the time of the
 s alleged seizin, by George C. Bates, Edwin A. Law-
 d S. C. Hastings, who, with William H. Davis and
 rady, became "invested with the title in fee simple
 to the undivided one half of said rancho," by virtue
 ain conveyance made by Maria Manuela Valencia, by
 rney in fact, Casimero Briones, bearing date on or
 e 31st day of May, 1854, and that such deed was
 rded in said county on that day; that after said con-
 were executed and delivered by Bates, Lawrence,
 tings, to said Agard, to wit: on the 31st day of May,
 entered into the possession under said conveyance of
 54, with the full knowledge, consent, and approval of
 Valencia, and that from that day to the time of
 such answer, the said Agard "has been in the quiet,
 e, and undisturbed possession of said premises, with
 knowledge of the said M. M. Valencia and of said
 of all his rights in said premises, and with the claim
 to the undivided three tenths of said rancho;" that
 at was the agent of said Agard, and as such agent,
 ore said 20th day of March, 1860, entered into the
 n of said land to occupy and retain possession of said
 nths thereof for said Agard, and that "he ever since
 d now doth retain and hold possession of the same
 agent of said Agard, and that he has and claims no
 le, interest, or possession of said premises, except as
 t of said Agard." The defendant then prays that the
 t may be dismissed, and that he may have judgment
 osts.

These affirmative allegations of the answer the plaintiff controverted by replication. By the pleadings, the parties agreed that said tract of land was granted to the said Madame Valencia by the Mexican Government in 1841, and that her claim and title to the same had been finally confirmed by the Supreme Court of the United States.

On the trial the plaintiff produced, in evidence, a deed executed by Mrs. Valencia, bearing date and acknowledged by her on the 20th of March, 1860, which was duly recorded on that day, by which she conveyed to Simon Blum, Elias Blum, and T. A. Brown, all and singular her right, title, and interest in and to said rancho, excepting four hundred acres. It was then admitted by defendant that he was and had been in the possession of the portion of said rancho set forth in his answer, as the agent of said Agard.

To maintain the affirmative matter pleaded by defendant, he gave in evidence a power of attorney, under seal, executed by Mrs. Valencia; on the 17th day of May, 1854, to Casimero Briones, her son, which was acknowledged and recorded, by which she constituted him her true and legal attorney, for her and in her name to take all necessary steps and to do all necessary things to secure the validity of her claim to said rancho; to employ lawyers, gather testimony, and, in general, to do all that was necessary to secure her right, title, and pretension to said rancho, and to provide the necessary expenses for the same; and for this she declared: "I give him full, complete, and perfect power, as my said attorney in fact, to do any and everything to secure my title to said rancho, and to prosecute the pretension of the same in all the Courts of the United States; and by this I ratify, confirm, and approve all the doings of my said attorney in fact concerning said rancho." The defendant then gave in evidence an instrument in writing, bearing date May 22d, 1854, purporting to have been entered into by Bates, Lawrence, and Hastings, "partners at law at San Francisco," William H. Davis, and Lewis Brady of the first part, and Maria Manuela Valencia of the second part, by which the parties of the first part covenant

Elias Blum v. J. B. Robertson.

to and with her to undertake to perfect in the Courts her title to said rancho, and to render their said Courts, and obtain a judicial confirmation of and to bear all the expenses in the premises, including a survey and partition of said tract of land; and patent for the same should be issued, to pay to her legal representative one thousand dollars in addition; follows, in the same instrument, that in consideration premises, and to enable the parties of the first part to said case with vigor, the said Valencia grants, sells, says to them all the one undivided half of the said This instrument, by the *testatum* clause, purports to be signed by the parties respectively under their hands, and to have been signed by the several persons comprising the first part, and also by Mrs. Valencia, by Casimero Briones, "her attorney in fact," and recorded on the 1st of May, 1854. It appeared on the trial that this instrument was executed by the parties of the first part, and the name of the party of the second part was subscribed Casimero Briones' name does not appear anywhere in the instrument, except as subscribed under the name of Manuela Valencia, as follows: "Per Casimero Briones." It appeared that Mrs. Valencia was not present when said instrument was thus executed.

The defendant also gave in evidence deeds of conveyance by Bates, Lawrence, and Hastings, respectively, to said defendant whereby Bates and Hastings each undertook to convey the undivided one tenth of said ranch; and Lawrence to the said grantee all his right, title, and interest in the property. The deeds of Bates and Lawrence were executed and recorded in the year 1856, and the deed of Hastings was executed and recorded in January, 1857. In these deeds reference is made to the title of Mrs. Valencia to the land of their own, and to the instrument bearing date of 1854, as the means by which they acquired their interests.

The defendant entered upon the ranch in 1856, after the

Elias Blum v. J. R. Robertson.

deeds of Bates and Lawrence to Agard were executed, as his agent, and from that time to the trial of the cause was in possession of the land or living upon it, claiming to be in possession of an undivided three tenths of it, as such agent. It does not appear that the defendant was let into the possession by Mrs. Valencia; but the defendant himself testified that some six weeks or two months after he first took possession he had a conversation with her for the first time, and between that time and August, 1860, he had occasionally conversed with her in respect to his occupation for Agard, and that at one of those conversations she expressed herself as very much pleased that Mr. Agard had purchased "into the ranch from the lawyers." The defendant also testified that she always showed him great respect as Mr. Agard's agent. While defendant was so in possession, Agard made improvements on the land of the value of from eight hundred to a thousand dollars. The defendant further testified that at one time Casimero Briones, by instructions of his mother, showed him a contract between Bates, Lawrence, Hastings, Davis, and herself, granting them one half of the ranch on their obtaining the final confirmation of it and paying her one thousand dollars. It was proved in general terms that Bates, Lawrence, and Hastings rendered the professional services by them to be performed, as mentioned in this instrument, and that some expenses had been paid by Agard in the employment of counsel to attend to the case, and some other expenses that had accrued subsequent to the final decree of confirmation.

It was also proved by the defendant that Mrs. Valencia had by deeds, conveyed two undivided tenths of said rancho to William H. Davis, and an undivided interest of four hundred acres to Encarnacion Briones de Vaca, both of which deeds were executed and recorded before the execution and recording of the deed under which the plaintiff claimed; but the defendant did not show that he had any interest in or occupied said premises under either of such deeds.

Much of the evidence offered on the part of the defendant was objected to by the plaintiff, on the ground that the same was

Elias Blum v. J. R. Robertson.

to the issues joined, and incompetent for the pur-
ed.

art before which the case was tried rendered judg-
avor of the plaintiff against the defendant for the
f the possession of the premises in controversy, and
ousand dollars damages for the wrongful withhold-
same premises from plaintiff. In due time the de-
plied for a new trial, which was denied. From the
ing the application for a new trial and from the judg-
defendant appealed, and now asks this Court to reverse
ent, mainly on the grounds:

That the power of attorney from Mrs. Valencia to
(asimero) was sufficient to authorize him to convey
e the tract of land mentioned; and that by the instru-
ng date May 22, 1854, Bates, Lawrence, and Hae-
red title in fee to an undivided three tenths of the
and that said Agard, under whom and by whose
he defendant entered and occupied the land, became
ith title in fee to the same undivided three tenths
the deeds of conveyance executed to him by Bates,
and Hastings, respectively; and that therefore the
was at the commencement of this action, and from
been, entitled to the possession of said tract of land.

—That, if the foregoing proposition be deemed un-
en Mrs. Valencia should be held bound to convey
ded half of the land on the happening of the events
in said instrument in writing, and which were
de conditions precedent to her obligation to convey,
sons that subsequent to the date of such instrument
ized its existence and ratified it by letting Agard
session of the land, and thereafter encouraged him
and conduct to make expenditures in improvements
mises, by which she became estopped from denying
ce of a subsisting right in him to possession of the
atrovery; and that, until default on the part of the
he first part in said instrument named, an action of

ejectment ought not to be maintained by her or her grantee against the said Agard or his agent in possession.

Thus the appellant relies, first, on a defense at law upon his supposed legal title, and second, on a defense in equity upon a contract binding Mrs. Valencia, the existence of which appellant asks the Court to find from the facts and circumstances proved under his answer, setting up, as he claims, this second ground of defense.

By the letter of attorney executed by Mrs. Valencia to her son, he was constituted her agent for a particular object, and his powers are to be ascertained alone from the instrument by which he was clothed with authority to act for her and in her name and stead. In the exercise of the power delegated, the agent could not go beyond it nor beside it, though it is competent for him to perform all such subordinate acts as are usually incident to or necessary to effectuate the object expressed.

In order to bind the principal in such case, it must appear that the act done by the agent was in the exercise of the power delegated, and within its limits. (*Mech. Bank v. Bank of Columbia*, 5 Wheat. 326.) No man can be bound by the act of another without or beyond his consent; and where an agent acts under a special or express authority, whether verbal or written, the party dealing with him is bound to know at his peril what the power of the agent is, and to understand its legal effect; and if the agent exceed the boundary of his legal authority, the act, so far as it concerns the principal, is void. This is a rule of the common law, and is indeed elementary in the doctrine of powers. (*Beals v. Allen*, 18 John. 363; *Hubbard v. Elmer*, 7 Wend. 446; *Rossiter v. Rossiter*, 8 Wend. 494; *North River Bank v. Aymar*, 3 Hill, 263; *Cox v. Robinson*, 2 Stew. and Porter, 91; *Stow v. Wiss*, 7 Conn. 214.)

The power of attorney under consideration authorizes Casimero to take all the necessary steps and do all necessary things to secure the right, title, and claim of Mrs. Valencia to the ranch therein mentioned, and to employ lawyers, gather testimony, and to provide the necessary expenses for the same.

Elias Blum v. J. B. Robertson.

the land, or part of it, does not appear to have been
ed by Mrs. Valencia. If it was, she entirely failed
any such intention, or to confer on her attorney any
convey or contract in her name, or otherwise to con-
ortion of it; and it is not competent for Courts to
y the acts of another to perform an obligation which
incurred.

of what we deem well settled rules of law on the
e hold that the power of attorney before us con-
authority on the attorney to convey, in the name of
uent, the land therein referred to, or any part thereof,
the deed, or contract, whichever form it may be,
ellant's counsel contends was executed by authority
ower of attorney, was, as a conveyance, or a con-
vey, utterly void.

osition which we have made of the first branch of
case brings us in the next place to the considera-
alleged equitable defense.

e Supreme Court held in a number of cases that a
ving a perfect equitable title to land in possession
it effectually in resistance to an action of ejectment
by one holding the legal title. (*Arguello v. Edin-*
al. 157; *Morrison v. Wilson*, 13 id. 497; *Weber v.*
19 id. 457.)

case the defense relied on must meet the claim made
aintiff to the possession, and the equity presented
such a character that it may be ripened by a decree
urt into a legal right to the premises the possession
is sought to be recovered, or such as will estop the
om the prosecution of the action. (*Lastrade v. Barth*,
60.) It is not enough that a defendant may have
ense in fact. He cannot avail himself of it without
t, in which case his answer must, in substance at
ess the elements and essential qualities of a bill in
which the Court could, upon proper proofs, pro-
decree for his present protection or final relief.
v. *Murphy*, 19 Cal. 272; *Downer v. Smith*, 24 Cal.

Elias Blum v. J. R. Robertson.

114.) Has the appellant presented such a case, by his answer and the evidence, as entitles him to a decree in his favor?

In our judgment the evidence in the case does not warrant the conclusion that Mrs. Valencia was a party to the instrument on which the appellant relies as a contract to convey, either by the execution of it by her son, or by subsequent adoption of it as such a contract; nor does it appear that she ever made any other agreement with the parties under whose appellant claims to defend his possession. It is a rule well settled that a party who claims a right to a conveyance of land under a parol or verbal contract, on the ground of part performance, must make out, by clear and satisfactory proof, the existence of the contract as alleged by him; and it is not enough that the acts of part performance proved are evidence of some agreement, but they must be unequivocal and satisfactory evidence of the particular agreement charged in the complaint or answer, as the case may be; besides which, the agreement must appear to be certain in its terms, and just and fair in all its parts. (*Phillips v. Thompson*, 1 John. C. 131; *Parkhurst v. Van Courtland*, Id. 273; *German v. Mack*, 6 Paige, 288; *Colson v. Thompson*, 2 Wheat. 336.)

William H. Davis, who was one of the parties to the instrument bearing date in May, 1854, and the defendant, and his principal, Agard, were examined as witnesses for the defendant, for the purpose of proving that Mrs. Valencia knew of the existence of the instrument, and that she ratified and adopted it by her conduct subsequent to its date. Davis testified that Mrs. Valencia on one occasion detailed to him its contents, and declared its import, with as much precision as the most enlightened person could have done it. Why she should have been so particularly minute in giving him information which, according to his own statement, she must have known he possessed, he does not explain; and another thing which is especially singular in this narrative is, that Mrs. Valencia, who, it appears from the record, was a woman nearly sixty years of age at the time, and whose vernacular language was, as the defendant expressed it, "Californian,"

Eliaz Blum v. J. R. Robertson.

" understood the character and import of the document which she was talking much better than did Davis and his lawyers who were parties to it. This must be so, if we are to regard the answer of the defendant in this action as positions assumed by his counsel in the argument of the case as an exposition of their understanding and interpretation of the instrument.

We are not surprised that the Judge of the Court below sustained this and other testimony of like character as failing to establish what is claimed for it on the part of the appellant, even if it could have been admissible under the pleadings for such purpose.

It is claimed by the appellant, in his answer, and also in his argument, that Bates and his associates, immediately after executing the instrument, took possession of the land and by virtue of it, with the knowledge, acquiescence, and consent of Mrs. Valencia; and also that when Agard took possession he entered under said instrument, as a conveyance of the tract to convey, with her knowledge, consent, and approval. In short, that the several parties were let into the possession by Mrs. Valencia, in subordination to and in recognition of a right in them respectively to the enjoyment of the land in common with her under such instrument, as a contract or conveyance of an interest therein. But a new point was introduced on the re-argument of the case, granted after judgment was pronounced affirming the judgment of the Court below, to the effect that the defendant was let into the possession by license of Mrs. Valencia under circumstances that would place him in the status of a tenant or *quasi* tenant at will; and therefore the action could not be maintained without proof that he had notice to quit before it was commenced.

We have examined with care the record to ascertain if there is any evidence showing that the defendant or his principal, or the principal's grantors, were let into the possession of the land by Mrs. Valencia, and have not been able to discover any therein that would have justified a Court or jury to find as found. Davis and the defendant, and the defendant's

Elias Blum v. J. R. Robertson.

principal, each testified in relation to their several entries and subsequent occupations; but no one of them proved, when his evidence is considered in the concrete, the fact that they or he entered by her permission, or sought to obtain her license so to do. Davis was asked, "Under what authority did you seek to make your location, and to what extent?" And to this he answered, "Under the authority of the contract, and by Mrs. Valencia's consent, who knew I was making the location under said contract. I was then making the location of my interest in the ranch." This entry, he says, was made in the Fall of 1854; and it appears that it was under a claim of right, independent of any license then obtained from her. If Davis entered under the authority of what he terms the contract, for the purpose of making a location of his interest in the ranch, such an entry and location could not inure to the benefit of the defendant, who held no interest in relation with him — and hence, all this testimony may be laid out of view in considering the new point made.

The defendant testified that he took possession of a portion of the ranch in September, 1856, for Agard, with the consent of Casimero Briones and his mother. Subsequently, in answer to a question propounded to him by his own counsel, he said the first conversation he had with her was about six weeks or two months after he first took possession. The testimony of Agard relates entirely to circumstances that transpired after the defendant's entry — none of which involve the question of an entry by license of Mrs. Valencia.

"Tenant at will," says Littleton, (Sec. 68,) "is where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called tenant at will, because he hath no certain or sure estate; for the lessor may put him out at what time it pleaseth him."

Any act of ownership exercised by the lessor which is inconsistent with this estate will operate as a determination of it. Thus, if he enters on the land and cuts down trees demised, or makes a feoffment, or a lease for years to com-

Ellas Bium v. J. R. Robertson.

Immediately, the estate at will is thereby determined. (242, 245.) This is the common law doctrine on the subject; but the law of tenancy has become very much modified by judicial decisions. The language of the books is, that a tenancy at will cannot arise without express grant or agreement (2 Preston on Abstracts of Title, 25,) and when it does arise, the tenant is entitled to a reasonable notice of the landlord's intention to terminate the estate before an action can be maintained against him for the possession. In *Jackson v. Johnson*, 3 John. 417, it was held that if there was no tenancy existing and admitted relation of landlord and tenant, a notice of notice to quit does not apply.

It is to be the rule in England and in some of the United States, that an occupant under an executory conveyance is a *quasi* tenant at will, and that he cannot be evicted without a previous demand of the possessor. (See *McDonald v. McDonald*, 4 Dana, 337; *Don v. Webster*, 10 R. 510; *Right v. Beard*, 13 East. 115; *Newby v. B. & C.* 448.) So far as this doctrine has obtained in this country, it is on the theory that the occupant is to be considered as a tenant at will. (*Roe v. Street*, 2 A. & E. 329; *Jones v. B. & C.* 718.) In New York a different rule has obtained, and a vendee in possession under a contract to convey is entitled to notice to quit before an action of ejectment can be maintained against him. (*Jackson v. Miller*, 7 R. 233; *Jackson v. Moncrief*, 5 Wend. 29; *Wright v. Eddy*, 7 Barb. 78.) The relation of landlord and tenant in no sense exists between the landlord and vendee. (*Watkins v. Holman*, 16 Peters, 54.) If the occupant enters under deed or an agreement for purchase, or by naked license, his right of entry must be considered as subsisting in grant or contract.

There is nothing in this case from which it can be justly inferred that the defendant entered in pursuance of a license. Valencia; the answer sets up no defense except as stated upon the instrument executed in May, 1854, and it is maintained throughout by the answer and in argument that

Elias Blum v. J. R. Robertson.

the defendant entered under and by virtue of that instrument claiming independently of any right granted at the date of his entry. A party thus entering into possession cannot adopt alternative lines of defense which are essentially inconsistent with each other. He cannot in the same case claim that he entered by deed absolute, and also under a contract for a conveyance, and also by leave or license requiring notice to quit. (*Shackelford v. Smith*, 5 Dana, 237.)

Upon the re-argument of the case, the appellant's counsel insisted that the deed executed by Mrs. Valencia to Davis in 1859 inured to the benefit of Agard, and as a predicate for this proposition it was assumed that the instrument entered into in May, 1854, between Bates and his associates and Casimero Briones, was a deed of conveyance executed by Mrs. Valencia; and as the statute abolishing joint tenancies was not passed until 1855, the deed to Davis inured to the benefit of his co-tenants, and the title thus derived may be set up in defense at law to the plaintiff's action.

This proposition is a *petitio principii*. The premises on which the deduction depends is wanting. The document called the deed of Mrs. Valencia was not her deed, and so was held, and the counsel for appellant had treated it on the first argument as amounting to no more than a contract to convey. The question as to the invalidity of this instrument as a deed or contract of Mrs. Valencia having been disposed of, an argument based upon it as a deed of conveyance cannot be entertained.

Returning to the case as presented upon the pleadings, we hold that the defendant's answer, though it sets forth some of the facts necessary to be alleged as constituting an equitable defense, is, both in form and substance, defective and insufficient as a pleading under which facts constituting such defense could be given in evidence, or on which the Court could grant a decree in defendant's favor, and therefore it is unnecessary to pass upon the rulings of the Court below in excluding a portion of the testimony offered in support of the theory of an equitable defense. Such offered testimony, a

John A. Clary v. A. Rolland et al.

ome of that received, was irrelevant under the issues
nd the Court committed no error in excluding it.
vidence established the plaintiff's right to recover the
n of the entire premises described, as against the
ts, and therefore he was entitled to judgment.

Barrett, 15 Cal. 371.)

judgment is affirmed.

A. CLARY v. A. ROLLAND AND C. REDWITH.

IN ACTION TO RECOVER PERSONAL PROPERTY.—In an action
the sureties on an undertaking given in a replevin suit, where there
en a trial and judgment in the replevin suit, the complaint does not
acts sufficient to constitute a cause of action unless it aver that the
of the property was found by the jury, and that an alternative judg-
was rendered, as provided in section two hundred of the Practice Act.

L from the District Court, Fifth Judicial District,
quin County.

omplaint averred, that on the 25th of January, 1862,
e plaintiff, was the owner of and in the possession of
personal property, (describing the same,) and that one
brought an action against plaintiff to recover posses-
he same, and that defendants Rolland and Redwith
the undertaking, and that the Sheriff took the prop-
n plaintiff, etc.; that a trial was had, and judgment
ered in favor of Olary for the restitution of the prop-
d for return thereof to Olary, and for costs of suit.
plaint further alleged that the property had not been

Beatty, for Respondent.

s was a new proposition, unembarrassed by former
, I should say it was clear. The parties who sign the
ing (defendants in this action) undertake, among
ings, "for the return of said property to the said

John A. Clary *v.* A. Rolland *et al.*

defendant, if return thereof be adjudged." Now, that undertaking is distinct; it is not qualified by any other language in the instrument. Then, what allegations besides the mere formal part of the pleadings must be made to entitle the plaintiff to recover?

First—That a return of the property had been adjudged.

Second—That it never had been returned.

Now, those allegations are doubtless made in proper form in the complaint demurred to.

The undertaking contains no condition or promise about the alternative judgment or value, but a simple undertaking for the return of the goods replevied.

If such condition is incorporated therein by operations of law, it can only be because the law in effect declares that no judgment for the property without the alternative shall be a good and valid judgment. Indeed, Mr. Justice Burnett put it expressly on that ground. He says: "It would seem that the sureties only bind themselves to make good such judgment as the plaintiff may lawfully obtain against the defendant." Here, then, is the whole foundation of Mr. Justice Burnett's surmises. A judgment without the alternative value would not be lawful. In *Ginaca v. Atwood*, 8 Cal. the Court decides such judgment would be lawful in case of nonsuit. In *Nickerson v. The Cal. Stage Co.*, this Court decides it is a lawful judgment in a case where there was not a nonsuit, but a finding of the jury on the issues submitted to them. If, then, such judgments are lawful, what becomes of the surmises founded on the supposition they are not lawful.

The form of the undertaking is prescribed by legislative Act. If it was intended to limit the liability of the sureties in the manner contended for, why was not this alternative condition inserted in the form of the bond?

George W. Tyler, for Respondent, cited *Nickerson v. Chatterton*, 7 Cal. 568.

By the Court, SAWYER, J.

This is an appeal from a judgment in a suit against the

John A. Clary v. A. Bolland et al.

on an undertaking given in a replevin suit. The Court
a demurrer to the complaint on the ground that it did
facts sufficient to constitute a cause of action, and the
declining to amend, final judgment in the case was

point of the demurrer is, that it does not appear that
it to recover the possession of the property the value
property was found by the jury, or that an alternative
t was rendered, as provided in section 200 of the
Act. The question must be determined by a construc-
sections 177, 200, and 210, subdivision 4 of said Act,
terms of the undertaking.

were called upon to construe the sections, as an
question, unaffected by any prior decision upon the
int, we might be disposed to hold the complaint
in this respect. Such was our impression upon the
t, but upon a careful examination of the decisions of
reme Court referred to in the argument, we find that
t has been determined the other way. In *Nickerson*
et al., 7 Cal. 568, the precise question arose in an
upon an undertaking given by the defendant, under
04 of the Practice Act, containing a similar condition.
case a judgment had been entered in the replevin suit
of plaintiff, for restitution of the horse in controversy,
damages and costs; and the breach alleged was the
very of the horse and non-payment of the damages
detention. As in the present case, the jury did not
value of the property, and consequently that fact was
ged. The defendants demurred. The demurrer was
l, and judgment entered, from which defendants
. The precise point made by defendant in the case
ore the Court was made and relied on in that case,
t, in order to hold the sureties on their undertaking,
e of the property must be found by the jury, and the
ve judgment provided for by section 200 entered in

court fully considered the question and decided it, sus-

John A. Clary v. A. Rolland et al.

taining the point made. One other point made by the appellant was decided by the Court in his favor, and the reversal of the judgment of the Court below was placed on both grounds. It is insisted by respondent that because there was another point decided upon which the judgment of reversal was correct, that the decision on this point is merely *dictum*. But we might just as well treat the decision on the other point as *dictum*. The appellant directly made and relied upon both points, the Court considered and decided both, and devoted much the larger share of the opinion to the discussion of the point now before the Court. The opinion closes with these words: "For these reasons we think the judgment of the Court below ought to be reversed."

The opinion was written by Mr. Justice Burnett, and concurred in by Mr. Chief Justice Murray. We cannot find that the decision on this point has been questioned in any subsequent case, although several have arisen where the Judges would have been likely to have suggested doubts had any existed in their minds.

In *Ginaca v. Atwood*, 8 Cal. 446, it was sought to apply to that case the doctrine laid down in *Nickerson v. Chatterton*. This was also an action on a similar undertaking. The plaintiff in the suit to recover the property had been nonsuited, and a judgment for the return of the property had been entered in favor of the defendant. As the plaintiff was nonsuited, there had been no opportunity for a jury to find the value. The breach was a non-delivery of a portion of the property. A demurrer was interposed to the complaint, the point of which was that the value of the property had not been ascertained by the jury. Mr. Justice Field delivered the opinion of the Court, Mr. Justice Terry and Mr. Justice Burnett concurring. No doubt is intimated as to the correctness of the rule laid down in *Nickerson v. Chatterton*. On the contrary, the Court takes an obvious distinction between the two cases, and by strong implication approves the doctrine of the former case, as will be seen from the following passage. Mr. Justice Field says:

John A. Clary v. A. Rolland et al.

Section 177 of the Practice Act applies only where the case has been submitted to and passed upon by a jury. It does not apply to a case of judgment of nonsuit. The decision of the Court in *Nickerson v. Chatterton*, 7 Cal. 568, and others, also, only applies to cases which have been submitted to a jury. The present case is like a judgment of a discontinuance, in which no jury is called. The result upon a trial by a jury would have been found in a writ of replevin suit are by such a judgment left to the discretion of the jury called in the suit on the undertaking, as the conditions of the undertaking will authorize the jury to enter into them."

The point made and relied on was the same relied on in the present case. The Court certainly had a legitimate authority to suggest a doubt as to the correctness of the decision in *Nickerson v. Chatterton*, if they had any, or if they intended to adhere to it. But not only was no doubt suggested, but the Court seeks other grounds upon which to base its decision, and expressly put it upon the ground that section 177 of the Practice Act, and "the decision of this Court in the case of *Nickerson v. Chatterton*, 7 Cal. 568, construing section 177 as only to apply to cases which have been submitted to a jury;" thereby strongly implying that the decision in that case would govern where the case was tried by a jury. Here was a Court comprised, in the opinion of other Judges, tacitly, at least, recognizing the validity of the decision laid down in *Nickerson v. Chatterton*.

The plaintiff in *Nickerson v. Chatterton* having failed in his attempt to recover against the sureties, subsequently brought an action against the principal — the California Stage Company — to recover the value of the property. The same case was substantially set up in the form of a former replevin suit, and this case found its way to the present Court. (*Nickerson v. California Stage Company*, 21 Cal. 51.) Still another Judge (Mr. Justice Baldwin) had concurred in the Bench. In deciding the case, the Justice who

John A. Clary v. A. Rolland et al.

delivered the opinion of the Court says: "The defendant objects that under our statute there should have been a finding of the value in the replevin suit, and an alternative judgment for the return of the property, or the payment of its value. *This would have been necessary to enable the plaintiff to recover against the sureties on the replevin bond*; but the failure to do so cannot affect his rights as to the defendants."

Here the rule in *Nickerson v. Chatterton* was invoked and relied on, and the Court directly, in express terms, approved the rule as applied to a case where it is sought to hold sureties—but say it does not apply to the principal. Applied to that case it may be dicta, but it shows that Justice had no doubt as to the propriety of the construction given to the provisions of the Practice Act under consideration.

Again, in *Mills v. Gleason*, 21 Cal. 280, the same section of the Practice Act came under consideration—Justices C. and Norton having in the meantime come upon the Bench. Mr. Justice Cope, in delivering the unanimous opinion of the Court, says: "A dismissal stands upon the same footing as a nonsuit, leaving the parties to settle in an action upon the undertaking those matters *which, if the original suit were prosecuted, it would be necessary to determine in the first instance*."

Nickerson v. Chatterton was cited by counsel in the argument; and the Court, in the passage just quoted, and which follows, assume that if the action in the original suit had been dismissed, but had been prosecuted, it would have been "necessary to determine, in the first instance," the matter provided for in the sections of the Practice Act under consideration.

The decision in *Nickerson v. Chatterton* was rendered several years ago. In these repeated instances the construction of the statutes announced in that decision has been brought to the notice of the Court, and recognized both expressly and by implication, and no doubt as to its correctness, so far as it can find, has been, in any instance, suggested or intimated.

The question arises upon the construction of a statute

John A. Clary v. A. Holland et al.

remedy upon a point that was, at least, debatable. Instruction by the highest Court of the State, so often in subsequent cases, or, at least, brought to the Court and passed by without criticism, has become the law itself, and the sureties in such cases may, per-
 mitted to contract in view of this exposition of the ex-
 liabilities they assume. If a litigant, by this con-
 s stripped of a right which is supposed to be given
 each of the first condition of the undertaking, as
 and by the appellant, it is his own fault. In every
 require the jury to find the value of the property,
 as a right upon the alternative judgment prescribed.
 e was authoritatively construed for him seven years
 his construction has been incidentally approved, ex-
 l by implication, frequently since that time. If he
 rough ignorance, carelessness, or otherwise, to dis-
 construction, and thereby fails to secure all his
 not the fault of the law or the Courts.

the reasoning of the Court in *Nickerson v. Chat-*
 not entirely satisfactory to our minds, yet, the point
 ble, and we do not feel at liberty, at this late day,
 a decision concurred in by so many of our prede-

isted that, admitting the plaintiff is not entitled to
 value of the property, he is still entitled to recover
 nine dollars and thirty cents recovered in the replevin
 hat the demurrer was improperly sustained on that

of *Nickerson v. Chatterton* seems to cover this point
 however that may be, under the view we have taken
 , the only cause of action shown by the complaint,
 hat to be good, is for the costs. The amount of the
 s than two hundred dollars, and no cause of action
 of which the District Court could take jurisdiction.
 ment is affirmed.

Donat Quiriauque v. Thomas Dennis.

DONAT QUIRIAQUE v. THOMAS DENNIS.

MORTGAGE ON GROWING CROPS.—A mortgage upon growing crops, even if not acknowledged, and recorded, like mortgages on real estate, is valid, as against third parties, without delivery of possession of the property mortgaged.
SAME—LIEN ON.—The lien of such mortgage ceases, as against subsequent purchasers, after the crop is harvested, unless, when harvested, it is delivered to the mortgagee.

APPEAL from the Second Judicial District, Santa Barbara County.

The facts are stated in the opinion of the Court.

Eugene Lies, for Appellant.

Charles E. Huse, for Respondent.

By the Court, CURREY, J.

The plaintiff commenced his action against the defendant to recover the value of a quantity of beans and corn, alleged to be of the value of one thousand dollars, which the defendant, as Sheriff, seized and carried away, under and by virtue of writ of attachment issued out of the District Court of the Second Judicial District, for Santa Barbara County, in an action therein of Abidie & Brothers against one Zuniga.

The plaintiff's right to the property was acquired by a mortgage of it, executed by Zuniga to him on the 8th of November, 1862, to secure the payment of six hundred dollars, which the mortgagor owed to the mortgagee. The mortgage was filed for record in the Recorder's office of the county on the day of the 19th of said month. The property described therein as being at the farm cultivated by the mortgagor at a particular place named. Immediately after the mortgage was filed for record, the plaintiff took possession of a part of the property, which at that time had been gathered. At the same time the greater portion of the beans and corn was upon the ground where the same grew, unharvested. The portion of the crop which had been gathered, and that which

Donat Quirique, v. Thomas Dennis.

standing on the ground unharvested, were seized by defendant under said attachment on the 19th day of November at some time in the day after the mortgage was filed and recorded. The defendant harvested the portion of the crop upon the ground and then took it away, together with which he found gathered and in plaintiff's actual possession and thereby the property became lost to the plaintiff. Cause was tried by two referees, who reported a judgment in the sum of five hundred and thirty-five dollars for plaintiff against defendant, upon which final judgment was entered.

The defendant moved the Court, on the judgment entered, to set aside the report of the referees and to grant a new judgment. The Court denied the motion, from which the defendant appeals.

Counsel for appellant has assigned several grounds on which he claims that the judgment should be reversed, only one of which, under the notice of appeal and the assignment of error in the Court below, it is necessary to consider, and that is to the effect that the Court erred in refusing to set aside the report of the referees, for the reason that they reported a judgment for the plaintiff in the sum of five hundred and thirty-five dollars, when the facts in the case warranted a judgment for eighty dollars only.

The objection is sought to be maintained on the ground that the portion of the property which was gathered and came into the actual possession of the plaintiff before the defendant harvested the crop was found by the referees to be of the value of eighty dollars, and that the portion of the property which remained unharvested when it was attached was not at the time in the plaintiff's possession, and therefore he had not acquired by his mortgage such an interest in it as the law protects as against an attaching creditor of the mortgagor. The objection made to the mortgage is, that it was not executed in the mode and with the formalities prescribed by the Act relating to chattel mortgages, passed in 1857, (Digest, 108,) and for that reason should be pronounced invalid as to the creditors of the mortgagor. The

J. N. Williams v. W. G. Hall.

Act of 1857 enumerates the kinds of personal property to which its provisions particularly apply. Growing crops are not found in the enumeration; but they are comprehended in the seventeenth section of the Act concerning fraudulent conveyances and contracts, (Wood's Digest, 107,) which provides that "no mortgage of personal property hereinafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee; *provided*, that a mortgage upon growing crops, executed, acknowledged, and recorded, like mortgages upon real estate, shall be valid against third parties without delivery of possession; but the lien of such mortgage shall cease as against subsequent purchasers, unless such crops, when harvested, be delivered to the mortgagee, as required in other cases of mortgage of personal property."

The mortgage in this case was executed, acknowledged, and recorded, like mortgages on real estate, and was a valid mortgage on the crop standing upon the ground when the defendant attached and harvested it. The other portion of the property mortgaged, the referees find, was in the plaintiff's actual possession when the defendant seized it and took it from him. The mortgage of the property in controversy was valid under the Act last cited, and the defendant could not, by virtue of the attachment in his hands, legally take it from him to satisfy the demands of other creditors of the mortgagor.

Judgment affirmed.

Mr. Justice SAWYER expressed no opinion.

J. N. WILLIAMS v. W. G. HALL.

DISMISSAL OF APPEAL.—If a cause is submitted, with leave to appellant to file a brief in a certain number of days, and respondent to have a certain number of days to reply, and appellant neglects to file a brief within the time fixed, and the transcript contains no assignment of errors, except the general one that the order or judgment appealed from is not warranted by the evidence, the appeal, on motion of respondent, will be dismissed.

Ezra Dane v. F. Corduan.

AL from the District Court, Fifteenth Judicial District,
County.

acts are stated in the opinion of the Court.

Long, for Appellant.

son & McConnell, for Respondent.

Court, **SANDERSON, C. J.**

n to dismiss the appeal for the want of prosecution.
called for argument, in its regular order on the calen-
cause was submitted upon briefs to be filed in ten
the appellant, and the respondent to have ten days
er to reply. More than ten days having elapsed since
mission, and no brief having been filed by appellant,
ondent moves to dismiss the appeal herein for want
eution. Upon examination of the transcript it appears
re is no assignment of errors beyond the general
that the order granting a new trial is not warranted
facts of the case, and that no brief has been filed
out the particular grounds upon which the appellant
r a reversal. Under such circumstances the respondent
ing to answer, and this Court will not assume the
counsel and search the record for grounds upon
o reverse the judgment of the Court below. In such
e proper practice is to move the dismissal of the appeal
want of prosecution, as has been done in the present

otion to dismiss the appeal is sustained.

**DANE v. F. CORDUAN, ADMINISTRATOR OF THE
ESTATE OF V. DEHAMBEAU.**

OF SURETY ON NOTE.—Where a promissory note is executed jointly
o persons, and one of them is surety for the other, and at a time when
ncipal on the note is solvent the surety makes demand on the creditor

Ezra Dane v. F. Corduan.

to proceed at once and collect the debt from the principal, and the creditor falls to sue the principal, who afterwards becomes insolvent, the surety is not thereby released from his liability on the note.

DECREE OF COURT FOR PAYEE TO SUE SURETY—COMPLIANCE WITH.—A.

B. executed a joint promissory note to C.; B. was surety for A. B. brought an action against C., after the maturity of the note, to compel him to proceed and collect the amount due on the note from A., the principal, and obtained a decree requiring C. to commence legal proceedings against A. for the collection of the note, upon B.'s tendering to him a sufficient amount to pay reasonable costs and expenses, or be forever debarred from collecting the same from B. B. deposited with the Clerk and Sheriff a sufficient amount to pay their costs, and tendered to C. the services of an attorney employed by B. C. refused to commence the action, and A. subsequently became insolvent. *Held*, that this was not a compliance with the conditions of the decree by B., the surety, and that he was not released from his liability on the note.

APPEAL from the District Court, Fifth Judicial District, Tuolumne County.

The facts are stated in the opinion of the Court.

H. P. Barber, for Appellant.

The decree was never fulfilled by the defendant, the plaintiff invoking its provisions; consequently he could not plead its bar.

The decree compelled plaintiff to sue on defendant tendering to him a sufficient sum to pay reasonable costs and expenses.

A party obtaining a decree cannot substitute his ideas of equity for the plain language of the decree; if he does so, he does it at his peril. (*Hoffman v. Treadwell*, 5 Paige, 33; *Sparhawk v. Buel*, 9 Vermont, 41.)

The decree ordered him to tender to plaintiff a certain amount for costs and expenses. The tender must be made to the plaintiff himself. (*Hargous v. Lahens*, 3 Sandf. 213.)

"Costs" mean the fees, etc., allowed by law. "Expenses" have a broader signification, and involve what it would reasonably cost a party to conduct such suit, including a reasonable fee for his lawyer.

All the cases show that a Court of equity will compel a surety fully to indemnify the creditor against expense in a suit he may be decreed to bring against the principal debtor.

Esra Dane v. F. Corduan.

Chy. Rep. 554; 17 Johns. 384; 1 Story's Eq. Jur. m. Lead. Cas. 317, *et seq.*)

point is to be found in *Dubois v. Dubois*, 6 Cowen,

here held that payment into Court was *not* a payment to the party to whom the decree ordered the money to

can the surety avoid the necessity of paying the "expense" of an attorney by endeavoring to foist upon the creditor. (*Peck v. Acker*, 20 Wen. 605.)

and *Redmond*, for Respondent.

effect of a neglect or refusal on the part of the proceed and collect from the principal, when requested by the surety so to do, cannot be said to have been, as yet, decided by this Court.

we that upon an examination of the authorities point it will be found that we are correct in saying a well settled doctrine, maintained by the Courts of the several States of the Union, that: "If the surety can and clearly show injury to himself, by the failure of the principal to prosecute, after request, he is exonerated *pro se*." (*Paine v. Packard*, 13 Johns. 174; *King v. Baldwin*, 13 Johns. 384; *Bruce v. Edwards*, 1 Stew. 11; *Manch. Iron Works v. Iron Works*, 18 Wend. 162; *Goodman v. Griffin*, 3 Stew. 162; *Thompson v. Thompson*, 4 Watts, 446; *Geddes v. Hawk*, 13 S. & R. 33; *Lectenhaler v. Thompson*, 13 S. & R. 157; *Wright v. Land*, 2 Baily, 368; *Hogaboom v. Herrick*, 13 S. & R. 31; *Dehuff v. Turbett*, 3 Yeates 157; *Vallentine v. Dehuff*, 2 Edw. Ch. 53; *Rutledge v. Greenwood*, 2 Dessau; *Dehuff v. Holmes*, Wright, 167; *Bailey v. New*, 29 Geo. 2d 167; *Shard v. Davis*, 1 Aiken, 296; *Montpelier Bank v. Vermont*, 587; *Paige v. Webster*, 15 Maine, 249; *Washington v. Allen*, 19 Conn. 101; *Boughton v. Duval*, 3 Call, 101; *Clark v. Clark*, 7 Hammond, 72; *Row v. Tulver*, 1 Cow.

Exra Dane v. F. Corduan.

246; *State v. Reynolds*, 3 Mo. 95; *Miller v. Berkley*, 7 P. St. 317; 18 Pa. St. 460; 3 Stob. Eq. 59; 5 Pick. 307; *Werner v. Beardsley*, 8 Wend. 194.)

"The surety will not be discharged unless the failure to comply with his request has resulted in actual injury, which must be shown by proving that the principal was solvent when it was made, and has become insolvent subsequently (*Huffman v. Hurburt*, 13 Wend. 377; *Herrick v. Burt*, 4 Hill 650; *Gardener v. Ferree*, 15 S. & R. 28; *Merrett v. Lincoln*, 21 Barb. 249; *Thompson v. Watson*, 10 Yerg. 362.)

In Ohio the surety is discharged, if the notice to proceed against the principal is in writing.

In Massachusetts the request must be accompanied with an indemnity against costs and charges.

The main objection to the maintenance of this doctrine, viz. that the surety has always the right and power to pay the debt himself and then proceed against the debtor—has been fully considered in some of the cases which we cite that we do not think it necessary to more than allude to it.

It cannot be urged that we are in any way endeavoring to lessen the obligation of the contract between the payee and the surety. In seeking to maintain this doctrine we only ask that the payee be held to respect those equities which are inseparable from the contract of suretyship. The surety's obligation is certainly only collateral, and the maintenance of the doctrine in question would necessarily result from the recognition of this position.

In concluding our argument on this point we cite the authority of the leading American text book on this subject.

Professor Parsons, on the Law of Contracts, Vol. 1, Book III, p. 50 says:

"From a consideration of the cases and the reasons which they rest, we think this rule may be drawn: That the surety is discharged when the creditor, after notice and request, has been guilty of a delay which amounts to gross negligence, and by this negligence the surety has lost his security or indemnity."

Exra Dane v. F. Corduan.

Justice Story, speaking of the equities between the grantor and surety, says (Story Eq. Jur. Vol. 1, §325):
 "If the grantor omits to do any act, when required by the surety, his duty enjoins him to do, and the omission proves a breach to the surety, in all such cases, the latter will be entitled to recover; he may set up such conduct as a defense to any action brought against him, if not at law, at all events in equity."

It is a well settled doctrine that the surety can proceed to compel the grantee to take immediate steps to pay the debt from the principal.

As was done in the case at bar, and the only question is, whether there have been any laches on the part of the defendant which will preclude him from pleading this as a bar to any recovery in the premises against the estate of V. Dehameau, deceased?

That laches have we been guilty, that we should be denied of the protection granted to us by the decree of the court in the case of *Corduan, Administrator, v. Dane*?

The court required us to tender to Dane, in that case, an amount sufficient to pay reasonable costs and expenses to which we would be put in proceeding against the principal,

and in evidence, uncontradicted, that we paid into the hands of the proper officers, for Dane, the costs which would be incurred in the suit ordered to be taken by him against the principal, and also tendered him the services of a lawyer to defend the case. What more could be required from us?

The learned counsel for the appellant will perhaps say: "We could have tendered us a reasonable amount with which to employ a lawyer of our own selection; that was clearly the intent of the decree; you did not, perhaps, offer us a com-
 mended lawyer, or we choose to have one of our own choice in whom we could place confidence."

But we conceive, is as insufficient a reason as was ever advanced in a Court of equity to deprive a suitor of the benefit of which had been granted to him.

Esra Dane v. F. Corduan.

Who was the most interested in the success of the suit ordered by the decree of the Court to be commenced against Volpillac? Or, indeed, we might ask, was there any one interested in the gaining of that suit except the administrator Corduan? If Dane lost, did he *lose* anything? Not a dollar. We had given bonds to secure our paying over all assets of the estate which came into our hands to those who were entitled thereto. It would have been *damnum absque injuria*.

It has been repeatedly affirmed that the party most interested in the result of a suit is entitled to the control in the selection of counsel, and, indeed, there would be but little equity in maintaining a contrary doctrine.

By the Court, SAWYER, J.

The note sued on was executed in favor of the plaintiff by Dehameau as surety for Volpillac, the joint maker. After the maturity of the note, the defendant Corduan, as administrator of Dehameau, deceased, filed his bill against the plaintiff, Dane, setting up the circumstances under which Dehameau executed the note, asking a decree requiring the plaintiff, Dane, to proceed at once against the principal, Volpillac, and collect the amount due. It was accordingly decreed in this suit: "That said defendant make an immediate demand on E. Volpillac for the payment of the note executed," etc.; "that on said E. Volpillac's refusal, defendant commenced legal proceedings against said Volpillac for the payment of said note and interest, * * * within ten days from the filing of this decree, or be forever debarred from claiming the same from the estate of said Dehameau, plaintiff, * * * on the plaintiff tendering to said defendant a sufficient amount to pay reasonable costs and expenses in the suit against E. Volpillac for the payment of the note aforesaid."

The defendant "deposited with the Clerk and Sheriff a sufficient amount to pay their legal fees in the proposed suit of *Dane v. Volpillac*." The defendant, by his attorney, wrote a letter to plaintiff, in which he says: "Please take notice that

Esra Dane v. F. Corduan.

and Sheriff's fees are paid, and sufficient money is
hands to pay all the costs in the suit of *E. Dane v.*
ordered to be commenced, * * * and you are
ordered the services of an attorney to conduct the
to which Dane, by his attorney, on the same day,
When the order made in the case of *J. Corduan,*
ator, v. *E. Dane*, is complied with on your part, I
l things comply. In the conduct of any legal busi-
I may have, I exercise my privilege of selecting
attorney." And he further emphatically declined the
the attorney proffered.

lac was in the possession of and exercising rights of
over property of the value of from five thousand
housand dollars in a store in the City of Sonora,
County, for a period of about two months subse-
the making of the decree aforesaid, and said property
t to levy and attachment."

her proceedings having been taken by either party
decree, this suit was brought to recover the balance
note. The foregoing facts, among others, were set
answer, and having been established by evidence on
the Court dismissed the suit with costs, from which
of dismissal the plaintiff appeals, "on the ground
decision is contrary to law and the evidence in the
that the defendant, not having complied with the
is decree, was not entitled to invoke its aid as a bar
."

state of facts two questions are raised in the argu-
unsel. The respondent insists:

That the first suit and decree may be regarded as a
mand made by the surety upon the creditor to pro-
ce and collect the debt from the principal; and the
aving failed to proceed against the principal upon
est, at a time when he was solvent, the surety, by
re, has been injured, and is exonerated.

—That he has substantially complied with the terms
ecree on his part, while the plaintiff has failed to

prosecute, as required by the decree, and he is thereby barred from recovering against the surety.

As to the first question, admitting that a request and failure to prosecute has been shown, is the security exonerated from liability? Such a state of facts did not discharge the surety in England. His remedy was to pay the debt himself, and then sue the principal; or, perhaps, he might, by bill in Chancery, compel the creditor to proceed against the principal. Chancellor Kent says: "There is no case in the English law in which the personal application of the surety to the creditor was held to be compulsory on the creditor, at the hazard of discharging the surety." (2 John. Ch. Rep. 562.)

There was a departure from the English rule on this subject in *Paine v. Packard*, 13 John. 174, and in that case the surety was held to be discharged. But this case was combated and overruled by Chancellor Kent in *King v. Baldwin*, 2 John. Ch. Rep. 554. The case was appealed, and in the Court of Errors reversed by the casting vote of the Lieutenant-Governor, who, like many Senators voting on the question, was a layman. This fact detracts very much from the weight of the decision as authority, and the arguments of Chancellor Kent in the Court of Chancery, and of Senator Van Vetchin in the Court of Errors, against the principle announced in the case, appear to us to be conclusive. The Courts of New York have since followed the case of *King v. Baldwin*, while they have disapproved of the principle established by it. Mr. Justice Cowen, in commenting on this case in *Herrick v. Boest*, 4 Hill, 65, says: "What principle such a defense should ever have found to stand upon in any Court it is difficult to see. It introduced a new term into the creditor's contract. It came into the Court without precedent, was afterward repudiated even by the Court of Chancery, as it always has been both at law and in equity in England, but was restored on a tie in the Court of Errors, turned by the casting vote of a layman. Platt, J., and Yates, J., took that occasion to acknowledge they had erred in *Paine v. Packard*, as Senator Van Vetchin showed most conclusively that the whole Court had done." Yet

Esra Dane v. F. Corduan.

the case, on the ground "that the error had become

courts of Pennsylvania have also followed *King v.* but they assign as a reason for so doing that in ania there is no Court of Chancery, and the common exercise chancery powers to a very limited extent for this reason a surety in that State cannot, as in es, compel the creditor to sue the principal. He is, without remedy, unless he can protect himself in a. In some other States, *King v. Baldwin* has also owed. In some, the rights and remedies of sureties ated by statute; and in others, the doctrine of *King in* has been entirely repudiated. (*Bull v. Allen*, 19 8; 2 Am. Lead. Cas. 270, and cases cited; 1 Par. otes and Bills, 236, and notes and cases cited.)

a party contracts jointly with another, as in this case, n himself and the creditor, he is a principal debtor— ly undertakes to pay the debt. It is his duty, both nd legally, to pay it; and we are of the opinion that t, both of authority and reason, is decidedly in favor oposition that the failure of the creditor to sue when so to do by the surety, does not operate to discharge y from his liability. This was evidently the opinion e Supreme Court of this State. (*Hartman v. Bur-* 9 Cal. 561, and *Humphrey v. Crane*, 5 Cal. 175.) And ess necessity for following a contrary doctrine in this r the reason that the Practice Act furnishes to the ore ample remedy than he formerly had, even in equity, for he can himself bring a suit against the nd principal debtor, and compel the latter to pay the Practice Act, 527.) The action contemplated by this as, doubtless, intended as a substitute for the proceed- ancery to compel the creditor to sue, and it may be whether any other action by the surety against the s allowed in our State.

the second point, admitting the decree to be suffi- cific in its provisions to be valid, of which there

Ezra Dane v. F. Corduan.

is much room for doubt, we do not think the defendant complied with its terms. To render the decree available as a bar it was necessary for him to perform specifically the condition imposed by it; and the condition was, that he should tender "to said defendant (plaintiff in this suit) a sufficient amount to pay reasonable costs and expenses in the suit against Volpillac," etc. He is not at liberty to do something else which he may deem to be equivalent to making a tender to the defendant in the decree; he must do the specific thing required by it. Paying to the Clerk and Sheriff a sufficient amount to pay *their* fees in the contemplated suit, is not the same thing as tendering it to Dane. (*Dubois v. Dubois*, 6 Co. 494.) Or, if so, it is certainly not the same thing as tendering to Dane "a sufficient amount to pay reasonable costs and expenses in the suit, etc. There are other costs than Clerk and Sheriff's fees, (even admitting payment to them of the fees to be a good tender under the decree, which we are not prepared to do,) such as witness and jury or referee fees, say nothing of the expense of procuring an attorney; and the tender of the services of an attorney is not equivalent to furnishing money to pay the expense of procuring one. The plaintiff was entitled to select his own attorney. (*Peck v. Acker*, 20 Wend. 605.) If the defendant desired to select his own attorney, or superintend the disbursements of the costs and expenses of the suit, he could have done so by bringing his suit under section 527 of the Practice Act, and making the principal as well as the creditor a party. In that mode, also, he could just as well have accomplished his whole object by a single action, instead of subjecting himself and the creditor to the trouble and expense of litigating a second suit. But he has chosen to pursue a different course, and he must rely for his discharge strictly upon the terms of his decree. Having failed to comply with those terms, the decree can afford him no protection.

Under the views we have taken of the case, the Court erred in dismissing the complaint and rendering judgment for the defendant.

Sebastian Munch v. James Williamson et al.

are other matters set up in the answer which may, constitute a good defense; but they do not appear, the transcript, to have been proved. But no point is these matters, and we do not pass upon them. ment reversed and the cause remanded for further pro-

SEBASTIAN MUNCH, ADMINISTRATOR, ETC. v. JAMES WILLIAMSON AND CHARLES COVILLAUD.

— WAIVER OF.—If the statement, on application for a new trial, more than five days after the filing and service of the notice, the to move for a new trial is waived, unless it appear from the transcript the objection to the failure to file the statement in season has been by the opposite party, either expressly or by implication.

COURT EXTENDING TERM.—The following is a copy of the order of court in denying the application for a new trial: "Now, on this day, in Court, comes on to be heard defendants' motion for a new trial; and upon, after having heard the arguments of counsel, the Court overrules same, to which ruling of the Court defendants, by counsel, except." that the order did not show an appearance of the counsel of the plain- the argument of the motion, and, therefore, did not show a waiver of objection to the filing of the statement.

PROOF OF.—The party who claims the benefit of a waiver of the to file a statement in due time must prove it beyond doubt, and not it to be ascertained by conjecture or doubtful inference.

ADMINISTRATOR.—One in the possession of personal property as ator can bring an action in his own name against a wrongdoer for onglful conversion without setting forth in the complaint his official representative capacity. An allegation in the complaint that the plain- es as administrator is surplusage.

AL from the District Court, Tenth Judicial District, county.

Plaintiff, on the 29th day of April, 1861, was ap- administrator of the estates of A. Y. Brown and Brown.

omplaint averred, that as administrator of said estates, had in his possession ninety-nine thousand six hundred ty-one pounds of barley, and that while it was in his n as administrator, defendants, in February and

Sebastian Munch v. James Williamson et al.

March, 1862, wrongfully took possession of it and converted it to their own use.

Plaintiff recovered judgment below, and defendants appealed.

F. L. Hatch, for Appellants.

The appellants contend—first, that the *demurrer* to the amended complaint was well taken, and that the Court below erred in overruling the same.

There is a misjoinder of parties plaintiff, and an improper joinder of two separate and distinct causes of action.

The plaintiff sues as the administrator of two separate and distinct estates. He is acting in a double capacity as the representative of two deceased persons, although it appears that they were husband and wife. As such representative, he stands in the shoes of A. Y. Brown and Cecelia Brown, his intestates. As the representative and successor of each and both of them, he is clothed with their rights, and, in suing, is subject to all the disabilities which would attach to them, were they living and in Court themselves.

The complaint having shown that A. Y. Brown and Cecelia Brown were husband and wife, it should also show such state of facts as would enable them to join as plaintiffs in an action of this character, were they living. Strike out the name of the plaintiff, Munch, and consider this an action brought by A. Y. Brown and Cecelia Brown—the several and independent owners of separate estates—for a trespass committed upon the separate estate of each, with nothing to show that they were husband and wife, and the complaint would be demurrable for an improper joinder of parties and action. On the other hand, consider them as man and wife, and the complaint would be demurrable for the reason that it would not present such a state of facts as would make it proper to make the wife a party plaintiff under our system of practice.

J. O. Goodwin, for Respondent.

The statement was not filed in time. This Court will

Sebastian Munch v. James Williamson et al.

e, entirely disregard the statement, and look only
judgment roll. (*Lafferty v. Brownlee*, 11 Cal. 132;
White, 2 Cal. 306; *Adams v. City of Oakland*, 8 Cal.

Hatch, for Appellant, in reply.

think that the objection comes too late, the record
that the motion for new trial was argued in Court,
it was after "argument of counsel" that the Court
d the motion. It is clear from the record of what
ed, that the respondent's attorney was present in
nd participated in the arguments. His name does not
because the rulings of the Court were in his favor and
no exceptions to take.

Court has decided that where a party appears and
a motion for a new trial, he cannot afterwards object
statement was not agreed to by him, and that it was
ed by the Judge. (*Dickman v. Van Horn*, 9 Cal.

e Court, SANDERSON, C. J.

appeal is from the judgment and the order overruling
on for a new trial. It is contended, on the part of the
ent, that we cannot review the order denying the new
cause the statement was not filed within the time pre-
by the statute. The judgment was rendered on the
y of January, A. D. 1863, and notice of motion for
al was served on the 30th of the same month. The
at on motion for new trial was not filed until the 13th
uary, more than five days after the service of notice.
nscript contains no order of the Court or Judge extend-
time allowed by the statute for filing the statement.
ht to move for a new trial, therefore, must be held to
en lost, unless it appear that the objection in question
a waived by the respondent, either expressly or by
ion. At the foot of the statement is an indorsement

Sebastian Munch v. James Williamson et al.

to the effect that the respondent waives all objection as to the time of filing the statement, but this indorsement is not signed by either the respondent or his counsel. There is, therefore, no express waiver.

The appellant contends that the respondent appeared by his counsel at the hearing of the motion, and participated in the argument, and that thereby he has waived all irregularity as to the time of filing the statement. Admitting this to be so, the fact of the appearance is denied by the respondent, and the controversy can be settled only by a resort to the transcript. The only matter bearing upon this question of fact is found in the order of the Court overruling the motion, which is in the following words: "Now, at this day, in open Court comes on to be heard the defendants' motion for a new trial, and, thereupon, after having heard the arguments of counsel, the Court overrules the same, to which ruling of the Court the defendants, by counsel, except."

We are unable to perceive how it can be seriously contended that this entry shows any appearance on the part of the respondent. It is only by a resort to a shadowy inference that we can say that there was an appearance even on the part of the appellant. It is claimed that the use of the word "arguments" shows that the motion was argued upon both sides. If upon questions of this character the doctrine of presumption can be invoked at all, the presumption in the present case is very much weakened and attenuated by the fact, disclosed by the record, that each defendant in this case had two counsel, making four in all. We are of the opinion that no appearance is shown. A party who claims the benefit of a waiver of this character must prove the waiver beyond cavil, and not leave it to be ascertained by conjecture or doubtful inference. This disposes of the appeal from the order denying a new trial, and leaves for our consideration only the appeal from the judgment, which rests entirely upon the judgment roll.

It is contended that the Court erred in overruling the demurrer to the complaint. The plaintiff seems to have sued an administrator of two, as it is claimed, distinct estates, to each

John W. Owen v. W. R. Frink et al.

portion of the property alleged to have been taken possession of the plaintiff by the defendants and con- them, belonged. It is contended that the plaintiff, in his official capacity, is, in contemplation of law, s, and has been improperly joined as plaintiff, and uch as the property belongs to two separate and dis- es, the anomaly is presented of two persons who int interest, or other connecting link, litigating each e and independent cause of action in the same suit. rently anomalous condition of the case arises from at the plaintiff was obliged to sue in his official sentative capacity. All the difficulties in the case ly solution in the fact that no such necessity existed. necessary for him to sue as administrator, and all e contained in the complaint in relation to the n which he held possession of the property in ques- here surplusage; and, inasmuch as surplusage never ight have been, and doubtless was, disregarded by below.

nt affirmed.

W. OWEN v. W. R. FRINK AND J. J. PEKO.

TRACT—SPECIFIC PERFORMANCE.—In an action to compel the performance of a verbal contract to convey land, a decree enforcing performance will not be reversed because the Court fails to find that y seeking performance was ready and desirous to perform on his vided the findings show such facts, as, taken in connection with an ay the price of the land into Court, evince a readiness and willing- perform.

FACT.—In such action, when the defense is a repudiation and ment of the contract by the party seeking performance, and the y is conflicting, the findings of the Court on the question are com-

LE.—An equitable right to a conveyance of real estate existing parol contract and part performance, passes to the purchaser by a ale not under seal.

E OF LAND.—A written, but unsealed, transfer of a legal estate is good as a contract to convey, under the Statute of Frauds.

O TESTIMONY.—Where the objection to the introduction of testi- in general terms, that it is irrelevant, without stating the particu- on why it is irrelevant, and the objection could have been cured by

John W. Owen v. W. R. Frink *et al.*

the party offering the testimony if the reason for it had been given, the Supreme Court will not notice the objection.

ACTION BY ASSIGNEES OF EQUITABLE TITLE.—If A. enters into a contract with B. for the conveyance of a tract of land, whereby B. acquires a right to the conveyance of the entire tract, and B. afterwards assigns to two or more persons, giving to each a separate conveyance of his equitable title to distinct and separate parcels of the land, the assignees of B. may maintain a joint action against A. for a specific performance of the contract.

SPECIFIC PERFORMANCE.—A contract for the conveyance of land, by the terms of which the purchaser may pay the purchase money either in labor or money at his option, may be enforced in equity if the purchaser elects to pay money, and makes a tender of the amount due.

APPEAL from the District Court, Seventh Judicial District, Solano County.

The facts are stated in the opinion of the Court.

Whitman and Wells, for Appellant.

Respondents were not entitled to a specific performance because they are not found to have been ready or desirous to perform. (Story on Equity, Sec. 776; *King v. Hamilton*, Peters, 311; *Conrad v. Lindley*, 2 Cal. 175; *Brown v. Cowland*, 6 Cal. 571; *Weber v. Marshall*, 19 Cal. 447; *Cooper v. Pena*, 21 Cal. 404; *Williams' Equity*, 292.)

The act of the defendant in denying title, or disclaiming the vendee's title, was a forfeiture of all rights under the contract. (*Conrad v. Lindley*, 2 Cal. 175.)

Defendants insist that they made a tender in 1858. In 1860 they deny our title, set up adverse possession and the Statute of Limitations. What were they doing in this but endeavoring to deprive us of the money they had tendered?

We submit, also, that the bills of sale offered in evidence from which the defendants seek to deraign their title to a specific performance, are competent to pass only a possessory interest in land or improvements. No contract is named in them, nor sought to be assigned.

The defendants have not the legal title under the contract and are not the legal successors in interest to the original contractor, the parties being sub-purchasers of several parcels.

under a bill of sale. (*Wood v. Perry*, 1 Barbour, 114; Equity, 226, 272; *Auldrich v. Putney*, 11 Paige, 204; Equity, Secs. 3, 788, 789.)

have they a legal title, but a simple chattel or personal succeeding to the tenancy of Brown only. (Willard's 298; *Meador v. Parsons*, 19 Cal. 298.)

who seeks specific performance must come *recenti facto*, the remedies must be mutual. There must have been a change of circumstance affecting the character of justice in the contract.

who asks specific performance must be in a condition to perform his own part of the contract, and must have shown himself ready, desirous, prompt, and eager to perform it. (Equity, 776.)

Wheaton, for Respondents.

Deeds of sale executed by Brower and Crockett were intended to convey his interest in the contract with Owen, and to confer upon the assignees a perfect equity which they could enforce. (Wood's Dig., Arts. 394, 396.)

Plaintiff was a stranger to these transfers, and had no right to question them, as they did not change his *status* in relation to his own contract.

Tender of one hundred dollars to plaintiff, and his refusal to accept it, placed him in the wrong, and he could not avoid the effect of the tender by offering to accept the money and execute the deed. He could not avoid his contract by the conduct of the defendants so long as they held him ready for him and he refused to accept it. (2 Greenleaf's Evidence, §608.)

The Court, SHAFER, J.

This is an action of ejectment brought to recover the possession of lands situate in Suisun Township, County of Solano. The defendants answered jointly, disclaiming all title to or interest in the premises demanded, except as to a certain part

John W. Owen v. W. R. Frink *et al.*

thereof particularly described, and as to that part the defendants aver that they hold and occupy it by title derived from one Brower. That Brower, in May, 1857, made a verbal contract with the plaintiff for a purchase of the particular parcel named, for one hundred dollars, payable in labor as the plaintiff should require, or in cash, at Brower's election. That plaintiff bound himself by the contract to execute a deed of the lot to Brower, on full performance on his part, and that Brower, in pursuance of the contract, went into possession of the lot, and made valuable improvements thereon. That he performed labor for the plaintiff, under the contract to the amount of thirty-five dollars, and always worked for the plaintiff when requested by him so to do. That on the 9th of June, 1858, the defendants succeeded to the rights of Brower, and on the same day tendered to the plaintiff one hundred dollars, and presented to him for execution a quitclaim deed running to them, and that plaintiff declined the tender and refused to execute the deed. Defendants also aver that they have ever been ready and willing to pay the balance of the consideration due, and they offer to pay the one hundred dollars tendered into Court, and pray that the plaintiff may be decreed to perform his contract specifically.

The replication denies all the allegations in the answer, asserts the Statute of Limitations as a defense, and the Statute of Frauds also, and claims that the rights of the defendants, if they ever had any, have been forfeited on the ground of alleged repudiation by them of the plaintiff's title to the land manifested in speech and by adverse occupation. The trial was by the Court, and on the findings judgment was entered for the defendants in conformity to the prayer in the answer. The plaintiff appeals from the judgment and from an order denying a new trial.

1. The appellant insists that the respondents were not entitled to specific performance, because they are not found to have been ready or desirous to perform on their part.

It is true that there is no direct statement in the findings that the defendants were either ready or desirous to perform

John W. Owen v. W. R. Frink et al.

it is found that Brower, under whom the defendants claim, performed personal services for the plaintiff of the value of thirty-five dollars, and that within thirteen months from the date of the agreement, the defendants, having succeeded to the rights of Brower, tendered to the plaintiff one hundred dollars—thirty-five dollars more than was due. These facts, taken in connection with the offer of the defendants to put the money into Court, we consider as sufficiently evincing readiness and willingness on their part to perform. Further, the Court does not find, neither is there any testimony tending to prove, that either Brower or the defendants had promised their legal rights under the contract by a breach of any of its provisions. Brower was to perform services from time to time as required, and he had the privilege of paying the hundred dollars, or any part thereof, in money, or he could at any time choose so to do. The Court finds that the service to a certain amount was performed, and that more than the balance due was tendered in money, and if additional service was ever called for by the plaintiff and refused by Brower, the burden of proving it was clearly upon the plaintiff.

It is insisted that the defendants, as the successors of Brower, have repudiated and abandoned the contract. It appears that the contract was made in May, 1857; that Brower entered at once into possession under it, made valuable improvements, and performed for the plaintiff the labor before referred to; and that on the 30th of May, 1857, he assigned to Crockett, through whom the defendants claim. A witness for the plaintiff testified that titles to land in Suisun were complicated and conflicting; that Frink was "an ardent man," and that he (the witness) had heard Frink conversing with miscellaneous crowds, debating the matter frequently, and that on such occasions Frink always took sides against the plaintiff's title. It further appears from the record, that the defendants, in their original answer, denied all the plaintiff's allegations, and pleaded the Statute of Limitations, neither of

John W. Owen v. W. R. Frink et al.

which defenses, however, was reproduced in the amended answer filed thereafter.

In so far as the criticisms put by Frink upon the plaintiff's title are concerned, they may have had some tendency, perhaps, to show that he was not in possession of the property on the faith of the contract, of which he was, in part, an assignee; and the original answer may, after it became derelict, have been admissible as evidence tending to the same conclusion. But the entry of Brower—the further fact that before parting with his interest he paid thirty-five dollars on account of the contract, and expended sixty dollars in improving the property—the fact that the defendants paid a valuable consideration for the equitable rights of Brower, and thereafter tendered to plaintiff thirty-five dollars more than was due, and that, too, in advance of any breach on their part, or by those under whom they claimed, were also before the Court as matters of conduct, having a clear bearing upon the abandonment or repudiation alleged. The question raised was a question of fact, (*Conrad v. Lindley*, 2 Cal. 175,) and by the whole course of the decision the finding of the Court thereon is conclusive.

3. It is further objected on the part of the appellant, that the equitable rights of Brower have not, on the proofs in the case, passed to the defendants.

The defendant Frink claims under Crockett by deeds signed, sealed, acknowledged, and recorded. The defendant Peko claims under Crockett, by a bill of sale of all the vendor's right, title, and interest, and Crockett's title, derived from Brower, stands upon a bill of sale of like character.

In *Ingoldsby v. Juan*, 12 Cal. 577, it was considered that "there is no authority which holds that a conveyance of an interest in land must necessarily be under seal; and if it were so at common law, it does not follow that it is so required by our statute." But the right of Brower was purely equitable; and though the contract was by parol, still, by part performance his rights were rescued from the operation of the Statute of Frauds, (*Arguello v. Edinger*, 10 Cal. 160,) and there can

John W. Owen v. W. R. Frink et al.

But that Brower's right to a conveyance passed by his sale to Crockett. If the written but unsealed transaction were of a legal estate in the land, though not operative as a conveyance *in presenti*, still, it would have been good enough to convey under the Statute of Frauds.

It is claimed by the appellant that inasmuch as the facts set up, in effect, that the defendants were joint assignors of Brower's right, that the documentary evidence shows that one part of the lot affected by the equitable title was assigned to Frink, and another and distinct part assigned to Crockett, would have been excluded by the Court.

To the objection there are two answers:

The first objection taken to each document, as offered, was "irrelevant and immaterial." The objection was too general. (*Dreux v. Crockett*, 8 Cal. 83.) Where objection is taken to the introduction of evidence, the party objecting should, as a general rule, state the exact point of his objection. (*Kiler v. Kimball*, 267.) If this rule had been observed at the trial of this case, the defendants, perhaps, could have produced proof of an assignment from Crockett to them, subsequently to the sale.

It is true, if an estate should be sold in lots to different purchasers, each purchaser could not join in exhibiting one bill against the vendor for a specific performance; for each party's bill should be distinct, and would depend on its own circumstances; and, therefore, there should be a distinct bill for each contract. (St. Eq. Pl. Sec. 272.) But that is not the case here. Here there was but one contract to convey, and the lands affected by it have come to the defendants jointly in divided moieties. The general rule is, that interested parties may join in bringing a bill in equity where there is one connected interest among them all, centering in the same point in issue in the cause.

In *Wells et als. v. Fellows et als.* 5 Cowen, 682, the bill was filed that the defendants had confederated among themselves with the debtor of the complainants, to defraud the complainants by taking a conveyance to each, in separate parcels.

cels, of all the debtor's real and personal property, with consideration, and with intent to avoid execution upon plaintiff's judgment. To this bill one of the defendants demurred, for multifariousness. The demurrer was overruled and substantially on the ground above suggested. In the case at bar the plaintiff made but one contract to convey, and can be subjected to but one suit upon it for damages at law and to but one for specific performance in equity. Though the defendants are not jointly interested in the contract, in a narrow sense of that term, yet, they have a common interest that it should be specifically performed to the whole extent of its terms. The plaintiff is in no manner prejudiced by a joint assertion of the equitable right in the answer, for his judgment will be not only a joint, but several, bar against any further proceedings upon the contract.

5. But it is urged for the appellant, that no decree for specific performance can properly be entered in this case, for the reason that "the remedies are not mutual."

In support of this objection counsel refer to *Cooper v. Pena*, 21 Cal. 404.

The principle is this: Where one is employed to work at a given time, or to do work by the job, the employer has the power to stop the work at any time, in his election; but the exercise of this power subjects the employer to damages commensurate with the injury sustained. (*Clark v. Marsig*, 1 Denio, 317; *Derby v. Johnson*, 21 Vt. 21.)

In the case cited from the 21 Cal., personal service on the part of Cooper was the sole consideration of Pena's contract to convey. The services were performed in part, and the plaintiff offered to perform the residue, but the offer was declined by Pena, and the plaintiff was, in effect, forbidden to proceed. In the case at bar, however, Brower was not bound implicitly to render any personal service, for, by the contract he was left at liberty to pay in money. He paid a part of the stipulated price in labor, and the defendants, claiming under him by assignment, tendered more than the just balance of money. On principle, no distinction can be taken, so far

A. Y. Easterby v. Nicolas Larco.

edy of specific performance is concerned, between a
for a conveyance of land going upon a purely money
ation, and a like contract where the consideration is
aid in labor or money, at the election of the purchaser,
vent the latter determines his election in the end by a
f the whole amount in money, or by a tender of so
hereof as remains unsatisfied at the making of the
nent affirmed.

A. Y. EASTERBY v. NICOLAS LARCO.

ENDING TIME TO MOVE FOR NEW TRIAL.—An order of Court grant-
party twenty days within which to file a statement to be used on a
for a new trial made before a notice of intention to move for a new
has been given, must be construed as extending the time to file the
ent twenty days from the date of the order, and not twenty days
he time the notice was given.

FILE STATEMENT.—If a statement on motion for new trial is not
within five days after notice of intention to move for a new trial is
or within such further time as may be granted by the Court, not ex-
g twenty days, the right to move for a new trial is waived.

AL from the District Court, Seventh Judicial District,
ounty.

acts are stated in the opinion of the Court.

Pate and H. P. Irving, for Appellant.

Brooks, for Respondent.

e Court, CURREY, J.

action was tried and a verdict rendered therein in favor
aintiff, on the 5th day of June, 1863, and judgment
ered on the verdict on the day following—when the
n the application of defendant's counsel, granted to
ndant twenty days within which to file a statement to
on a motion for a new trial. On the 8th of the same
he defendant gave to the plaintiff and his attorneys

A. Y. Easterby v. Nicolas Larco.

notice of his intention to move for a new trial of the cause and to set aside the judgment rendered. Some time afterwards the respective parties, by their attorneys, entered into a stipulation in writing, to the effect that the minutes of the testimony and proceedings in the case, taken by the Court Reporter on the trial, might be used in the place and stead of a statement on motion for a new trial, provided the defendant then had the right to file a statement or to make the motion, and had not waived such right; and it was declared by such agreement that it was not intended by it to waive any default committed, but to leave the rights of both parties as they were at that time. This stipulation was dated the 27th and filed on the 30th of June, 1863, in the office of the District Court, in Napa County, where the action was commenced and tried.

It will be presumed, in the absence of anything appearing to the contrary, that the testimony in the case, with the rulings of the Court, and the exceptions taken on the trial, were filed in the office of the Clerk of the Court within five days thereafter (Laws of 1861, p. 497), and that the same became at the time the stipulation of the parties was filed, the statement to be used on the motion whereof notice had been given; provided the time within which a statement for such purpose could properly be filed had not fully expired.

When the application for a new trial came on to be heard the attorney for the plaintiff objected that the Court could not entertain the motion because the defendant had not filed any statement of the grounds on which he intended to rely in support thereof. The Court overruled the objection, and heard the application upon the stipulation filed and the minutes of the evidence and proceedings taken by the Reporter, and the rulings of the Court and the exceptions referred to in such minutes, and thereupon made an order denying the motion for a new trial. From this order and the judgment the defendant in due time appealed.

The respondent, by his counsel, still insists upon his objection made on the hearing of the motion, and we think the objection well taken; because, by the terms of the order made

A. Y. Easterby v. Nicolas Larco.

8th of June, the twenty days granted to the defendant to file his statement expired four days before the motion of the parties was filed. The statute (Practice section 195) provides that a party may have, after he has given notice of his intention to move for new trial, five or such further time, not exceeding twenty days, as the Judge thereof may by order grant, within which he shall file with the Clerk a statement of the grounds on which he intends to rely; and it further provides that, if the statement is not filed within such period, or within such time as the parties may agree upon, the right to move for new trial shall be deemed waived.

The order granted by the Court giving to the defendant ten days in which to file a statement on motion for a new trial, construed by the appellant's counsel as granting to the defendant that period after the notice of the intention to move was given, and that as the notice was filed and served on the 8th of June, he was in time if he complied with the statute on the 27th of that month; and in aid of such construction reference is made to the decision of the Judge of the Court below, who, on the hearing of the motion, overruled the objection interposed, and thus, in effect, determined that the statement was duly prepared and filed. But the language of the order is plain and unambiguous, and its import is to be governed by its terms. No just construction of this order will extend the time specified to the day of the filing of the motion. The statute requires the statement to be prepared and filed with the Clerk within five days after notice given, or such further time as may be granted, not exceeding twenty days, and declares an omission to so file the statement to be a waiver of the right to move for a new trial. The statute referred to is peremptory in terms, and therefore the objection of the respondent must be sustained. This leaves the case to be considered upon the judgment roll alone, and as the complaint states a cause of action against the defendant, and no error in the judgment is apparent, it must be affirmed. Judgment affirmed.

Estate of George Harlan.

IN THE MATTER OF THE ESTATE OF GEORGE
HARLAN, DECEASED.

JURISDICTION OF PROBATE COURT.—The Probate Court of the county of which the decedent was a resident at the time of his death, alone has jurisdiction to issue letters of administration upon his estate.

CHANGE OF COUNTY BOUNDARIES—EFFECT OF ON ADMINISTRATION.—If, after the death of the intestate, that portion of the county in which he resided at the time of his death, is erected into a new county, or attached to another county, the Probate Court of the old county still retains its jurisdiction over the administration.

IN WHAT COUNTY LETTERS OF ADMINISTRATION ISSUED.—The residence of the party at the time of his death, and not the situation of the estate, is the test of probate jurisdiction.

APPEAL from the Probate Court of Santa Clara County.

The facts are stated in the opinion of the Court.

Rhodes and Drake, for Appellant.

Harlan, having been at the time of his death a *resident of the County of Santa Clara*, it follows that from that time to the time of the organization of the County of Alameda, the Santa Clara Probate Court had jurisdiction of the estate of Harlan, and was the only Court that could exercise *active* jurisdiction by the grant of letters, etc., upon a proper petition being filed.

There is a marked distinction between the meaning of the term "jurisdiction" when employed to designate the authority that a Court may exercise over any given *class* of person or property, or subjects of litigation, and when the term is used to designate the power and control that the Court is, in fact, exercising over a particular subject matter or person, upon action being brought.

The Court of Sessions of any county has jurisdiction of public offenses committed within the county, but it has no jurisdiction in fact of any particular case, or criminal action, until proper proceedings, by indictment or otherwise, have been had.

The statutory rule, that letters of administration must be

Estate of George Harlan.

in the county of which the deceased was a resident at the time of his death, is an *arbitrary* rule, and is not liable to be changed or varied, in any case, by considerations of convenience or expediency, or a subsequent change of facts, but, once ascertained of what county the deceased was a resident at the time of his death, if a resident of the State, the Probate Court of that county, upon the occurring of the death of the deceased, acquired jurisdiction of the estate of Harlan.

That rule being absolute, as well as arbitrary, if there be any exceptions to or qualifications of it, they must be found in the statute.

Reason, *not of*, but for the establishment of the rule was, that there might be but one administration granted within the estate of any estate.

The Respondent contends that the Probate Court of the county in which the *place* of residence of the deceased may be at the time of the filing of the petition for letters of administration has jurisdiction of the estate.

The rule would confer jurisdiction of an estate upon the Probate Courts, successively, of as many counties as might be included, by changes of boundaries, include the place of residence of the deceased. Suppose that a proper petition for letters of administration had been filed by Henry C. Smith, in Santa Clara County, and that some of the heirs or creditors of the deceased had successfully resisted the petition, and that, in the meantime, the Mission of San José had been included in Contra Costa County, and that the heirs or creditors should desire to sue the estate, where should they file their petition?

The Respondent says in the Contra Costa Probate

that the widow, or other persons interested in the estate, should succeed in dismissing the last mentioned petition, and that, pending the pendency thereof, the Mission of San José had been included within Alameda County, the respondent's rule requires that the widow, or others desiring letters of

administration, should file their *third* petition in the Alameda Probate Court.

The appellant contends that the Probate Court of San Clara acquired jurisdiction of the estate of Harlan by virtue of two facts concurring: First—the death of the deceased and, Second—his residence at the time of his death in San Clara County; and that the jurisdiction, having once attached, continues for all purposes relating to the administration and settlement of the estate. (*Platt v. Beardsley*, 1 Vermont, 151.)

If the statute had declared that the Probate Court of the county containing the last residence of the deceased, at the time of the filing of the petition for letters, or of the order granting letters, should have jurisdiction of the estate, the position of the respondent would be correct; but, instead of either of those rules, the statute has adopted the simple one of conferring jurisdiction upon the Probate Court of the county that contained the place of residence of the deceased at the time of his death, and the statute has failed to provide for a change of jurisdiction in case the boundaries of the county should be changed.

When a county is divided, the old county retains all powers, unless taken away by express Act of the Legislature (16 Mass. 86.)

The jurisdiction of the Federal Courts, in cases between citizens of different States, when it has once been acquired, is not divested by reason of both parties becoming residents of the same State. (*Morgan v. Morgan*, 2 Wheat. 290.)

There are, perhaps, no cases where jurisdiction attaches in the same manner, or for the same reason, as in the case of administration.

The statutes granting jurisdiction of estates to the Probate Court have been strictly construed, (*Beckett v. Selover*, 7 Cal. 233,) and all cases not strictly within the statute have been excluded from the Probate Courts. The will of a testator who died before the organization of our State government has not been allowed to be probated, it not being within the let-

v. (Grimes v. Norris, 6 Cal. 624; Tevis v. Pitcher, 77.)

ates of persons who had died before the passage of
ate Act are not subject to administration under that
la Guerra v. Packard, 17 Cal. 193.)

Clarke, for Respondents.

can only be granted on petition, and the petition
e the facts essential to give the Court jurisdiction.
1850, p. 381, § 58.)

court has definitely settled what those *jurisdictional*
to wit: First—Death of the party; Second—His
at his death, *within the county* where letters are
Becket v. Selover, 7 Cal. 236; Hynes v. Meek, 10
Estate of Warfield, 22 Cal. 51.)

resentation of a petition containing the necessary
to give the Court *jurisdiction* to the Probate Court
Clara County, that Court could *unquestionably* have
valid letters prior to the organization of Alameda
out after that organization the jurisdiction to grant
s in Alameda County. (Statutes 1853, p. 59, § 17.)
y appellant alleged that the Probate Court of Santa
nty did acquire jurisdiction of said estate prior to
ization of Alameda County, and that that Court, hav-
acquired jurisdiction of the estate, such jurisdiction

t organizing Alameda establishes the jurisdiction in
County to grant letters and perform all other judicial
(See §§ 16 and 17 of the Act organizing Alameda
Knight et al. v. Knight Adm'rs, 27 Georgia, 636.)
ly case we can find at all opposed to respondent's
that of *Bugbee v. Surrogate of Yates, 2 Cow. 471,*
case seems to have been acted upon without the
ttention being called particularly thereto. There
gument before the Court, nor briefs filed.

far as we can see, *all reason is opposed to the*

Estate of George Harlan.

Suppose, after Yates County had been formed, two other counties had been formed out of and embracing all the balance of Ontario County, where, then, according to this decision would have been the jurisdiction to grant letters?

Suppose, after Alameda County was organized, the balance of Santa Clara County had been added, for jurisdictional purposes, to the adjoining County of Santa Cruz, where would one seek letters upon Harlan's estate?

It is evidently the object of the statute to require letters of administration to be issued by the Court having jurisdiction over the *place of residence of deceased* at the time when such letters are asked.

E. R. Carpentier & H. K. W. Clarke, also for Respondents.

The Probate Court of Santa Clara County, having once had territorial power sufficient to have given it jurisdiction over the estate of Harlan, if such jurisdiction had been called into exercise by proper proceedings and the production of the statutory facts, does that Court still retain that power, notwithstanding the erection of the County of Alameda in 1853 and the inclusion of Harlan's last residence in the latter county?

The Act of the Legislature creating Alameda County, (Session Laws, 1853, p. 59, Secs. 16, 17) transferred all judicial proceedings, the "subject matter" of which was in the new county, to the Courts of that county, and retained that part of the territory out of which Alameda County was formed "for judicial purposes" only until the County of Alameda should be organized under that Act. Thenceforth, it seems to us, the jurisdiction of the Courts of Santa Clara was limited to Santa Clara County with its restricted boundaries. And in view of this statute, we submit that even if the Probate Court of Santa Clara County had already acquired jurisdiction of the subject matter, that jurisdiction would have been transferred to Alameda County upon its organization by virtue of the statute and its clear intendment, and that after that period it would not have been competent for the Court

Estate of George Harlan.

Santa Clara County to proceed in the affairs of the estate of Harlan; and much less had it the power to acquire a new jurisdiction beyond its territorial limits over that estate.

the Court, SAWYER, J.

George Harlan died intestate, in the County of Santa Clara, 1850. Immediately before and at the time of his death Harlan resided at the Mission of San José, which was at that time in the County of Santa Clara. In March, 1853, by an Act of the Legislature, the County of Alameda was created out of territory taken in part from the County of Santa Clara.

The territory so taken from the County of Santa Clara included the land on which said Harlan resided at the time of his death, and the place of said Harlan's residence at that time, and ever since been, and it now is in the County of Alameda.

In June, 1863, the appellant, Charles Halsey, filed his petition in the Probate Court of Santa Clara County, stating, among other things necessary to entitle him to letters of administration, that Harlan died intestate in Santa Clara County, and that he owned real estate of great value in the County of San Francisco, and that said Harlan at the time of his death was a resident of Santa Clara County, and concluding with a prayer that letters of administration be issued to him. This application was opposed by sundry parties claiming to be interested in the estate, as heirs or otherwise, on the ground, among others, that the Probate Court of Santa Clara County had no jurisdiction over the reason that the place of residence of Harlan at the time of his death was no longer in the County of Santa Clara, but at the time of the said application was a part of the County of Alameda. The petition was denied on that ground alone, and the only question presented by the record is, whether the Probate Court of the County of Santa Clara has jurisdiction of the estate of the said George Harlan, and can grant letters of administration upon said estate, or whether such jurisdiction is in the County of Alameda.

The Act of 1850 relating to this subject provides that "Let-

ters testamentary or of administration shall be granted: 1. In the county of which the deceased was a resident at or immediately previous to his death, in whatever place his death may have happened." The same provision is contained in the Act now in force.

The Mission of San José continued to form a part of Santa Clara County for three years after the death of Harlan, and during all that time the only Court that could take jurisdiction of the administration of his estate was the Probate Court of Santa Clara County. That county still exists, and its county government has been continued to the present time. Its territorial limits have been somewhat curtailed, it is true, but its legal identity is the same. The change in boundaries cannot affect the fact that Harlan died in Santa Clara County, and this is one of the jurisdictional facts prescribed by the statute. All the jurisdictional facts, then, once existed, and the Probate Court of that county, upon a proper presentation of those facts, would, at one time, have been authorized to take and in fact did take cognizance of the administration of the estate. Unless something has occurred to oust that tribunal of its right it still exists, and we find nothing in the law withdrawing the jurisdiction from the Probate Court of Santa Clara County unless the mere fact that the tract of land on which Harlan resided at the time of his death has been taken from the County of Santa Clara, and in connection with other territory erected into the new County of Alameda, works such a result. We do not see that this result necessarily follows. There is, in the nature of things, no necessary connection between the land and the jurisdiction. It was found convenient to establish some uniform test of jurisdiction, and the Legislature adopted the arbitrary one of making the residence of the party at the time of his death that test, although his property might be, as in this instance, to a great extent, in some other locality.

When a party dies, the jurisdiction to administer upon his estate, under the provisions of the Act, becomes fixed in the county of the residence of the decedent. The legal identity of the county may continue, notwithstanding its territorial limits

Estate of George Harlan.

may be modified. In contemplation of law, the legal entity known as the County of Santa Clara is the same with that which existed prior to 1853, at the time when the *situs* of the jurisdiction upon the estate of Harlan became fixed. In organizing the new County of Alameda no provision was made for transferring to the new county the jurisdiction to administer the estates of those who had already died in the County of Santa Clara. Provision is made for transferring certain records and certain legal proceedings of a local character from the County of Santa Clara to the County of Alameda. (Laws of 1853, p. 59, Secs. 16, 17.) It is insisted that this case is embraced in the term "subject matter" used in section sixteen. We think not. If the estate is the "subject matter" of this proceeding, then all of the estate now remaining, and consequently the subject matter, appears to be situate in the County of San Francisco, and not in either of the Counties of Santa Clara or Alameda. The residence of the party at the time of his death, and the situation of the estate, is the test of jurisdiction.

The provisions of the Act cited clearly do not embrace cases like the one under consideration. Had the Legislature intended to include such cases, they doubtless would have made provision for them. No such provision was made, and the presumption, from the fact of this omission, if any presumption can be indulged, is that the Legislature did not intend to deprive the Probate Court of Santa Clara County of jurisdiction in those cases in which the right to take jurisdiction had already become fixed in the County of Santa Clara, by the death of a party while a resident of that county. In considering the question in the light of authority, we have found but one case directly in point. In the matter of *Bugbee v. The Surrogate of Yates County*, 2 Cow. 471, the precise question arose under a similar statutory provision. A Bugbee died while a resident of the Town of Benton, in the County of Ontario. Subsequent to his death, the Town of Benton, in connection with several other towns, was erected to the County of Yates. An application was made to the surrogate of the new County of Yates for letters of adminis-

Charles H. Willson v. A. H. Broder.

tration. The Surrogate, having doubts as to his jurisdiction refused the letters, and the parties interested applied to the Supreme Court for a mandamus to compel him to act. The Supreme Court held that "the Surrogate of Yates County had no jurisdiction;" that "Alva Bugbee was, at the time of his death, an inhabitant of the County of Ontario, and the granting letters of administration pertained to the Surrogate of that latter county."

For the reason stated, and upon the authority of the cases cited, we hold that the Probate Court of Santa Clara County has jurisdiction, without reference to the question as to the validity of the proceedings taken in the matter of Harlan's estate in that county prior to the year 1853.

This view makes it unnecessary to consider the points made upon those proceedings, supposed to bear upon the present question.

The judgment is reversed and the cause remanded for further proceedings.

Mr. Justice RHODES, having been of counsel for petitioner, did not sit in the case.

CHARLES H. WILLSON v. A. H. BRODER.

RECORD OF SUPREME COURT—HOW CORRECTED.—An error in the record of the proceedings of the Supreme Court cannot be attacked collaterally, but should be brought seasonably to the notice of the Court by a direct motion to correct it.

REHEARING IN SUPREME COURT.—A cause cannot be reheard in the Supreme Court on application of counsel, except upon petition filed, and the party applying for the rehearing should include in his petition all the grounds upon which the rehearing is claimed, and those not included are deemed waived.

APPLICATION for rehearing in the Supreme Court.

This case is reported in the 10th of Cal. 486. Willson, the plaintiff, recovered judgment in the Court below, and defendant appealed. The Supreme Court reversed the judgment. The other facts are stated in the opinion.

Charles H. Willson v. A. H. Broder.

F. Sloan, for Appellant.

Wilson, for Respondent, cited *Oakley v. Aspinwall*, 547, and 16 N. Y. 294.

Court, SHAFTEE, J.

case was decided by the late Supreme Court, October 1858. The remittitur went down November 18, 1858, respondent now moves for a rehearing on affidavit. Affidavit states that the case was argued orally at the bar, Justices Terry and Baldwin, Justice Field not being present.

That the opinion in the case was signed only by Justices Baldwin and Field; and that within ten days after the decision, the counsel of the respondent informed Justice Field that he intended to file a petition for rehearing, on the ground that said Justice was not present at the argument; that counsel thereupon inquired if he, the said Justice, had any objection to the filing of such petition. That Justice Field replied to the question in the negative, but added that such petition, if presented, would be useless. It is admitted that briefs were filed in the case by the respective parties before the argument and before the decision.

From the entries in the case it appears that the respondent filed a petition for rehearing on the 11th November, 1858, and that the rehearing was denied November 13, 1858; and it further appears, from the minutes, that there was a full argument on the day when the case was argued and submitted.

The case of *Blanc v. Bowman et als.* 22 Cal. 23, is, in all respects, similar to this, and as we are satisfied with the correctness of that decision, we shall merely indicate the points upon which the question now presented will be argued.

It appears of record that the argument was before a full court, and the record cannot be attacked collaterally. If the record is erroneous, the error should have been brought seasonably before the court.

John W. Owen v. S. H. Fowler.

sonably to the notice of the Court, on a direct motion to correct it.

2. A cause cannot, unless, perhaps, the Court so order upon its own motion, be reheard, except upon petition, and under the rules of the Court ample provision is made for such applications. When a party makes up his mind to file a petition for rehearing it behooves him to include in it all the grounds of relief then known to him. It would seem from the affidavit filed in support of this motion that the respondent's attorney, when he filed his petition for rehearing on the 11th of November, 1858, was fully advised of all that he now alleges and that in consequence of a suggestion from Mr. Justice Field he, in the language of the affidavit, "desisted" from inserting in his petition the particular objection upon which this motion is made. The fact that counsel omitted then to make the point which he presents now, can be regarded in no other light than as a definitive waiver of the objection in question made more emphatic, if possible, by over five years of continuous silence.

Motion for rehearing denied.

JOHN W. OWEN v. S. H. FOWLER.

POSSESSION OF LAND—WHAT PROOF NECESSARY TO RECOVER.—In order to entitle a plaintiff in ejectment to recover, he must show a right to the possession in himself, and a possession in the defendant, at the time the action is brought, and if he fails to establish either proposition he cannot recover.

APPEAL from the District Court, Seventh Judicial District, Solano County.

The judgment in the Court below was rendered against Josiah Wing, Josiah Wing, Jr., W. P. McCord, John Clark, D. W. McCollum, and S. H. Fowler. Fowler alone appealed.

The other facts are stated in the opinion of the Court.

M. H. Wheaton for Appellant, cited *Garner v. Marshall*, 9 Cal. 268, and *Klink et al. v. Cohen et al.*, 13 Cal. 623.

John W. Owen v. E. H. Fowler,

an & Wells, for Respondent, cited *Valleja v. Fay*, 77; *Guy v. Hanly*, 21 Cal. 397; *Lick v. Stockdale*, 19.

Court, SANDERSON, C. J.

an action of ejectment brought against a large number of defendants who, as it appears from the record, severally separate and distinct portions of the general tract of land described in the complaint. The complaint was filed on the 1st day of April, A. D. 1860, but the summons was not served until the 13th day of February, A. D. 1861. The plaintiff filed a special answer, containing—first, the general denial, and second, a plea of the Statute of Limitations. In the first plea the defendant admits that he is “now” in possession of a small portion of the land described in the complaint, and in defense of that portion he invokes the aid of the Statute of Limitations. This plea was doubtless defective in not describing the land, and, for the purposes of this decision, it will be dismissed, and the answer held to be only a plea of the general

denial, and the land described in the complaint embraces the site of the city, in Solano County. The evidence was taken before a referee appointed by the Court for that purpose. On the report of the referee, and before the trial, the action was dismissed by the plaintiff, upon his own motion, as to all of the defendants, only two of whom, in connection with the present case, it is material to mention, viz: Goodwin and Edwards. The first was served with summons, but the second was not. At the time the action was brought, as appears from the testimony, was in possession of the north half of Lot 2, in Block 11 of said city. Edwards was in possession of Lot 3, in Block 5, and the defendant, Goodwin, was in possession of an undivided interest in Lot 1, in Block 15. At the time the suit was brought the defendant occupied a room in Goodwin's house for lodging purposes, and boarded at some other place. But, as clearly

John W. Owen v. S. H. Fowler.

appears from the testimony, he neither had nor claimed have any interest whatever in Goodwin's lot, and neither exercised nor claimed to exercise any control or acts of ownership over the same. Several months after the complaint was filed, and before the summons was served, Edwards sold and conveyed his lot to the defendant, Fowler, who soon afterwards went into possession, and continued in possession until the trial. Fowler's interest in Lot 1, in Block 15, was sold and conveyed to him by the plaintiff himself, long prior to the commencement of the suit.

Upon this state of facts the Court, having tried the case without a jury, rendered a judgment, as against Fowler, for the whole tract described in the complaint. On motion for a new trial, the Court first required the plaintiff to release the defendant's interest in Lot 1, Block 15, (the same conveyed by plaintiff to Fowler before the suit was brought), and then denied the motion. So the effect of the judgment, as it now stands, is to deprive the defendant of the possession of the Edwards lot only.

It is difficult to perceive upon what ground this judgment can stand. In order to entitle a plaintiff in ejectment to recover, he must show a right to the possession in himself and a possession in the defendant, at the time the action was brought, and if he fails to establish either proposition he cannot recover. The defendant, as clearly appears from the testimony, was not in possession of the Edwards lot until long after the action was commenced. The judgment is erroneous and must be reversed.

The judgment is reversed and the Court below directed to render judgment in favor of defendant.

Mr. Justice RHODES expressed no opinion.

S. C. Hastings v. E. W. Dollarhide et al.

**HASTINGS v. E. W. DOLLARHIDE, GEORGE
INGER, JOHN J. BASSETT, OLIVER L. BAS-
SETT, ROBINS McCOY, J. T. THOMSON, ISAAC
ARKENDALL, WALLIS JOSLIN, MARY JOSLIN,
ALFRED M. JAMISON.**

WHO CAN TAKE ADVANTAGE OF.—No one can take advantage of act of infancy in avoidance of contracts except the infant himself, or heirs or personal representatives.

OF INFANT—HOW AVOIDED.—An infant may make or indorse a promissory note, and as to him, the note or indorsement will not be void, but merely voidable, at his election.

MAY CONTRACT BY AGENT.—An infant may execute a promissory note by agent, and an infant promisee may also authorize another to transfer the note by indorsement for him, and the transfer is valid until avoided.

TITLE OF NOTE BY INFANT.—An indorsee of a promissory note, deriving title from an infant indorser, acquires a good and valid title to the note against every other party thereto except the infant. The infant may, at any time before ratifying the transfer, intercept payment to the indorsee, or by giving notice to the maker of his avoidance, furnish him a valid defense against the indorsee.

OF INDORSEMENT BY INFANT.—Until the infant gives notice of his avoidance of his indorsement of a promissory note, the title of the indorsee is good, and the maker cannot plead the infancy of the indorser, in an action brought on it, as a defense.

OF INDORSEMENT OF INFANT.—An infant promisee sold a promissory note, and received the purchase money, and indorsed the note to the purchaser, and for eleven months after she arrived at her majority made no effort to return the purchase money, nor did she do or say anything indicating an intention on her part to disaffirm her indorsement; held, that she is bound by the note, and that her acts amounted to a ratification of the assignment.

OF INFANT.—The deed of an infant is not void, but voidable.

INFANT MAY AFFIRM DEED.—An infant grantor can neither affirm nor disaffirm a conveyance of land made during nonage, until he attains the age of legal majority.

INFANT—HOW DISAFFIRMED.—If an infant grantor, after attaining his majority, executes a conveyance of lands embraced in a deed given by him when a minor, the second conveyance will work a disaffirmance of the first, unless before the execution of the second conveyance the first has been affirmed.

INFANT ONCE RATIFIED CANNOT BE DISAFFIRMED.—If an infant grantor, after arriving at full age, ratifies a conveyance made by him during his minority, he will have no power to revoke the ratification and disaffirm such conveyance thereafter.

INFANT—HOW RATIFIED.—The voidable deed of an infant may be affirmed after he arrives at mature age, by an express verbal ratification in writing, or by acts which reasonably imply an affirmation, or by an omission to affirm the deed within a reasonable time. What is a reasonable time will depend on the peculiar circumstances of each case.

S. C. Hastings v. E. W. Dollarhide et al.

APPEAL from the District Court, Seventh Judicial District,
Solano County.

The facts are stated in the opinion of the Court.

Whitman & Wells, for Appellants.

The transfer and delivery of the note for a valuable consideration vested title in plaintiff. (*Prescott v. Hall*, 19 Johns. 284; *Briggs v. Dorr*, 19 Johns. 95; *Jones v. Hitter*, Mass. 304; *Billings v. Jane*, 11 Barbour, 620.)

There is no question but that in the case at bar the plaintiff paid a valuable consideration for the note. The Court finds that he paid eight hundred dollars. The payment was made to Munk, who had the note in his possession, by the permission and at the request of the payee, for the purpose of discounting or collecting the same, as he might be able. Upon the receipt of the money, Munk delivered the note to the plaintiff, who has since been the holder of the same, and, under the well settled rules of law before cited, has been the owner and entitled to collect the amount due thereon. Being the real party in interest under our statute, the suit was properly brought in his name, and could only be so brought.

The note passed to the plaintiff by indorsement, (Wood's Digest, p. 75, Art. 198,) for the fact of infancy did not interfere with the right of the payee to indorse. (Edwards on Bills, p. 246; Parsons on Bills, Vol. 1, p. 70; Parsons on Bills, Vol. 2, p. 3; *Nightingale v. Wittington*, 15 Mass. 272; *Hart v. Waters*, 38 Maine, 450.)

In *Nightingale v. Wittington*, Parker, C. J., said: "That an infant may indorse a negotiable promissory note, or a bill of exchange, made payable to him, so as to transfer the property to an indorsee, for a valuable consideration, seems to be well settled in the Law Merchant, and is no ways repugnant to the principles of the common law."

The payee, although an infant, could indorse by herself, or by her agent or attorney. Letters of attorney made by an infant

generally spoken of as utterly void; but yet, it is con-
that an infant may delegate authority to indorse a note,
that there are exceptions to the rule that letters of attorney
id. Mr. Parsons, in his work on Bills, Vol. 1, page 70,
laying down the rule that an infant may indorse, goes on
: "And it seems that such indorsement may be made
agent or attorney of the infant, or at least that such
ement is susceptible of ratification by the infant, after
comes of age."

Story on Agency, page 7, we find the rule as follows:
infant may authorize another person to do any act which
his benefit; but he cannot authorize him to do an act
is to his prejudice. If, therefore, an infant should
a letter of attorney to take livery of lands as a feoff-
to him, it will be good, for it will be intended for his
."

the policy of the law is to declare no act of the infant
tely void; but to place all, excepting, perhaps, those
are manifestly and unquestionably to the injury of the
, upon the same basis — to make them voidable at the
of the infant. The protection of the infant, which is
ject of the law, is thus allowed, and strangers are pre-
from availing themselves of that which is properly the
al privilege of the infant.

in the case at bar, were we standing solely upon the
ement by Munk, as attorney or agent, and were it held
his appointment, and his acts under it, were void, then
ants could avail themselves of such a ruling as matter of
e to this action, and put plaintiff out of Court, notwith-
ng the infant might desire to ratify, or might actually
attempted to ratify such acts. This would be absurd,
t, and inequitable.

ce the delegation of authority and the acts done there-
upon the basis of voidable acts only, and then the
will have all proper protection, while the rights of the
who may have had dealings with him or her will not be
d.

The claim of defendants is that Ysabel Armijo, their grantor and payee of the note sued on, repudiated the contract and gave evidence thereof after reaching her majority by selling the same interest previously conveyed to defendants and others to H. H. Hartley. This amounts to nothing more than a plea of failure of consideration. To support this plea, the defendants offered a deed from said Ysabel to H. H. Hartley, which was admitted under the objections and exceptions of plaintiff.

We contend that the deed was improperly admitted, because the pleadings made no proper case for such admission.

Possession, in the absence of proof to the contrary, is deemed to actually accompany a conveyance of real property. The presumption then is, that the defendants received possession from Ysabel, that they went into possession under her, and so continue in possession. If so, then they should have offered to surrender their deed to be cancelled, and to have returned to her the rights derived from her.

They cannot be allowed to retain all they have received, and, at the same time, repudiate the consideration therefor. (*Jackson v. Norton*, 5 Cal. 262.)

But, we submit with confidence the proposition that the defendants have no right to raise the question of the infancy of their grantor, either in respect to the consideration of the note or the appellant's right to maintain the action.

"Infancy is strictly a personal privilege; no one can take advantage of it but the infant or his legal representative." (2 H. Bla. 515; 3 Camp. 254.)

"Several parties join in a security; the infancy of one cannot be taken advantage of by the others." (4 Taunt. 10, 46.)

"And the infant may always sue on his contract the same as if he was an adult." (2 M. & S., 205; 6 Taunt. 118; Strange, 938; 4 Taunt. 469; Bacon's Abridgement, Infancy, 1, 4.)

"Infancy (say the authorities) is not permitted to protect fraudulent acts of the infant," and with stronger reason may urge, nor of the adult contracting with the infant.

"No one but the infant himself, or his legal representative

S. C. Hastings v. E. W. Dollarhide et al.

his voidable deed or contract." (2 Kent. Comm. 44; *Bramer v. Cooper*, 2 Johns. 279; *Jackson v. Todd*, 257; *Oliver v. Houdlette*, 13 Mass. 237.)

defendants, as has been well observed, are not, the of the legal rights of the infant; the question is not liability as arising out of or connected with the con- any aspect of the case, but it is simply an attempt of t one, but many, to repudiate their own contract.

as to be insisted on, with great force, by the learned or defendants, that the power of attorney of an infant tely void. We are not aware that the authorities hat position, and we believe it cannot be sustained her than a limited sense applying it to cases where power is necessary to be given under seal, to be ex- h all such solemnity as a deed imports, and even then submit that the tendency of modern decisions is hardly t the doctrine.

y be that there is a lack of uniformity in the cases; e keep the distinction above noted in view, much of pancy will be reconciled.

ellor Kent states the tendency of modern decisions to avor of the reasonableness and policy of a liberal of the rule that the acts and contracts of infants e deemed voidable only;" and the case of *Zouch v. a* leading authority on this subject, has, as the same marks, "been recognized as law in this country, and w to be shaken."

been adhered to in the various cases cited in our rief, and recognized as a necessary relaxation of a tech- e in favor of all mercantile transactions. (*Edwards* 246; *Parsons on Bills*, Vol. 1, page 70; same, Vol. 2,

not too late to question the accuracy of those cases s claimed have laid down the rule in such broad seem to have been assumed in this defense, and to why a power of attorney given by an infant, author- execution of a deed in his name, should be absolutely

S. C. Hastings v. E. W. Dollarhide et al.

void, while the deed itself, if executed by the principal, would be only voidable; why the indorsement of a note by the agent of an infant, or a person claiming to be such, is of no effect though the infant might himself indorse it, and thereby pass a valid title; why the making of a note by a person of full age, competent to transact business in his own behalf, cannot be done in the name and as the act of an infant, and yet the same act, if done by the infant around whose acts the law, in theory at least, assumes to throw its protecting shield, is not may be valid and binding upon him, even to the destruction of his estate.

The infant may assume all these positions at his election and at his peril, guarded only by the right of disaffirmance, or the power to treat the act as voidable.

He may take upon himself the obligation of a surety. (*Curtin et al. v. Patton et al.*, 11 Serg. & Rawle, 305, 310; *Hinely v. Margaritz*, 3 Barr. 428.) May confess a judgment or suffer a decree to pass without the interposition of an attorney *ad litem*. (*Porter's Heirs v. Robinson*, 3 Marshall, 253; *Austin v. Charleston Fem. Seminary*, 8 Metcalf, 196, 203; *Bloom v. Burdick*, 1 Hill, N. Y. 131, 143; *Barber v. Graves*, 18 Vermont, 292.) May state an account. (11 Meeson Welsby, 256.) Bind himself by a recognizance for another. (*Patchin v. Cromach*, 13 Vermont, 330.) Convey his estate by deed apart, or exchange it. (*Bool v. Mix*, 8 Wendell, 123, 131; *Eagle Fire Company v. Lent*, 6 Paige, 635; *Gillett v. Stanly*, 1 Hill, N. Y. 122, 125; *Dana et al. v. Coombs*, 1 Greenleaf, 189; *Wheaton v. East*, 5 Yerger, 41; *Cole v. Penoyer*, 14 Illinois, 161.) Encumber it by mortgage or bond. (*Boston Bank v. Chamberlain et al.*, 15 Mass. 220; *Hubbard et al., Executors, v. Cummings*, 1 Greenleaf, 11; *Lynd v. Budney*, 2 Paige, 191; *McGann v. Marshall*, 7 Humphreys, 121, 126.) May bind himself by a negotiable note. (*Goodsell v. Myer*, 3 Wendell, 470; *Reed v. Batchelder*, 1 Metcalf, 550; *Jefferson v. Adm'r, v. Ringold & Co.*, 9 Alabama, 544.) Or by the indorsement of one. (*Nightingale v. Wittington*, 16 Maine, 272, 274; *Hardy v. Waters*, 38 Maine, 450—where it is fu

S. C. Hastings v. E. W. Dollarhide *et al.*

that such infant promisor may, by parol, authorize transfer such note by indorsement for him, and such valid.) May bind himself to service. (12 Pickering, 572.)

he acts he may do in his own name, and none but his personal representatives can question or avoid. The policy of the law which seems to harmonize the protection to the infant with a just regard to the rights is satisfied to hold all these acts as voidable only, at extent, and subject to the single contingency of age, he is regarded as competent and *sui juris* to act for his own benefit in all these matters; and yet it seems that while the law does not regard him as absolutely and fully disabled from acting in these matters for himself, yet denied the privilege of being allowed to delegate his own authority for such a purpose, though a person *sui juris* may do by himself he may do otherwise," is, we are told, the general maxim of law. Yet, it is asserted that when the infant would act thus, he is inconsistent with those with whom he deals; he has changed from the adult, who may disaffirm the contract without notice to rescind it, retain the property of the infant, yet convey it to his assignee, convey it away, pocket its proceeds, and still deny it to his own vendor.

such a doctrine, however, we find the authority of many cases, the guarded language of the courts, the cases above cited, the guarded language of the court in *Snyder v. Sponable*, 1 Hill, 567, in itself showing grave exceptions to the rule there given, and its conflict with the general principles of law applicable to infancy.

Murray, for Respondent.

Plaintiff claimed to be owner of the note on which the action was brought, as the assignee of Ysabel Armijo. The note being non-negotiable in form, the plaintiff took it, and acquired any right to it, subject to all the equities existing or arising between the immediate parties thereto. *Darling*, 5 Mason, 214; *Wallis v. Twambly*, 13

Mass. 204; *Comstock v. Farnham*, 2 Mass. 96; 1 Pars. Contracts, 198, 199.)

In a case of an assignment of a chose in action, which not by the terms of it assignable, the assignee takes it on credit of the assignor, and acquires no greater rights respecting the same than the assignor had, or would have had if he had retained it. (*Wallis v. Twambly*, 13 Mass. 204; 1 Parsons's Cont. 198, 199; *Wood v. Perry*, 1 Barb. 115, 131.)

The Act entitled "an Act relative to bonds, due bills, and other instruments in writing," has not changed the law so as to affect this case. (Wood's Dig. 75, 76, §§ 3, 5, 6.)

By Ysabel's last conveyance with Morales, her husband, disaffirmed and avoided the deed made and executed by her when an infant. (*Tucker v. Moreland*, 10 Peters, 59; *Jackson v. Carpenter*, 11 John. 539; *Jackson v. Burchin*, 11 John. 124; *Boal v. Mix*, 17 Wend. 119; *Lessee of Drake v. Ramsey*, 5 Ohio R. 251; *Voorhies v. Voorhies*, 24 Barb. 1; 2 Kent's Com. 234-239; 1 Am. Lead. Cases, 232-238.)

The note in question was not duly assigned to the plaintiff. The indorsement and assignment of it was by a person who professed to act for Ysabel Armijo by written appointment, executed by her when an infant. This power of attorney was void. (*Sanderson v. Marr*, 1 Hen. Black, 75; *Zo v. Parsons*, 3 Burrows, 1808.)

An infant cannot appoint an attorney. This was so held in *Fonda v. Van Horn*, 15 Wend. 634, 636; and in *Thomas v. Roberts*, 16 Meeson & Welsby, 778, it was held that an infant could not appoint an agent of any kind.

Messrs. Hare & Wallace, in 1st American Leading Cases, 250, say: "The constituting of an attorney by one who is an infant, and the acts he is authorized to do by him, are in their nature voidable, is repugnant and impossible, for it is imparting a right which the principal does not possess — that of doing valid acts. If the acts, when done, remain voidable, at the option of the infant, then he has done, through the agency of another, what he could not have done directly."

A warrant of attorney by an infant to confess judgment is absolutely void. (*Bennett v. Davis*, 6 Cow. 393; *Waples*

S. C. Hastings v. E. W. Dollarhide et al.

vs, 3 Harrington, 483; *Camahan v. Alderdice*, 4 Har-
99.)

note did not pass to plaintiff by endorsement. The
Ysabel, did not indorse it, and Munk, who did indorse.
authority to do so, for the reasons already stated.

erson dealing with one who professes to be an agent.
pon himself the risk of the fact of such agency; and
ct, the professed agent be a special agent, he who deals
m is bound to know, at his peril, the extent of such
authority, and to understand its legal effect. (1 Amer-
ad. Cases, 544, 545; Story's Agency, pp. 145, 146, 148,

e may be cases where an infant has rendered the con-
on for a note made and delivered to him or her, such
he loan of money or the sale and delivery of personal
y, which loan of money or sale and delivery of per-
roperty is not void or *voidable*. In such a case it may
he infant could himself transfer the note by the indorse-
ad sale and delivery of it, for a *valuable consideration*,
o vest the property of the note in the assignee; but
e prevails, if at all, because the transaction is for the
of the infant. But it is nowhere said, that I am aware
an indorsement can be made by an agent or attorney
nfant. Mr. Parsons does not say in direct terms that
y be done, but he says "It seems that such indorse-
ay be made by an agent or attorney, or at least that
ndorsement is susceptible of ratification by the infant after
mes of age." So any act of one who assumes to be the
f another may be ratified by the principal who is com-
to ratify; but until a ratification of an unauthorized
act cannot be regarded as valid.

In this case there was no ratification of the act of Munk
infant after she became of age.

es not appear that the transfer of this note was for the
of the infant. It does not appear that she needed the
undred dollars paid by plaintiff, as Munk testified, or
e ever received any of it. Munk don't say she did—a

thing he would have been likely to testify to if such had been the case.

It is worse than idle for plaintiff's counsel to speak of Hastings paying the value of this note, provided it was to become of value by a ratification on the part of Ysabel (after she might become of age) of the sale and conveyance of the land to defendants, for the note bore a fair rate of interest, namely, one per cent per month for the first eight months, and *two* per cent per month thereafter.

Then it is not evident that this pretended sale of the note in question was to the disadvantage of the infant, if the note was worth its face?

It is argued on the part of plaintiff, that because the note became due before she became of age, and because the defendants could then have been made to pay it, that therefore she then became liable, and that a subsequent destruction of the consideration of the note on the part of Ysabel could not operate to discharge the defendants of liability.

This argument seems to me to be entirely fallacious. If A. should on this day, in consideration that B. would sell and deliver to him a thousand bushels of wheat on the first day of September next, make and deliver to B. his (A's) promissory note for one thousand dollars, payable on the first day of August next, B. could sue and perhaps recover the amount of the note before the 1st of September, even though the consideration for the note was executory. But if B. should wait until after the first of September before he commenced his action, and should refuse to perform the consideration promised for the note, no lawyer would hesitate to advise A. that he had a good defense to such note, and no Court would say that such advice was not sound.

That the conveyance by Ysabel, after she arrived at her majority, to a third person, was a *disaffirmance* of the former conveyance to the defendants, seems to be in accordance with the settled law of the land. This was so held in *Tucker v. Moreland*, 10 Pet. 59-79; *Jackson v. Carpenter*, 11 John. 539; *Jackson v. Burchin*, 14 John. 124.

Tucker v. Moreland, at page 71, the Court say the nature of the original act of conveyance governs as to the nature of the act required to be done in the disaffirmance of it. If the act be of as high and solemn a nature as the former, it amounts to a valid avoidance of it.

Jackson v. Burchin, 14 Johns. 124, the question here involved was elaborately discussed, and the Court there say that it would seem, not only on principle but on authority, that the defendant can manifest his dissent in the same manner by which he assented to convey.

The case of *Jackson v. Carpenter*, 11 Johns. 589, is equally decisive on this point, as also the learned commentaries of Chancellor Kent, Vol. 2, pages 237 and 238, and notes. (See, 1 Am. Lead. Cases, 232-238, and notes by Hare and Walpole; *Hayle v. Stow*, 2 Dev. and Bat. 320; and *Boal v. Mix*, 17 Cal. 119.)

the Court, SHAFER, J.

This is an action on a non-negotiable promissory note, executed by the defendants to Ysabel Armijo, on the sixth day of September, 1858. The note was for one thousand dollars, bearing interest at one per cent per month until May 6, 1859, and at the rate of two per cent per month thereafter until September 6, 1859.

The complaint alleges that on the day the note was executed it was transferred to the plaintiff by indorsement, in consideration of eight hundred dollars paid by him to the plaintiff, Ysabel Armijo.

The complaint was filed October 6, 1860; summons was served November 20, 1860, and served on all the defendants (seventeen in number) except James Jeans; and all of the defendants, except Jeans, appeared and answered jointly. The answer contained:

First—A general denial.

Second—A special defense that the note was given without consideration.

Third—A special defense, setting forth that the said Ysabel

E. C. Hastings v. E. W. Dollarhide et al.

Armijo sold and conveyed an undivided one sixth of certain lands situate in the County of Solano to the defendants and others named in the deed, and that the said note "was a part of the consideration of the conveyance." That the grantor, at the date of the conveyance, was an infant under eighteen years of age, and that after arriving at the age of legal majority she refused to confirm the aforesaid deed, but executed a deed of conveyance of all her estate in the land to H. H. Hartley, whereby she disaffirmed the deed to defendants; and it alleged that the consideration of the note has thereby wholly failed.

The trial was by the Court, and on the findings judgment was entered for the defendants. The plaintiff appeals from the judgment, and also from an order denying a motion for a new trial.

It appears from the record that Ysabel Armijo was born December 30, 1841, thus attaining her majority December 29, 1859; that on the 6th of September, 1858, she made the conveyance to the defendants alleged in the answer, and on the same day received from the defendants the note in question; that the note was a part of the consideration of her conveyance, the balance of purchase money (one thousand dollars) having been paid at the date of the deed; that on or about the day of its date, the note was delivered by Ysabel and her stepfather to one Munk, for the purpose of collection or discount; that Munk sold and transferred the note to the plaintiff, E. C. Hastings, on the 28th of October, 1858, for eight hundred dollars, which amount was paid to Munk in two instalments; that the note was indorsed as follows: "Ysabel Armijo. By her attorney in fact, Thomas K. Munk, as her power of attorney, filed October 28, 1858, and recorded in Liber 1, pages 182, 183, of Solano County records." It further appears that before October 27, 1860, said Ysabel intermarried with Diego Morales, and that on said 27th of October, 1860, she and her husband executed a deed, duly acknowledged, to H. H. Hartley, for the land mentioned in the said deed of September 6, 1858; that in the deed to Hartley there is a declaration

S. C. Hastings v. E. W. Dollarhide et al.

id Ysabel to the effect that, by said deed, she rescinds
s all contracts and conveyances made or purporting
een made by her during her minority, in any way
said tract of land. The deed also contained a cove-
nst all legal conveyances previously made by the
el. There was no evidence tending to prove that
at the time when the note in suit was transferred to
ober 28, 1858,) had any notice that Ysabel was an
either was there any evidence tending to prove that
ants had any notice of their grantor's disability on
f the same month, when they took their deed. The
attorney referred to in the indorsement of the note
intiff was given in evidence by him, and it is suffi-
oad in its terms to authorize Munk to sell and assign

ars from the findings that the Court below considered
plaintiff was not the owner of the note as between
d his alleged assignor, and that, therefore, the plain-
o right of action on the note against the parties by
was made; and, further, that the conveyance made
to Hartley, after attaining her majority, had worked
failure of the consideration on which the note was
hese questions will be treated separate and apart
other.

o the title of the plaintiff to the note.
sisted for the respondents that the power of attorney
Munk by Ysabel was void by reason of her infancy,
the indorsement fails with the power.

le is well settled that no one can take advantage of
f infancy except the infant himself, or his heirs or
representatives. If the defendants in this action have
to controvert the title of the plaintiff to the note in
e ground of the infancy of Ysabel Armijo, it must
hypothesis that the assignment is not voidable merely,
and that therefore payment by the defendants to the
ould leave them still exposed to an action at the suit

S. C. Hastings v. E. W. Dollarhide et al.

It is now well settled as a part of the law merchant that an infant may make or indorse a promissory note or bill of exchange, and that, as to him, the note in the one case is the indorsement in the other will not be void, but void at his election. (*Nightingale v. Wittington*, 15 Mass. 292; *Hardy v. Waters*, 38 Maine, 450; Storey on Promissory Notes, section 78.)

It is also established by the tenor of the modern decisions that an infant may execute a promissory note by agent. *Whitney v. Dutch*, 14 Mass. 457, it appeared that of two partners in trade, one was an infant, and the other of full age. The adult, for a debt of the co-partners, made a promissory note in the name of the firm, and the infant, after coming of full age, ratified it; and it was holden good against him. It has been held that an infant promisee may, by parol, authorize another to transfer a note by indorsement for him, and the transfer so made will be held valid until avoided. (*Hardy v. Waters*, 38 Maine, 450.) In the case last cited, it was admitted that an infant might transfer a note payable to himself by indorsement, and the point directly presented was, whether he could confer upon another power to do it for him. 4 Wend. 479; 17 Wend. 419; 2 Hill, 120; 11 Wend. 85.)

Mr. Chancellor Kent, in summing up the doctrine, says: "It is held that a negotiable note, given by an infant, even for necessaries, is void; and his acceptance of a bill of exchange is void; and his contract as security for another is absolutely void; and a bond, with a penalty, though given for necessaries, is void. It must be admitted, however, that the tendency of modern decisions is in favor of the reasonableness and policy of a very liberal extension of the rule that the contracts of infants should be deemed voidable only, and subject to their election when they become of age, either to affirm or disallow them. If their contracts were absolutely void, it would follow as a consequence that the contract could have no effect, and the party contracting with the infant would be equally discharged."

In the case at bar the note executed to the infant pa

S. C. Hastings v. E. W. Dollarhide et al.

not negotiable; but, on principle, no distinction can be between negotiable and non-negotiable notes in the of the power of an infant to make or to indorse them. Cases cited proceed upon the ground that infants are protected by the rule holding their contracts of every action voidable in their election, with the exception of a peculiar contracts, in relation to which the Court can say, section, that they are necessarily prejudicial to the infant, if these the contract of suretyship may be stated as an le.

view of the foregoing authorities, as well as upon principle we are satisfied that both, under the written power given Isabel Armijo to Munk, and the verbal directions given by him at the time she put the note into his hands for collection or discount, he was authorized to sell and transfer the to the plaintiff, and that when Ysabel became of age she in her power to ratify or disaffirm the assignment.

another and perhaps more important question here presents itself. It is whether the transfer by the infant is operation in favor of the plaintiff as assignee, so that he may receive the proceeds of the note from the defendants, and give satisfaction therefor. It seems now well settled that an indorsee taking title from an infant indorser, acquires a good and valid title to the note against every other party thereto, except the maker, since the title is not void, but voidable only. The infant indorser, at any time before ratifying the transfer, intercepts the title to the indorsee, or by giving notice to the maker of the assignment, furnish to him a valid defense against the claim of the indorsee. But until he does so avoid it, the indorsement is deemed, in respect to such antecedent parties, a good and valid transfer. (*Grey v. Cooper*, 3 Doug. 65; *Taylor v. Porter*, 4 Esp. 187; *Jones v. Darch*, 4 Price, 800; *Nightingale v. Wittington*, 15 Mass. 272; Story on Bills, Sec. 85.) In the case at bar there has been no attempt made on the part of Isabel Armijo, either before or since she became of age, to ratify her assignment to Hastings, nor has she at any time attempted to collect the note of the defendants in disregard of

S. C. Hastings v. E. W. Dollarhide et al.

that assignment—nor, so far as the record shows, has she ever given any notice to the defendants that she did not intend to abide by the transfer to Hastings. In the case of *Nightingale v. Wittington*, 15 Mass. 272, a minor had received a negotiable promissory note in payment of labor in the employment of the maker of the note, and had indorsed the same to a third person for a valuable consideration, the indorsee knowing the indorser to be under age; and afterwards the father (who had previously emancipated his son in effect, by neglecting to provide for him) received the amount of the maker in discharge of the note, both the father and the maker knowing of the indorsement.

It was held that the maker could not himself deny the validity of the indorsement, and that inasmuch as the infant had never disaffirmed it, and inasmuch as the payment to the father was a payment by the maker in his own wrong, the indorsee was entitled to judgment.

The fact that the note given by Ysabel Armijo was non-negotiable, is, as we have already intimated, entitled to no consideration, so far as the question of the plaintiff's title is concerned. Notes non-negotiable at common law are made negotiable with us by positive statute. True, the persons to whom such notes are transferred hold them subject to all defenses that might be urged in suits against the maker brought by the payee; but that fact is not inconsistent with an absolute ownership of the securities vested in the party to whom the may have been transferred.

But there is another ground on which the title of the plaintiff to the note in controversy may be rested. Ysabel Armijo, since she became of age, has ratified her assignment to the plaintiff, and has thereby made it impossible for her to compel the defendants to pay the note a second time. In the absence of all proof to the contrary, it must be presumed that Munk accounted to his principal for the money paid him by the plaintiff. Ysabel became an adult on the 29th of December, 1859, and this action was commenced about eleven months thereafter. During this interval she made no offer to return

H. C. Hastings v. E. W. Dollarhide et al.

received by her from Hastings, nor did she do any-
r did she say anything indicating any purpose on her
disaffirm her indorsement. The contract between her-

Hastings was not executory, but executed, and her
and inaction for the period named, coupled with the
a of the consideration paid her—both facts being
ned—amount to a ratification by “mediate” pre-
n. (11 Stark. Ev. 745.) On this point the authorities
erous and decisive; but as we shall have occasion to
them in discussing another but analogous question,
e only will be cited here. In *Delano v. Blake*, 11
5, where an infant took the note of a third person in
for work done, and retained it for eight months after
ne of age, and then offered to return it and demanded
t for his work, it was held, in an action for work and
rformed by him, that the retaining of the note for
length of time was a ratification of the contract made
nfancy.

to the alleged failure of consideration.

general rule the deed of an infant is not void, but
This is the established doctrine of all the modern
s. An infant grantor can neither affirm or disaffirm a
nce of land made during nonage until he attains to
of legal majority. It was so held in the leading case
t v. *Parsons*, 3 Burr, 1,794, decided in 1765, and the
s been steadily adhered to in England and America
ce. If an infant grantor, after attaining to mature
cute a conveyance of lands embraced in a deed made
when a minor, it is settled, as a general proposition,
e second conveyance will work a disaffirmance of the
But it is clear that if an infant, after arriving at adult
ifies a conveyance made by him during his infancy, he
ve no power to revoke the ratification and disaffirm
nveyance thereafter. Conceding, then, that the deed
el Armijo and husband, to Hartley, was in itself con-
an act of disaffirmance, it becomes material to ascer-

tain whether she had not, in effect, ratified the prior deed the defendants before that act of disaffirmance was performed.

The exemption of infants from liability on their contracts proceeds solely upon the principle that such exemption is essential to their protection; and it is admitted that the law of infancy should be so administered that that result may, in all cases, be secured. But it has not unfrequently happened that Courts, in their anxiety to protect the rights of infants in the matter of contracts made by them during nonage, have, after they have become adult, treated them to some extent as infants still, exempting them from the operation of rules of law, not only of general obligation, but founded in essential justice. The strong tendency of the modern decisions, however, is to limit the exemptions of infancy to the principles upon which the disability proceeds.

In considering the question of ratification with which we have to deal, it is to be remembered that the contract of sale made between Ysabel Armijo and the defendants, on the 6th of September, 1858, was fully executed on the day of its date by the delivery of a deed on the part of Ysabel, and a payment to her by the grantees of a part of the purchase money and the execution of their note for the balance. There is no distinction taken between executory and executed contracts in the matter of ratification, but it is the law of the latter class of contracts only that we now have occasion to consult.

In *Baylis v. Dinsley*, 3 Maule & Sel. 481, it was held that a parol confirmation of a bond given by an infant after he came of age was invalid, and that the confirmation should be supported by something amounting to an estoppel in law, and of as high authority as the deed itself, and of equal solemnity.

In *Tucker v. Moreland*, 10 Pet. 75, after citing the foregoing case, Mr. Justice Story remarks upon it as follows: "Without undertaking to apply this doctrine to its full extent, and admitting that acts *in pais* may amount to a confirmation of a deed, still we are of opinion that those acts should be of such a solemn and unequivocal nature as to establish a clear

B. C. Hastings & B. W. Dollachide et al.

to confirm the deed, after a full knowledge that it was voidable."

Johnson v. Carpenter, 11 John. 542, and in *Curtin v. Johnson*, 11 S. & R. 311, the rule stated in *Baylis v. Dinahy* was further relaxed; for, according to those cases, acts of an infant are not required to be "solemn," nor is it requisite that they should be absolutely "unequivocal;" but if, when construed, they are found to be "evincive of assent," they are held to be sufficient. But the rule in *Baylis v. Dinahy* has been subjected to still further modification. In *Reynolds v. Houser*, 1 Hayw. 143, the plaintiff and defendant were joined under one Wright, who, while an infant, had conveyed the lands to Houser, and after coming of age had conveyed the lands to Reynolds; but before making such conveyance, and after coming of age, he said to Houser: "I do not wish to take advantage of my having been an infant at the time of executing the deed, and it is my wish that you should ratify the deed." It was held that these words ratified the deed. Here, there was no act done, and the words were used informally. This decision is sustained in the case of contracts executory, by *Goodsell v. Myers*, 3 Wend. 101; *Myers v. Hurd*, 4 Day, 57; *Wilcox v. Roath*, 12 Conn. 341; *Le v. Gerrish*, 8 N. H. 374; *Millard v. Hewlett*, 19 N. H. 301. In *Orvis v. Kimball*, 3 N. H. 314, it was held that a declaration of an intention to pay a note, and authorization to take it up, was a good ratification, although the party had done nothing about it.

In real estate cases so far cited, though differing *inter sese* as to the rule of ratification now in question, all agree, however, that the deed of an infant cannot be ratified by mere acquiescence or inaction, no matter how protracted; and (in *Boody v. Conney*, 23 Maine, 523) a reason is suggested: "Where an infant has made a conveyance of real estate during infancy, he cannot afterwards affirm or disaffirm it after he becomes of age, inasmuch as mere acquiescence for years affords no proof of a ratification. There must be some positive and clear act performed for that purpose. The reason is, that by his silent

R. C. Hastings v. R. W. Dollarhide et al.

acquiescence he occasions no injury to other persons, and secures no benefits or new rights to himself. There is nothing to urge him as a duty toward others to act speedily. Language appropriate in other cases, requiring him to act within a reasonable time, would become inappropriate here. He may therefore, after years of acquiescence, by an entry or by a conveyance of the estate to another person, disaffirm and avoid the conveyance made during his infancy." The consequences of the grantee of enduring silence on the part of the grantor after he has become an adult are, as we conceive, misapprehended in this opinion, and their character is very differently presented in cases to be cited hereafter. The decision in *Lessee of Drake v. Ramsey*, 5 Ohio, 251, marks another step in the progress of judicial opinion upon this subject, and the Court say: "In our opinion, lapse of time may frequently furnish evidence of acquiescence, and thus confirm the title of the first purchaser; but, of itself, it does not take away the right to avoid until the Statute of Limitations has run." The same doctrine was afterward affirmed in *Cresinger v. Lessee of Welch*, 15 Ohio, 193.

In the case of *Kline v. Beebe*, 6 Conn. 794, the effect of silent acquiescence on the part of a grantor — after becoming of age — to ratify a deed given during infancy, was fully considered and adjudged. The action was ejectment, and the plaintiff claimed title as tenant by the courtesy. He was the husband of Patty Kline, deceased, formerly Patty Bolles. In 1791, Patty, being then under age, executed to Ebenezer Bolles a quitclaim deed of the premises, and received from Ebenezer his promissory note for the purchase money. Within a year after Patty became of age she intermarried with the plaintiff, by whom the note was held during an interval of ten years, when this action was commenced. During this period of eleven years, and until the commencement of the plaintiff's action, a profound silence was observed relative to the disaffirmance of the deed, and the defendant was permitted to remain in the unquestioned occupation of the lands. It was held by Hooper, C. J. — Brainard, Lamm

and Daggett, Justices, concurring—that there were three modes of affirming the voidable contracts of infants: 1. By express ratification; 2. By performance of acts from which an affirmation might be reasonably implied; 3. By an omission to disaffirm within a reasonable time; and that on the facts of the record before them there was both an implied and tacit affirmation of the conveyance.

In *Scott v. Buchanan et al.*, 11 Humph. 468, it was held that the voidable deed of an infant might be affirmed by an express ratification, or by acts which reasonably implied an affirmation, or by the omission to disaffirm the deed within a reasonable time; and it was further considered that “reasonable time” was a question of fact necessarily depending on the circumstances of each particular case. Held, in *Jones v. Butts*, 30 Barb. 641, that infant parties to a marriage settlement could avoid it within reasonable time after coming of age, or could be considered as having been ratified by them.

In *Richardson v. Bright*, 9 Vt. 370, it was held “that in every case of every act of an infant, merely voidable, he must affirm it on becoming of full age, or he will be bound by it, and the case of *Kline v. Beebe* was cited with approbation, and Mr. Justice Redfield says in the opinion: “The doctrine of that case is but the long established doctrine of the common law.” This statement of the learned Judge is sustained by Co. Litt. 51b: “If an infant exchange lands, and at his full age occupy the lands taken in exchange, thereby the exchange is become perfect.” And it is further justified by the decision in *Holmes v. Blogg*, 8 Taunt. 35, in which case it is observed: “The infant is bound to give notice of the disaffirmance of a voidable contract in reasonable time; and in the case before the Court were that simple case, I (Dallas, Judge, afterward Chief Justice) should be disposed to hold that as the infant had not given express notice of disaffirmance within four months, he had not given notice in reasonable time.”

In *Delano v. Blake*, 11 Wend. 85, an infant, after becoming of age, held a note for eight months, given him for work and

S. C. Hastings v. E. W. Dollard & others.

labor while an infant, and it was held that it was too late to disaffirm. Chancellor Kent, K. Com. 11, 263, referring to *Holmes v. Bloggs*, 8 Taunt., already cited, says: "The inference from that doctrine is, that without some act of dissent, all the avoidable contracts of the infant would become binding. * * * This is the usual course when the infant does not intend to stand by his contract; and the confirmation of the act or deed of his infancy may justly be inferred against him after he has been of age for a reasonable time, either from his positive act concerning the contract, or from his tacit assent under circumstances not to excuse his silence."

In the cases cited there is a marked disagreement as to whether mere acquiescence on the part of an adult will ratify a deed made by him while an infant; but in the case of a purchase made by an infant, the decisions are uniform that if the infant retains the property purchased, whether it be real or personal, and gives no notice of an intention to disaffirm within a reasonable time after he arrives at full age, it will be sufficient evidence of a ratification. Some of the leading cases upon the subject are *Boyden v. Boyden*, 9 Met. 519, *Boody v. McKenny*, 23 Maine, 517, *Hubbard v. Cummings*, 1 Greenl. 11, where this doctrine is applied to the purchase of real estate. On principle, we can see no difference between the case of an infant grantor and the case of an infant grantee, justifying a distinction between them. If the infant, on attaining majority, is bound by the rule of diligence in the one relation, then he must be in the other; and if he is exempt from the rule in either relation, then he must be exempt in both. Whether the infant stands as grantor or grantee in the deed to be ratified or avoided, good faith, public policy, and the very principle upon which the law of infancy is based, require that he should make his election within reasonable time after he becomes of age. To hold otherwise would make the disability of infancy a "sword" rather than a "shield," and, in the language of Mr. Chief Justice Hosmer, 6 Conn. 505, would extend to the adult unlimited license "to hold the scales in

E. C. Hastings v. E. W. Dollarhide et al.

on hand, and decide as further circumstances should

consider the rule as given by Chancellor Kent, and as
in the 6 Conn., 8 Taunt., 9 Vt. and 11 Humph., to be
the rule of the common law, as stated in Coke upon Litt.
and there applied to the case of land acquired by exchange.
Differences of title by exchange and title by
purchase are technical and circumstantial. They relate to the
mode of acquiring rather than to the results of title when
acquired; and where results are confessedly uniform and con-
sistent, why should the law be at once embarrassed and blem-
ished by arbitrary distinctions concerning them? The central
idea and whole purpose of the law of infancy is the pro-
tection of the infant; and if infants, under the rule in Coke
upon Litt., are adequately protected against improvident ex-
changes of land made during their minority, so they must be
protected against improvident purchases and sales.

We have considered this case at length for the reason that
the authorities are in conflict; the questions involved are made
clear for the first time, and for the purpose, if possible, of sub-
stituting exchanges and executed sales and purchases of both
real and personal property by infants to one uniform rule, so
that the ratification or disaffirmance of such contracts is con-

sideration is another question raised by the record, but as it is
unnecessary to decide it, we shall refrain from discussing it.

An infant after becoming of age disaffirm a conveyance
during infancy, without returning, as a part of the pro-
ceedings, the consideration received, in so far as
the disaffirmance, the consideration received, in so far as
the consideration, whether in money, securities, or chattels,
was within his power or control?

Verdict reversed and new trial ordered.

Justice CURREY, having been of counsel, did not sit on
the trial of this case.

James H. Long et al. v. A. H. Dollarhide.

**JAMES H. LONG, GARRARD LONG, JOHN P. LONG,
SOUTHEY LONG, WILLIAM B. LONG, AND WILLIAM
LONG v. A. H. DOLLARHIDE.**

PAROL PARTITION.— A parol partition of land may be made by co-owners under the Mexican law, as well as by tenants in common under the common law.
SAME — WHAT CONSTITUTES.— In order to uphold a parol partition, under both the Spanish and common law, it must satisfactorily appear that there was not only an agreement to make the partition, but that the same was fully executed and followed up by a several possession, by either the parties themselves or their grantees.

SPANISH LAW — PAROL SALE OF REAL ESTATE.— Under the Spanish law, contracts for the sale of real estate rest upon the same footing with those relating to personal estate, and may be by parol or otherwise, at the option of the parties.

PRIOR AND SUBSEQUENT PURCHASERS OF LAND.— The rule that a subsequent purchaser in good faith and for a valuable consideration, and whose deed is first recorded, will hold the land conveyed, as against a prior purchaser, only applies where both parties claim under the same grantor.

BONA FIDE PURCHASE — HOW PROVED.— The burden of showing that he is a purchaser in good faith and for a valuable consideration is cast upon one claiming under a second deed but recorded first in point of time, and the deed itself is not evidence of these facts, but they must be shown by other testimony.

APPEAL from the District Court, Seventh Judicial District, Solano County.

The defendant in this action, by his title deraigned from Pena, claimed to be a tenant in common with plaintiffs in the demanded premises.

The other facts are stated in the opinion of the Court.

Whitman & Wells, for Appellant.

A parol partition is only good, whether judged by the rule of civil or common law, when it is open, notorious, and followed immediately by possession.

The parol agreement is merged in the act, and though the agreement may be proved, it is not as a substitute for the act but to explain the acts. In this case, the most that can be made of the evidence is a loose declaration from one tenant in common to the other, or between the two, that each might sell a half league of land indeterminate in locality or quality and not reduced to possession. As against the defendant

James H. Long et als. v. A. H. Dollarhide.

in any event, the evidence was incompetent; he may be found by acts which would impart notice to by loose conversations, most probably very imper-derstood, and at the time of trial at *nisi prius* unequiv-nied by one of the parties said to have been engaged The rule existing in this country as to parol parti-very well expressed in *Mount v. Merton*, 20 Barbour, though this transaction took place in 1847, it was y done under the common law, or rather, under a rules, as appears by the very contract "A;" how- may be, we assume, for the purpose of this argu-at the civil or Mexican law did not differ from the law. If this position be correct, then we shall well second point, which is: That the evidence intro-d not prove any partition. The evidence has been at some length, and from the facts occurring and as therein detailed, no person, unless blessed with of divination, could ever have surmised any special y of any special half league of the forty-four thou- odd acres, appearing by the patent in evidence, by his grantees, or Pena or his grantees. It will be red that paper "A" was only an agreement to con- it was only with reference to paper "A" that the fore recited was made; but, subsequently, plaintiffs ed paper "B." This paper is a deed made between d Pattens and Lyon, in 1849, conveying to the gran- his right, title, and interest, in and to a certain tract If we judge this instrument by the common law conveyed nothing more than it pretended to convey, its utmost, could only make Vaca's grantees tenants on with Pena. Strictly, it is utterly void as to Pena anteas, being a conveyance by a tenant in common to er, by specific metes and bounds. (*Stark v. Barrètt*, 162.)

ew of the whole testimony shows that plaintiffs and ts are tenants in common, if either take anything by ds. That defendant has possession of only about one

James H. Long *et al.* v. A. H. Dollarhide.

hundred and sixty acres, and that plaintiffs are in possession of the remainder of the half league. That, even admitting plaintiffs' theory to be correct, as to the efficiency of the partition, and the effect of the subsequent conveyance from Vaca, defendant being an innocent purchaser, without notice for a valuable consideration, cannot be affected thereby.

Williams & Thornton, for Respondents.

According to the Spanish law unchanged by legislation, contracts in regard to land might be made by parol. Title to land was not conveyed by deed, but passed by virtue of the contract. Sales of land under that system of law could be made by parol. The Louisiana cases to this effect are numerous. The following are some of them: *Gonzalez v. Sanchez*, 4 Mart. N. S. 657; *De Vall v. Choppin*, 15 La. 566; *Landry v. Martin*, 15 Lou. 1; *Leblanc v. Victor*, 6 Martin's N. S. 257; *Maes v. Gillard*, 7 Mart. N. S. 317; *Ducroix v. Bijean*, 8 Mart. N. S. 197; *Sackett v. Hooper*, 3 Lou. 10; *Choppin v. Michel*, 11 Robinson, 233; *Badon v. Bahen*, Ann. 467.

See, also, 1 Sala's "Illustracion Derecho Real," 271; and 2 Tapias "Febrero Novisimo," (edition published at Paris 1855,) Sec. 3, p. 134, and Sec. 31, p. 147; where the same rule is stated as to sales of land. According to these authorities the Spanish law made no difference as to the requisites of sale of personal or of real property. (See, to the same effect, Law 6, Title 5, Partida 5.)

Such also seems to have been the opinion of the Supreme Court of the United States, in *Strother v. Lucas*. (See the opinion of the Court in that case, 12 Peters, 447, 448.)

The contract of exchange of lands can also be made under the Spanish law by parol, with or without writing. (See Law 1, Title 6, Partida 5.) Donation can be made also with or without writing. (Law 4, Title 4, Partida 4.)

Promises and obligations can be entered into with or without writing. (Law 2, Title 11, Part. 5.)

James H. Long et al. v. A. H. Dollarhide.

the Law 2, Liber 10, of the Fuero Juzgo, the partition made between brothers, although it is not in writing, is valid, if it can be proved by witnesses. According to the Law 3, Title 5, of the Fuero Real, the partition made between brothers, or between the relations of those who shall not be undone, although there may not be

consent can be made *judicially* or *extra-judicially*, without the intervention of the judge. (Febrero Novisimo, 4th Vol. p. 61.) It can be made *intellectually*. (Ib. Sec. 1, p. 1. *s v. Compton*, 3 Martin, O. S. Marg. 143.)

The court say, in the case just cited from 3 Martin: "A partition can be ascertained by measurement, according to the already agreed on, produces as perfect a separation of the law as that which may be drawn by going to the marked object to another. There is no difference in the translation of the country, at the time the transaction took place. None. Febrero states, in express terms, that partitions may be either real or intellectual; for, says he, as things are divided intellectually by the law, they may be by man; and that the intellectual division may not only be of rights, but also of corporeal objects."

In the same manner we say in this case, the partition was made as the calls in the deeds. The south line across the valley was only described in the contract with Vaca, on the north line, one half a league of land was to be surveyed; and in the contract of Pena to Hoppe and Hollingsworth, a half a league of land was conveyed, having for its southern boundary the southern boundary line of the land sold by Vaca to the Pattens. Thus the partition was consummated, and Pena was the proprietor in the sale to Hoppe and Hollingsworth.

Court, SANDERSON, C. J.

This is an action of ejectment, brought to recover the possession of a tract of land, part of the Rancho Los Puntos, situ-

James H. Long *et als.* v. A. H. Dollarhide.

ated in Solano County. The plaintiffs obtained judgment the Court below, and the defendant appeals.

Both parties claim under a grant from the Mexican Nation to Manuel Vaca and Juan Felipe Pena, and under a patent from them from the Government of the United States, bearing date June 4, 1858. The plaintiffs claim under paper title from Vaca, and the defendant under like title from Pena, plaintiff's title being the oldest. The plaintiffs further claim that they and their grantors acquired Pena's estate in the land in question at the same time that of Vaca was obtained, by reason of a parol partition between Vaca and Pena, made at or before the sale by Vaca to plaintiffs' grantors, by which Vaca was to have in severalty a half league of land, of which the land in question is a part, and Pena was to have another half league in like manner. Whether the plaintiffs did thus acquire Pena's estate is the principal question presented by the record in this case.

That a parol partition of land may be made by co-owners or co-proprietors, under the Spanish or Mexican law, as well as by tenants in common under the common law, is a proposition not denied by counsel for the defendant; but it is insisted that the evidence fails to establish a partition in the present case. The determination of this question involves a patent analysis of all the testimony bearing upon the point.

In order to uphold a partition under the Spanish law, as well as under the common law, it must satisfactorily appear that there was not only an agreement to make the partition, but that the same was fully executed and followed by a several possession by either the parties themselves or their grantors. What will amount to a several possession sufficient to complete the partition must in a measure depend upon the circumstances of each particular case. So far as the question is controlled by legal rules, we have been unable to ascertain that there is any material difference between the Mexican and the common law; but, if any difference exists, it is certain that the less rigid rules are found in the former system, growing out of the fact that under that system less importance

James H. Long et al. v. A. H. Dollarhida.

to real estate than has always been accorded to it by common law. Under the Spanish law — independent of what was avowedly had for the purpose of facilitating the performance of Government duties — contracts touching the sale of real estate are put upon the same footing with those relating to personal estate, and may be by parol or otherwise, at the option of the parties. (Law 6, Title 5, Partida 5.)

Also, contracts for the exchange of lands may be by parol with or without writing, (Law 1, Title 6, Partida 5,) and the alienation of land can be made in like manner; also, contracts and obligations can be made and entered into with or without writings. (Law 4, Title 4, Partida 4, and Law 2, Title 5, Partida 5.)

It is clear, therefore, that such acts as are sufficient to work a partition between tenants in common, under our system, can be made in satisfying all the demands of the Mexican law.

It appears from the record that Manuel Vaca and Juan Pena were jointly in possession of and living upon the Rancho Los Putos in 1847, under a grant to them from the Mexican Nation. In March of that year, Vaca entered into a contract with plaintiffs' grantors, John Patten, Sr., John Patten, Jr., and Albert G. Lyon, for the sale of half a league of land belonging to the Rancho Los Putos, the latter to pay therefor a valuable consideration, part in money and part in labor to be bestowed upon the house in which Vaca was at that time dwelling. This written contract was drawn up by one J. D. Hoppe, and signed by him and one John Coombs as witnesses. This document is contained in the transcript and designated "Paper A," which designation was adopted. On the 7th day of April, 1849, Vaca, pursuant to his covenant as expressed in "Paper A," made a deed of a Spanish league of land to the Pattens and Lyon. This deed is also set out in the transcript and called "Paper B." There is a slight variance between the descriptions of the land as contained in these two instruments; but it is explained by the testimony of a surveyor, who had run out the boundaries pursuant to the calls of both instruments, that either

James H. Long et al. v. A. H. Dollarhide.

description embraces the land in controversy. All question of conflict between the two instruments must be determined by "Paper B," it being the more solemn and formal instrument, and the one by which the legal title actually passed. The land is described in "Paper B" as follows, viz: "One half of a Spanish league of land lying in the first valley east of the present residence of said Vaca, beginning at Alamo Creek at a certain oak tree marked "B," being near the first crossing of said creek; thence east, across the valley, to Ulattis Creek; thence up the said Ulattis Creek to a point where the said creek leaves the base of the mountain; thence along the base of the mountain a sufficient distance, so that running the north line parallel with the south across the valley to the western side of the valley and thence down the base of the mountain on said western side to the point of the small mountain, thence due west to said Alamo Creek, and then down said creek to the point of beginning, will include the quantity of one half of a Spanish league of land."

It further appears from the record that half a league of land lying on the north and adjoining that described in "Papers A and B," was sold by Pena to J. D. Hoppe and H. Hollingsworth. At what time this sale was made does not clearly appear, but the deed, which is contained in the transcript, bears date on the 30th day of March, 1850. It is apparent, however, from the recitals contained in a subsequent conveyance by Lucy Hoppe, widow of said J. D. Hoppe, and from the further fact, disclosed by the testimony, that Hoppe was residing upon the land at the time of the sale from Vaca to the Pattens and Lyon, (whose contract, "Paper A," he drew up), that the sale from Pena to Hoppe and Hollingsworth must have been about the same time as that from Vaca to plaintiffs and grantors, viz.: March, 1847. This theory is further sustained by other facts and circumstances which will appear hereafter.

The deed from Pena to Hoppe and Hollingsworth contains the following description of the land sold by the former to the latter: "All that certain piece or parcel of land being in the

James H. Long et als. v. A. H. Dollarhide.

of the first valley east of the residence of Manuel bounded as follows, to wit: commencing at the corner of the lands of John Patten, Sr., John Patten and Albert Lyon, and running in a northeast direction north line of the said Pattens and Lyon, to the west of the mountain east of said valley; thence up said valley parallel with the base of said mountains, a sufficient distance to include half a league of land, Spanish measure; also, from the place of beginning with the base of the mountain west of said valley in a northerly direction, so that the line of said half league of land will run parallel to the valley with the south line."

Carol testimony upon the question of partition is conflicting. Nathan Coombs, one of the subscribing parties to "Paper A," who was called upon for that purpose as interpreter between the Pattens and Lyon on the one side and Vaca on the other, at the time the contract was made, testified that Pena was present at the sale, and that he (Pena) and Vaca stated at that time, either to him or in his presence, "that they had an agreement between them that this half league of land," (referring to the land sold to the Pattens and Lyon) "should be sold by Vaca on behalf of his interest in the rancho, and that Pena should have the right to select another half league in place of it; or if they thought their interests equal they should do this." Pena, when also examined as a witness, testified that there was no agreement between him and Vaca as stated by Coombs; that he admits that he was present at the sale, and knew of it, and that he had no objection to it; and further states that he sold the land to the Pattens and Hollingsworth, and Vaca sold to the Pattens and Lyon, and that they both had the right to sell.

The latter part of Pena's testimony can hardly be reconciled with the former, for it is difficult to perceive how either party could have the right to sell the estate of both in a particular tract of land unless there was some agreement between them to that effect. Moreover, the testimony of Pena is con-

James H. Long et als. v. A. H. Dollarhilde.

tradictory in other particulars, and it is evident that it is entitled to but little weight.

It further clearly appears from the testimony that Vaca and Pena both sold their respective half leagues for the same purpose, viz: to procure means and labor to repair and improve their dwelling houses; and that the entire consideration paid by the Pattens and Lyon was paid to and received by Vaca to his separate use, and that paid by Hoppe and Hollingsworth was in like manner paid to and received by Pena, all of which is admitted by Pena on the witness stand.

It further appears that, immediately after the sale, the Pattens and Lyon were put into formal possession by Vaca, and that the Pattens soon after built a house on the lower and Lyon on the upper end of the tract, and that both subsequently farmed and cultivated a small portion thereof, respectively contiguous to their dwellings, and kept more or less stock running over the land; that they, and others under them have been in possession since. It also appears that Hoppe and Hollingsworth were in possession of their half league in 1847, and so far as anything appears to the contrary, they and others under them have since continued in possession.

Thus it appears that the two half leagues were sold by Vaca and Pena, respectively, at about the same time and for their separate use; that their respective grantees went into the several possession of their respective tracts under deeds the calls of which are unambiguous and certain, and readily followed; that neither signed the other's deed, but each conveyed the land as though held by him in severalty, and each did this with the full knowledge of the other. The two tracts are contiguous, and constitute but one body of land, and embrace, apparently, all the land contained in the valley. The lower end is sold by Vaca and the upper by Pena. And this could not have happened by accident; but, on the contrary, it is manifest that these several acts were the result of design, and were performed by the respective actors in pursuance of an agreement between them of the character of that testified to by Coomba. That agreement, followed by the ac-

James H. Long et al. v. A. H. Dollarhide.

and above, fully satisfies all the requirements of either the common or common law upon the subject of the parol partition of real estate, and establishes beyond a doubt, in our opinion, that a parol partition of the land in question was claimed by the plaintiffs in this suit. The execution of their respective deeds, with the calls therein contained, by Vaca and Pena, was a full ratification of their agreement, and a sufficient division and segregation of the land in question to create a common and create a several possession, which was kept up and continued by their respective grantees. We have examined the instructions of the Court to the jury upon the question of partition, and have been unable to find any error in them; on the contrary, we think the question was properly submitted.

The next contention by counsel for the defendant that inasmuch as the defendant's deed was first recorded, he is a subsequent purchaser in good faith and for a valuable consideration, and that against him the plaintiffs' title, although prior in point of time, must fail. In order to avail himself of this defense, the defendant's and plaintiffs' grantor must be the same, which circumstance seems to have been entirely overlooked by counsel. The defendant has no conveyance from Vaca, the original grantor of plaintiffs, nor from their immediate grantors, Vaca, Lyons and Lyon. The defendant's subsequent title is derived from Pena alone, who, the partition being established, has no interest whatever in the land. Had the defendant, however, shown a deed from Vaca, recorded before that of the plaintiffs, he would have failed in making out this defense; and from the recitals contained in his deed, he offered no evidence showing himself a subsequent purchaser in good faith and for a valuable consideration. The burden of proving the title rested upon him, and the recitals of the deed are not, as counsel contends, *prima facie* proof of a valuable consideration. The recitals are but the declarations of the grantor, and it has never been held that the declarations of a vendor or grantor, made after the sale or assignment, can be received in evidence at the title of the vendee or assignee. A party seeking

James M. Warner v. D. B. Holman.

to bring himself within the statute cannot rely upon the recitals of his deed, but must prove the payment of the purchase money *aliunde*.

The judgment is affirmed.

Mr. Justice RHODES expressed no opinion.

JAMES M. WARNER v. D. B. HOLMAN.

EXCEPTION TO FINDING OF FACTS.—A judgment rendered in an action tried by the Court without a jury will not be reversed for a defective finding of facts, unless exceptions are taken in the Court below to the defective finding, particularly specifying the defect, and the bill of exception is settled by the Judge, as in other cases.

APPEAL from the District Court, Seventh Judicial District, Solano County.

The facts are stated in the opinion of the Court.

Whitman & Wells, for Appellant.

John Currey, for Respondent.

By the Court, CROCKER, J.

This is an action to recover a sum of money due upon contract to construct a road, executed by the defendant to the plaintiff. The case was sent to a referee to take the testimony. The testimony was taken and reported to the Court, and the Court filed the following findings thereon: "The cause came on to be tried by consent of parties without jury, before the Court, and the Court having heard the evidence in the cause, finds that the plaintiff performed the labor and services by him alleged, at defendant's request and by his employment, and is entitled to have and recover of and from the defendant the sum of one thousand four hundred and twenty-five dollars and the costs of this action." To the findings the defendant objected, and excepted that the findin

James M. Warner v. D. B. Holman.

and conclusions of law are not separately stated, that the findings are defective and insufficient in not finding the facts put in issue by the pleadings. Written exceptions were filed, specifying and particularly designating the particular facts in which the findings were defective, as required by section two of the Act of May 20, 1861. (Statutes 1861, p. 589.) The facts thus omitted in the findings were put in issue by the pleadings, and evidence was introduced respecting them; but the court failed to remedy the defect thus pointed out and directed to. The exceptions were filed within two days after the findings were filed, but they do not appear to have been acted on by the Judge," as required by the Act in question. The record does not show that they were ever brought to the attention of the Judge until the hearing of the motion for a new trial, which was nearly six weeks afterward. It is not shown that the defendant asked the Court, before the findings were drawn or filed, to find certain specified facts, which the court refused to do; but that proceeding is not within the scope of the Act referred to. To make these exceptions available, they have been brought to the attention of the Court, that the court might remedy the alleged error; and upon failure to do so, the exceptions should have been settled by the Judge, as required by the statute.

The next point is that the findings and judgment are against the evidence. We think there is sufficient evidence to sustain the judgment, and the parties seem to have had a fair

The respondent objects that the notice of appeal was not properly filed and served, and therefore moves to dismiss the appeal. The notice of appeal was filed February 23, 1863. It was dated February 19th, and the affidavit of service states that it was served February 20th, which was three days after it was filed. In *Hastings v. Halleck*, 10 Cal. 31, it was held that the service of the notice of appeal should be made on or at the time of the filing of the notice. This motion is therefore, be sustained.

The appeal is therefore dismissed.

The People v. Francis C. Coffman.

On petition for rehearing. By the Court, SHAFTER, J.

The petition for a rehearing in this cause upon the merits must be denied; but, inasmuch as we have serious doubts as to the correctness of the judgment dismissing the appeal on the ground of alleged defects in the notice, that judgment is vacated, and instead thereof, a judgment affirming the judgment of the District Court is directed.

Petition denied and judgment affirmed.

[The above case was decided at the October term, 1863, by the late Supreme Court, but a rehearing was asked, which was denied by the present Court.—REPORTER.]

THE PEOPLE v. FRANCIS C. COFFMAN.

WAIVER OF ERRORS IN CRIMINAL CASES.—If the defendant, in a criminal action, omits to interpose his objection to any irregularity that occurs in the drawing and impanelling of a trial jury at the time the same occurs, he is deemed to have waived the same, and objections cannot for the first time be raised on a motion for a new trial.

PROOF OF INSANITY IN CRIMINAL CASES.—To establish a defense in a criminal action, on the ground of insanity, it must be clearly proved that at the time of committing the act the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature or quality of the particular act with which he stands charged, or if he did know its nature and quality, that he did not know it was wrong.

SAME — BURDEN OF PROOF OF.—In a criminal case, if the defendant relies upon insanity as a defense, proof beyond a reasonable doubt is not required, but the burden of proof is cast upon him, and his insanity must be established by such a preponderance of evidence that, if the single issue of the sanity or insanity of the defendant was submitted to the jury in a civil case, they would find that he was insane.

APPEAL from the District Court, Eleventh Judicial District, El Dorado County.

The facts are stated in the opinion of the Court.

George G. Blanchard, for Appellant.

In criminal cases especially, the Courts will never affirm a

The People v. Francis C. Coffman.

at where any error has occurred on the trial, for every presumed to be injurious to the prisoner, and he is to a reversal if such error exists; he has a constitutional privilege to stand upon his strict legal rights; his trial proceed upon legal principles, and strictly so. This of the law has been affirmed by this Court in the case *People v. Williams*, 18 Cal. 187. The instruction of the Court below is in derogation of and the converse of the doctrine laid down by this Court in the case of *The People v. Myers*, 20 Cal. 518. Mr. Justice Norton, delivering the opinion of the Court, somewhat modified the doctrine before announced concerning burden of proof, *prima facie* case, and in criminal cases, where insanity is the defense. It is true that the presumption of law is in favor of innocence, yet, when that presumption is fully rebutted, the presumption in favor of innocence would acquit; for, in regard to substantive fact, upon the existence of which a case is made, the evidence establishing such fact being exactly equal in quantity and quality to the evidence disproving the same, by law or logic, the fact is disproved. This reasoning may be adverse to the position assumed for defendant, and the Attorney-General may say you *assert* that the defendant is sane, and unless you can bring more proof to establish that than I can to disprove it, his sanity is established. It might be true did not the defendant occupy a position in which where the preponderance must be against him, and in which all reasonable doubts are in his favor. Therefore the opinion of the Court below that the defendant must make his case appear beyond any reasonable doubt, reverses the rule and compels him to establish his defense and innocence beyond a reasonable doubt. The jury under this charge could believe the defendant insane by preponderating evidence, and have entertained a reasonable doubt of the fact, and been called under the charge to convict. A case can scarcely be conceived where some reasonable doubt might not arise. "It is a tenant in common of the mind with conviction, perhaps reason.

The People v. Francis C. Coffman.

In the case of *The State v. Marler*, 2 Alabama, 43, the Court say, the humanity of our law requires that the guilt of the accused should be fully proved. The jury must be satisfied beyond a reasonable doubt of his guilt or he must be acquitted.

The guilt or innocence of the defendant depends upon sanity or insanity; if insane, he is innocent, and a reasonable doubt of this in the minds of the jury gives to the defendant the *preponderance*. Doubts are never intended to favor guilt. The above charge misled the jury, was erroneous, against law, and therefore entitles defendant to a new trial.

J. G. McCullough, Attorney-General, for Respondent.

The law is: if the evidence of the prosecution leaves doubt any one fact necessary to show defendant's guilt, the defendant is entitled to that doubt and an acquittal. But when defendant is shown, beyond a reasonable doubt, to have committed the act charged, and defendant sets up in defense a separate independent fact to exculpate himself, he must prove that fact beyond a reasonable doubt. Each, in such case, is held to the same measure of proof.

Every man is presumed to be sane. If defendant sets up the distinct fact of insanity, he must prove it, and prove it beyond a reasonable doubt. In this case the State proved the fact of homicide beyond doubt; defendant pleaded insanity, and he is bound to prove it beyond reasonable doubt. This is the charge of the Court, and is the better opinion. (1 Whart. Cr. Law, §§ 55, 711; 1 Bennett & Heard's Leading Criminal Cases, 111.) And this is the rule in England and the Circuit Courts of the United States, and, it seems, in all the States that have passed on the question, except New York and Massachusetts. And, though the Massachusetts Editors of the Leading Criminal Cases (Messrs. Bennett & Heard) incline upon theory to an opinion contrary to the rule established by the great preponderance of authority, their suggestions have been disapproved by this Court, and the true rule affirmed (*People v. Myers*, 20 Cal. 518.)

A man need not possess a "sound mind," in order to render

The People v. Francis C. Coffman.

to punishment. There are many cases of unsound mind that do not exempt from punishment—as intoxication, a deprivation of understanding shown to exist in connection with some other act than the one inquired about—in such cases, the defendant might be of unsound mind upon every subject except the one that instigated the murder; the defendant might have been acting under a delusion at the time of the homicide that deceased intended to steal from him, (as far as far, not of “sound mind,”) and still the law holds him guilty of murder — and so of numberless delusions mentioned in the books.

The court has only to refer to the different heads of “mental unsoundness” in the authorities and text books, to notice that the various classes of “unsoundness” do not relieve from punishment. (Whar. & Stille’s Medical Jurisprudence, 6-60.)

Court, RHODES, J.

The defendant was indicted for the murder of one Deady, and was convicted of murder in the first degree, in the District Court of El Dorado County. The defendant moved for a new trial and in arrest of judgment, both of which motions were overruled, and judgment having been rendered upon the appeal, the defendant appeals.

One of the errors assigned by the defendant is the illegality of the manner of impaneling the trial jury; and to show the illegality he relies wholly upon the affidavit of the Clerk of the District Court, which states that after the regularly summoned jury had been exhausted without completing the trial,

The Court ordered ten special jurors to be summoned, and the trial was completed by calling the special jurors from the list without having their names written upon the ballots taken from a box. The affidavit was filed at the time of the motions for a new trial and in arrest of judgment. The statement in the record, however, respecting the impaneling of the jury is as follows: “This cause coming on for trial, the following named citizens were duly accepted, impan-

The People v. Francis C. Coffman.

neled, and sworn as the jury to try the cause, to wit." And following this, are the names of twelve jurors.

It does not appear from the record of the proceedings, nor from the statement on appeal, that any irregularity occurred in drawing or impanneling the jury, nor does it appear therefrom, or from said affidavit, that the defendant, at the time pointed out any irregularity, or objected to any of the proceedings in drawing or impanneling the jury.

The defendant is entitled to have all the formalities observed that are prescribed by law for the summoning, drawing, and impanneling of the jury, and if any omission or irregularity in that respect occurs, he is entitled to have the same corrected, and if not so corrected upon its being pointed out by the defendant, it is error; but as most of those proceedings are merely formal, and do not affect the substantial rights of the defendant, if he omits at the proper time to interpose his objections to any irregularity, he is deemed to have waived them. They cannot be raised for the first time on a motion for a new trial. He will not be permitted to take the chance of a trial before a jury that he knows has not been impanneled in strict conformity to law, and, after an adverse verdict to move to set it aside on account of an irregularity that he can fairly be deemed to have assented to. This doctrine has been announced by this Court both in respect to grand and trial jurors. (*People v. Roberts*, 6 Cal. 215; *People v. Chua* *Lit*, 17 Cal. 321; *People v. Romero*, 18 Cal. 89.)

Second — The defendant also assigned as error the refusal of the Court to give the instructions asked for by him; but he urges the point only in regard to the following instruction: "The possession of a *sound mind* by the defendant at the time of the homicide, is requisite to constitute murder or any other crime." This proposition is clearly not law. A man's mind may be unsound in many respects—indeed, he may be a monomaniac upon any given subject—and yet his mind may be sound in all other respects. Such a man, though quite capable of judging between right and wrong in regard to an act of the nature of that of which he may be accused, cannot be sa-

possessed of a *sound mind*, yet he would be held responsible for the commission of a criminal act, except in a case where his unsoundness or monomania was involved.

The instruction is too broad and general in its terms, and cannot be satisfied by evidence of slight unsoundness in respect to matters that had not even a remote connection with the subject of the prosecution.

Unsoundness of mind, or insanity, that will constitute a defense in a criminal action is well described by Tindal, C. J., in his answer to questions propounded by the House of Lords to Lord Abinger (cited in Roscoe's Cr. Ev. 953.) He says, "that to establish a defense on the ground of insanity, it must be proved that, at the *time* of committing the act, the party was laboring under such a defect of reason, from disease of the mind, as not to know *the nature or quality of the act*, or that he did know it, that he did not know he was doing *what was wrong*."

It is proper to remark here, that although we have followed the counsel of both parties in treating the above instruction as refused, and have, for the reason that they so treated it, placed it under consideration, there is nothing in the record to show that it was refused, except the marginal notes of the clerk on the transcript. The defendant's instructions are not read and signed by the Judge as refused, and at the end of a list of seventeen unnumbered instructions, which are denominated "defendant's instructions given," are the words, "read and excepted to by the defendant," and those words, which had been signed by the Judge, would be construed as applying only to the last instruction.

The defendant also assigns for error, the giving of the following instruction by the Court: "This defendant is presumed sane until the contrary is shown, and a doubt upon this point alone should not acquit, for insanity is an affirmative defense, and should be made to appear beyond any *reasonable doubt*."

There can be no question, that in a criminal case, if the defendant relies upon insanity for his defense, the burden of

proof is cast upon him, and that the allegation of insanity an affirmative proposition which must be fully and clearly proved in order to rebut the presumption of his sanity; but the only question of difficulty arising upon the instructions respects the amount of proof required to rebut the presumption.

The amount of proof required is neither increased nor diminished, because the evidence for the prosecution first raised the question of the defendant's sanity, and, indeed, a part of the whole proof of the defendant's insanity may result from the evidence offered by the prosecution.

It may be laid down as a general rule that preponderant proof is sufficient to establish a fact in the defendant's favor. This was so held in *People v. Milgate*, 5 Cal. 129; also in *People v. Stonecifer*, 6 Cal. 410.

In cases where insanity was set up as a defense, the decisions have not been as uniform as in respect to other matters of defense.

Mansfield, Chief Justice, in Billingham's case, 1 Collins on Lunacy, 636, says: "To support such a defense, (insanity) it ought to be proved by the most distinct and unquestionable evidence that the person was incapable of judging between right and wrong; that it must be proved beyond all doubt that at the time he committed the act he did not consider that murder was a crime against the laws of God and nature, and that there was no other proof of insanity which would excuse murder or any other crime."

In another case it was held "that the defense of insanity must be clearly made out;" and in a still later case it is said that "every man is presumed to be sane, etc., until the contrary is proved to their entire satisfaction."

Mr. Justice Norton, in delivering the opinion of the Court in the case of *The People v. Myers*, 20 Cal. 518, says: "If the burden of proving the existence of insanity rests upon the accused, it follows that this fact must be satisfactorily established and that is by a preponderance of proof."

In cases where the homicide is clearly established against

Isaac Cook v. Pablo de la Guerra et al.

the defendant, the only object in proving his insanity is to negative the malicious intent of the defendant, presumed by law, from the act of killing; and if it is proved that the defendant was insane at the time of the commission of the act, that presumption is rebutted.

Insanity, then, being a fact to be proved by the defendant, it must be established by evidence in the case with the same firmness and certainty as any other fact alleged by the defendant in his defense; that is to say, the proof must be such in amount, that if the single issue of the sanity or insanity of the defendant should be submitted to the jury in a civil case, they would find that he was insane. (*People v. McCann*, 16 N. Y.

the instruction being erroneous, the judgment must be reversed, and it is ordered that the cause be remanded for a new

ANDERSON, C. J., having been of counsel for the people in Court below, did not sit in the case.

ISAAC COOK v. PABLO DE LA GUERRA, FRANCISCO DE LA GUERRA, MIGUEL DE LA GUERRA, ANTONIO M. DE LA GUERRA, AND CASPAR ORENA.

OFFICE OF.—A statement of facts in a demurrer is not admissible. The only office of a demurrer is to raise issues of law upon the facts stated in the pleading demurred to.

DEFENSE AGAINST.—It is no defense, in an action to foreclose a mortgage upon real estate, that it was executed by the heirs after the death of their father, from whom they inherited the property, and that the deceased left debts which remain unpaid, and that the estate is being administered upon in the Probate Court.

NEW TRIAL ON GROUND OF SURPRISE.—A new trial will not be granted on a showing, alone, of surprise, which ordinary prudence could not have guarded against, but it must also be made to appear that the moving party has a valid defense to some material part of the plaintiff's cause of action, and that on the new trial the result may be different from that on the first trial.

ESTATE BY HEIRS.—FORECLOSURE OF.—The foreclosure of a mortgage, executed by the heirs of the deceased, upon property inherited from him, does not divest or injuriously affect the rights of the creditors of the deceased;

Isaac Cook v. Pablo de la Guerra et als.

but the purchaser at the foreclosure sale will hold the property, subject to the proceedings in the Probate Court, for the settlement of the estate of the deceased.

FINDING OF FACTS — EXCEPTION TO.— A judgment, rendered in an action tried by the Court, without a jury, after the first day of July, 1861, will not be reversed for want of a finding of the facts, unless exceptions be made in the Court below to the want of a finding.

APPEAL from the District Court, First Judicial District, Los Angeles County.

José de la Guerra y Noriega, the father of the defendants, the De la Guerras, died in February, 1858, and by his last will and testament devised the mortgaged premises to said defendants, and made the defendants Pablo and Francisco, his sole executors. The will was admitted to probate, and the executors entered on the discharge of their trust.

The devisees, on the 29th day of May, 1861, executed a note and mortgage upon which this action was brought.

The other facts are stated in the opinion of the Court.

Howard and Sepulveda, and Coffroth & Spaulding, for Appellants.

Charles E. Huse, for Respondent.

Surprise, alone, is no ground for a new trial. It should be such surprise as *ordinary prudence* could not have guarded against. (Wood's Dig. 192, § 193; *Patterson v. Ely*, 19 Cal. 28; *Haight v. Green*, 19 Cal. 113; *Mulholland v. Heynema*, 19 Cal. 605; *Malhom v. Hyde*, 3 E. D. Smith, 177; *Fowler v. Colyer*, 2 E. D. Smith, 125; *Babcock v. Brown*, 2 Vermont 550.)

By the Court, RHODES, J.

The complaint in this case is in the usual form of complaints for the foreclosure of mortgages of real estate. All of the defendants except Orena demurred to the complaint on the grounds that there is a defect of the parties defendant and that the complaint does not state facts sufficient to constitute a cause of action.

Isaac Cook v. Pablo de la Guerra et al.

es not appear upon the face of the complaint that a defect of parties, but the defendants, in order to the defect apparent, allege as facts that the mortgaged are a portion of the estate of José de la Guerra y , and that the estate is unsettled, and that for that rea- creditors, claimants, and legatees of the estate are y parties to the action.

mode of pleading is inadmissible under any system, for the office of a demurrer to state facts, but to raise an law upon the facts stated in the pleading demurred to. second ground is not well taken, for the complaint does the facts that are necessary in a complaint to fore- mortgage.

defendant Orena filed a separate answer, and Pablo, co, Miguel, and Antonia Ma. de la Guerra, filed a joint in which they set up substantially the same defense, s that the mortgaged premises belong to the estate of la Guerra y Noriega, deceased, which remains in the Court unsettled, and that the creditors and legatees deceased are unpaid, and that Orena, on the 16th of , 1861, (which was subsequent to the mortgage,) pur- of the other defendants, who are the sons of said l, all their right, title, and interest in and to the estate deceased; but they do not deny the execution or de- f the promissory notes by the De la Guerras to the , nor that the amount alleged in the complaint is due them to plaintiff, nor that they executed and deliv- e mortgage to secure the payment of the notes. Upon ring, the Court rendered a decree of foreclosure and the mortgaged premises, and a personal decree against la Guerras for the deficiency that might remain after ion of the proceeds of sale to the payment of the e, debt, and costs.

ne day following the entry of the decree, all the defend- ept Orena moved for a new trial on the ground of sur- The motion was heard upon the affidavits of the attor- the parties, and was overruled. Pablo de la Guerra

Isaac Cook v. Pablo de la Guerra et al.

states that he was the attorney of all the defendants except Orena; that on the 9th day of November, 1863, he received notice that the case would be brought on to trial on the 1st of the same month; that on the 13th of November he wrote from Santa Barbara to Ygnacio Sepulveda, an attorney at Los Angeles, where the cause was tried, to appear for him and procure a postponement of the trial; that Sepulveda did not receive the letter until seven o'clock p. m. of the 17th of November—the decree having been rendered on that day—before the receipt of the letter.

The defendants fail to state what were the grounds for the continuance of the cause, and do not allege that they had any other or further defense to the action than they have set up in their answers; but if they had stated in their affidavits a good and meritorious defense, this Court would not reverse the action of the court below, in refusing to grant a new trial, unless there was a gross abuse of discretion.

It does not clearly appear that the surprise was such that ordinary prudence on the part of the parties or their attorneys could not have guarded against it. It requires, however, something more than a showing of surprise which ordinary prudence could not have guarded against. The Court will not set aside a decree and grant a new trial, on behalf of a defendant, merely for the purpose of going through the form of a trial in the presence of the defendant or his attorney, but it must be made to appear that on the new trial a result may be different from that on the first trial; in other words, the defendant must disclose a valid defense to some material part of the plaintiff's cause of action.

The defendants have failed to disclose any defense other than that better than that set up in their answers. If the defendants had appeared and proved on the trial all the affirmative allegations contained in their answers, it would not have changed the result of the action. As already stated, the answers do not deny any material allegation in the complaint, but rest upon the fact that the mortgaged property formed a part of the unsettled estate of the deceased father of the defendant.

Ex parte Gregory Yale.

de la Guerra, which is subject to the payment of certain debts and legacies. Those matters could not be litigated in this action.

The decree expressly saves the rights and liens of the executor of said estate; but even if that reservation had not been made, the foreclosure of a mortgage executed by the testator or devisees of the deceased could not divest or injuriously affect the prior rights of the creditors or legatees of the deceased. The purchaser at the foreclosure sale will acquire no greater or higher right in the mortgaged premises than the mortgagors held, and the property in his hands will be subject to the orders and proceedings of the Probate Court as fully in all respects as if the mortgage had not been foreclosed.

The last error assigned by the defendants is that the Court failed to find a separate finding of the facts and conclusions. It is provided by section two of "An Act to regulate appeals in this State," approved May 20, 1861, that no judgment shall be reversed for the want of a finding unless exceptions be made therefor in the Court below. No exceptions were taken to the want of a finding, therefore the Court will disregard the alleged error, and cannot by reason of it reverse the judgment. The judgment is affirmed.

EX PARTE GREGORY YALE.

CONSTRUCTION OF.—The terms "office," and "public trust," as used in section three, Article XI, in the Constitution of this State, have reference only to such duties and responsibilities as are of a public nature.

ATTORNEY AT LAW.—An attorney at law is not an officer, nor does he hold a "public office" or "public trust," in the constitutional sense of those terms.

SUBJECT TO LEGISLATIVE CONTROL.—The manner, terms, and conditions of an attorney's admission to practice, and of his continuing in practice, as well as his powers, duties, and privileges, are subject to legislative control, the same as any other profession or business that is created or regulated by statute.

OATH OF.—The Legislature may lawfully require, as a condition precedent to an attorney's admission to practice, or his continuance in practice, the taking of the oath of office.

Ex parte Gregory Yale.

the taking of the oath prescribed in the Act of April 25th, 1863, entitled "An Act to exclude traitors and alien enemies from the Courts of justice in civil cases." (*Cohen v. Wright*, 22 Cal. 293, affirmed.)

The facts are stated in the opinion of the Court.

By the Court, RHODES, J.

Gregory Yale, the attorney for the appellants in the case of *Lent v. Morrill et al.*, now pending in this Court, filed a motion in writing to submit the said case to the Court on the briefs on file, which motion is as follows:

"*Lent v. Morrill et al.*—SUPREME COURT, January Term, 1864.—Gregory Yale, an attorney of this Court, having been admitted as an attorney and counsellor of this Court since its organization under the Constitution of the State, and having taken the oath to support the Constitution of the United States and of the State of California, and otherwise conformed to the rules of this Court as an attorney, now moves the Court to submit the case to the Court on the briefs on file, by consent of the attorney for the respondent.

"GREGORY YALE, for Appellants.

"Sacramento, February 11, 1864."

Whereupon, John F. Swift, one of the attorneys for the respondent, made and filed his objection in writing to the appearance of said Gregory Yale as an attorney at law, which objection is as follows:

"Gregory Yale, not having taken the oath prescribed by the Act of the Legislature, approved April 25, 1863, entitled 'An Act to exclude traitors and alien enemies from the Courts of justice in civil cases,' as an attorney has no right to appear in the above entitled cause, for the purpose of said motion, and I object to his appearance in the capacity of attorney until he takes the said oath.

"JOHN F. SWIFT, for Respondent."

Yale appeared in person, and having admitted he had not

Ex parte Gregory Yale.

taken the oath prescribed by said Act of the Legislature to be taken by attorneys at law, contended that the Act referred to in the objection interposed by Swift was unconstitutional, and, therefore, void.

The questions arising upon this proceeding were fully argued, both orally and in briefs, before the Supreme Court in the case of *Cohen v. Wright*, 22 Cal. 293, and though a very elaborate opinion was rendered by Mr. Justice Crocker, which was concurred in upon the most material points by Mr. Justice Norton, it was considered proper to permit the questions to be again argued upon the motion and objection in writing, as there was no record in this Court of the motion or proceeding upon which the opinion in the case of *Cohen v. Wright* was rendered.

No brief has been filed by Gregory Yale, or by the Attorney-General, who appeared in support of the objection of Swift, and it is not deemed necessary to discuss in detail the several propositions urged in argument, but it will be sufficient to announce the conclusions of the Court upon those propositions that are decisive of the question as to the constitutionality of the Act referred to, so far as the same relates to attorneys at law.

The term "office" and "public trust," as used in section 3, Article XI, of the State Constitution, are nearly synonymous—at least the term "public trust" is included in the more comprehensive term "office." Those duties and responsibilities of a public character that are temporarily or specially devolved upon persons, may be more appropriately denominated public trusts than offices; yet the persons discharging such duties or assuming those responsibilities are officers. The form of the oath prescribed by the Constitution, as the only oath to be taken by officers and persons executing public trusts, the last part of which is: "That I will faithfully discharge the duties of the office of — according to the best of my ability," clearly indicates, that the person who executes a public trust, was deemed by the Constitution to be an officer.

The terms "office," "office and public trust," as employed

Ex parte Gregory Yale.

in the Constitution, have relation only to those persons and duties that are of a public nature. This subject was ably considered by the Supreme Court of New York, (in the matter of oaths to be taken by attorneys and counsellors, 20 John. 492,) in which a question arose whether the Act to suppress duelling, passed in 1816, had been repealed by the Constitution adopted in 1821. The oath required by that Constitution was in every essential particular the same as that in ours, and was prescribed for the same class of officers. The Act to suppress duelling required every officer, (with certain exceptions,) and every person who should be admitted as a counsellor, attorney, or solicitor, to take the oath that he had not been engaged in a duel, etc. Mr. Justice Platt, in that case, says: "The point is simply whether an attorney or counsellor holds an office or public trust, in the sense of the Constitution. * * * In my judgment, an attorney or counsellor does not hold an office, but exercises a privilege or franchise. As attorneys or counsellors they perform no duties on behalf of the Government—they execute no public trust."

An officer, as defined by Webster, is "a person commissioned to perform any public duty." An attorney at law is not such an officer; and, in our opinion, he is not an officer in the constitutional sense of the term, and does not hold a public trust. On this point we fully concur with Justices Crocker and Norton, in *Cohen v. Wright*.

The manner, terms, and conditions of their admission to practice, and of their continuing in practice, as well as their powers, duties and privileges, are proper subjects of legislative control to the same extent and subject to the same limitations as in the case of any other profession or business that is created or regulated by statute.

It is held by this Court in *People v. Coleman*, 4 Cal. 46, and confirmed in many subsequent cases, that "the Constitution of this State is not to be considered as a grant of power, but rather as a restriction upon the power of the Legislature; and that it is competent for the Legislature to exercise all powers not forbidden by the Constitution of the State, or delegated

John Doran et al. v. Central Pacific Railroad Company.

to the General Government, or prohibited by the Constitution of the United States." There is no provision of the Constitution directly restricting the Legislature from exercising plenary control over the qualifications, admission, oath, or duties of attorneys at law, and in our opinion no such restriction arises by implication; and it therefore follows that the Legislature may lawfully require, as a condition to their admission to practice, or their continuance in practice, the taking of the oath prescribed in the Act under consideration, or, at their pleasure, may dispense with all conditions and oaths.

It is therefore ordered that the said objection of the said Swift be sustained, and that the said Gregory Yale be not permitted to practice in this Court as an attorney at law until he shall have taken and filed in the office of the County Clerk of the county in which he resides, the oath prescribed for attorneys at law in the above mentioned Act.

JOHN DORAN AND WILLIAM WILSON *v.* THE CENTRAL PACIFIC RAILROAD COMPANY.

CENTRAL PACIFIC RAILROAD — RIGHT OF WAY OF.—The right of way over a strip of land two hundred feet in width on each side of its road, granted to the Central Pacific Railroad Company by the second section of the Act of Congress, passed July 1st, 1862, extends to and covers all public lands, whether mineral or not.

SAME — MINERAL LANDS.—The proviso to section 3 of said Act, excepting mineral lands from its operation, refers to the alternate sections granted to said company, and has no reference to the grant of the right of way in section 2.

PUBLIC LANDS — CONTROL OF.—The General Government is entitled to the possession of and all the beneficial interest in the public lands, and its grantee takes the same subject to no conditions, except such as are expressed in the grant.

MINERAL LANDS — OCCUPANTS OF.—Mere occupants of the mineral lands, who have entered upon the same for mining or other purposes, have no title or right under which they can maintain possession, as against the United States or its grantee.

POWER OF STATE OVER PUBLIC LANDS.—The State of California has no power to interfere with the public lands within its limits, or grant a license or permission to occupy the same.

PUBLIC LANDS — HOW SOLD.—The only manner in which the right, title, or interest of the United States in or to any of the public lands can pass to or vest in any private person is by means of an Act of Congress directly making the grant, or authorizing the grant to be made in their behalf by some person or officer.

John Doran et al. v. Central Pacific Railroad Company.

SAME — PRESCRIPTION — ADVERSE POSSESSION.— No title to the public lands, whether mineral or otherwise, will accrue to any person against the General Government by prescription, adverse possession, or by estoppel *in pais*.

SAME.— No presumption of a grant will arise as against the United States, but the legislative grants, or the letters patent, or something that is made by law their equivalent, must be produced.

RIGHTS OF POSSESSOR OF PUBLIC LANDS.— A naked possessor of public lands is deemed in law the owner of the same, until the General Government, or a person showing title under it, makes an entry upon the same, and when this is done, the right or claim of the possessor must yield to the paramount authority of the United States, or its grantee.

RIGHT OF WAY OF CENTRAL PACIFIC RAILROAD COMPANY.— The grant by Congress of the right of way over the public lands to the Central Pacific Railroad Company, vests in the company the full and ample right to enter upon the four hundred feet in width and use the same for railroad purposes, and a mere naked possessor cannot prevent such entry, or recover damages for an injury necessarily done to his possession or improvements by such entry.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

The facts are stated in the opinion of the Court.

George R. Moore and J. K. Alexander, for Appellants.

We admit that the Government is the owner of the fee in this land, but we contend that the policy of the United States and this State has been, and is, to invite and encourage settlements upon the public domain, and that such settlers in good faith ought to be and will be protected in their possession and improvements.

In 1850 the Legislature of this State passed a law for the better regulation of the mines and the government of foreign miners, giving, by necessary implication, whatever rights the State might have in the minerals in the soil, and the right to mine, to all native born or naturalized citizens of the United States who may wish to toil in the gold placers. The 621st section of the Practice Act would seem to imply the same right. (*McClintock v. Boyden*, 5 Cal. 97.)

In the case *Irwin v. Phillips*, 5 Cal. 146, in discussing this subject, this Court said: "Courts are bound to take notice of the political and social condition of the country which they judicially rule. In this State, the larger part of the territory

John Doran et al. v. Central Pacific Railroad Company.

consists of mineral lands, nearly the whole of which are the property of the public. No right or intent of disposition of these lands has been shown, either by the United States or the State Government; and, with the exception of certain State regulations, very limited in their character, a system has been permitted to grow up by the voluntary action and assent of the population, *whose free and unrestrained occupation of the mineral region has been tacitly assented to by the one Government, and heartily encouraged by the expressed legislative policy of the other.*"

"When we consider the current and the spirit of the legislation of both Governments, (State and National,) taken in connection with the history and the known circumstances of the country, the conclusion is irresistible that the mines are occupied and worked with the clear assent and encouragement of both Governments. And while the terms of this license, and the relation which the miner sustains to the superior proprietor, may not be expressly laid down, and the duration of the estate not clearly designated by any positive law, and we may not, for these reasons, be able to give any exact definition of the precise nature of the right, yet, one thing is well understood and indisputable, *they are there by the clear license of both Governments, and have such a title as will hardly be divested, even by the act of the superior proprietor.*" (*Merced Mining Co. v. Fremont*, 7 Cal. 326; *Conger v. Weaver*, 6 Cal. 555.)

No necessity can arise where the public weal is not involved that will justify a railroad company in taking the property of private individuals for its own use, without paying a just and adequate compensation therefor. The plea of necessity urged by defendant in justification of its acts is inconsistent with a claim of right or title in itself, and necessarily admits the title and interest of the plaintiffs. (10 Conn. 23.)

The defendant also claims the right to take and use this land and improvements, under the Act of Congress approved July 1st, 1862.

By the second section of this Act, it is provided, "that the right of way through the public lands be and the same is

John Doran et al. v. Central Pacific Railroad Company.

hereby granted to said company, for the construction of said railroad and telegraph line," etc.

By section third of said Act, it is provided, "that there be and there is hereby granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line," etc., "every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said road; on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed; *provided, that all mineral lands shall be excepted from the operations of this Act.*"

This language seems to be plain and explicit. All the rights and privileges granted by this Act of Congress to the railroad company, so far as mineral lands are concerned, are excepted and reserved.

If the law referred to did not except mineral lands, it would be, in most respects, similar to the Act of Congress of 1852, giving to all railroad companies the right of way over public land for ten years from the date of its passage. This law was directly involved and passed upon by this Court in the case of the *Northern Railroad Co. v. Gould*, 21 Cal. 259. In this case, Mr. Justice Norton, who delivered the opinion of the Court, said: "But the Act of Congress does not, in terms, grant any other estate or right which pertains to the United States as proprietor of the public lands. It was, doubtless, the purpose of the Act merely to give a right to enter upon the public lands, assuming them to be vacant. The action was brought by the Northern Railroad Company against the parties in possession, to compel them to acknowledge the right of the company to cross their lands for railroad purposes. The Court below decided, 'that the defendant could not be deprived of his right of property, resulting from his possession, without compensation, to be ascertained as provided by the railroad Act of this State.'"

John Dorn et al. v. Central Pacific Railroad Company.

E. B. Crocker, for Respondents.

The proposition is too clear to be disputed that the fee simple title of the mineral lands of this State is vested in the United States. This principle has been fully recognized by this Court in all its adjudications upon the various questions relating to the rights of miners and other occupants of the mineral lands. While such miner and occupant is treated as between himself and all other persons but the United States as the owner of the land and the mine, yet the title of the National Government to the land and the mines, and its right to dispose of the same, has been fully recognized. (*Irwin v. Phillips*, 5 Cal. 146; *Tarter v. Spring Creek Co.*, 5 Cal. 395; *Hoffman v. Stone*, 7 Cal. 46; *Merced Mining Co. v. Fremont*, 7 Cal. 324, 327; *McKeon v. Bisbee*, 9 Cal. 142; *Hughes v. Devlin*, 23 Cal. 501.)

The Act of Congress provides that all persons entering or settling upon land of the United States, until duly authorized by law, shall forfeit all right to the land, and may be removed by the United States Marshal, by order of the President. (2 U. S. Stat. at Large, 445.)

Our next proposition is, that the superior proprietor, the Government of the United States, has, for great National purposes, granted the right of way to the defendants over all the public lands, including mineral lands: First—by the Act of Congress of August 4, 1852. (10 U. S. Stat. at Large, 28.) Second—by the Pacific Railroad Act. (12 U. S. Stat. at Large, 491.) By the Act of 1852, the right of way *over all public lands* is granted to all railroad companies chartered within ten years after its passage. The defendants were incorporated in 1861, prior to the Act of July 1, 1862, and less than ten years after the Act of 1852, and are, therefore, entitled to the benefits of this law.

By section 2 of the Pacific Railroad Act, the right of way through the public lands is granted to the Union Railroad Company four hundred feet wide, including land for all neces-

sary depots, workshops, etc., and the United States agree to extinguish the Indian title thereto.

By section 9, the defendants are authorized to construct a railroad line in the State of California, "upon the same terms and conditions, in all respects," as the Union Railroad Company.

Both of these Acts contain a direct and positive *grant* from the United States, the owner of the land, of the right-of way over the public lands. Under these Acts the defendants claim the right to enter upon the premises occupied by the plaintiffs, for the purpose of constructing their railroad, and that the possession and occupation of the plaintiffs, and their claim to the mines thereon, were subordinate and subject to these grants made to the defendants.

As has already been shown, the plaintiffs have no title whatever to this tract of mineral land, as against the United States and those claiming under them, and it follows that they can claim no damages for any alleged injury to the mines or improvements, or the trees growing thereon. They form part of the land, and are subject to the same rule which relates to the land itself.

Damages are allowed under the Railroad Act of this State only to those having some *title* to the lands over which the road runs. Under sections 28 and 30 of the Act of 1861, (Stats. of 1861, p. 607,) the assessment of damages is to those "having or holding any right, title, or interest" in or to the tract sought to be appropriated for railroad purposes. The claimant, therefore, must have some estate in the land to entitle him to compensation. A mere occupancy without title is insufficient to found a claim for compensation. The mineral lands being excepted out of the pre-emption laws, the claim of the plaintiffs is a mere naked possession, without right, title, or interest, as against the United States and those claiming under them, and they are not, therefore, entitled to compensation under the State Railroad Law. No compensation is allowed for anything but the *title* to the land, or to any person but the owners of some title. In this respect our statute

John Doran et al. v. Central Pacific Railroad Company.

conforms to the established rules of law upon this subject. (Redfield on Railways, 141, 142; Pierce, R. R. Lgw, 212.)

The next question is, were the plaintiffs entitled to an injunction, even if entitled to compensation? The granting of injunctions in cases like this, where great public interests are involved, is not a matter of absolute right, but depends upon a consideration of all the equities of the case.

Thus, an injunction was refused against a canal company, who, in enlarging their canal, which they had a legal right to do, raised the water of a creek by a dam, and thereby injured plaintiffs' mill. It was held that the latter had an ample remedy at law, and that it was not every case, even of a clear violation of the plaintiff's rights, that would entitle him to an injunction. He must first clearly show that the act itself is illegal. (*Bruce v. The Delaware and Hudson Canal Co.*, 19 Barb. 371; see, also, *Hentz v. L. I. R. R. Co.*, 13 Barb. 647; *Ely v. City of Rochester*, 26 Barb. 133; *Creamor v. Nelson*, 23 Cal. 464; *Harper v. Richardson*, 22 Cal. 251.)

By the Court, RHODES, J.

This is an action to recover damages for a trespass upon a tract of land claimed by the plaintiff, and for an injunction to restrain the defendant from injuring the said land, and a quartz lode, mining claim, and growing trees thereon. The defendant justifies under the right of way granted to said railroad company by the Act of Congress, passed July 1, 1862. (12 United States Statutes at Large, p. 489.)

It appears from the statement of facts, as agreed to by the parties, that the plaintiffs are in possession of the tract of land described in the complaint, and have thereon the improvements as stated by them; that the land is mineral land, containing mines of gold; that the title in fee simple to the lands is now in the United States, and has continued so to be since the cession of California to the United States by Mexico by the treaty of Guadalupe Hidalgo; that the defendant is duly incorporated under the laws of this State and of the United States, under the name and style stated in the answer, and is

John Doran et al. v. Central Pacific Railroad Company.

entitled to all the rights and privileges conferred on said railroad company by the said Act of Congress and the laws of this State; that said company has duly located the line of the road across the said lands; that the company has not taken or used, and does not intend to take or use, any more of the said lands than are necessary for the construction of said road, and have done no other damage than was necessary in the construction of said railroad.

The Court, upon the hearing, refused to grant the injunction, and rendered judgment dismissing the complaint.

The errors assigned by the appellants are resolvable into two questions:

1. Has Congress granted the right of way for the railroad and telegraph line over the mineral lands? And,

2. Have the appellants any right, title, or interest, in the tract of land in controversy of such a nature that they can recover damages against the defendant for the entry upon the lands, in pursuance of the grant of the right of way, or can they enjoin the railroad company from proceeding over the land, notwithstanding the grant of Congress?

By section 1 of the Act of Congress above mentioned, "The Union Pacific Railroad Company" is organized, and by section 2 it is enacted that "the right of way through the public lands be and the same is hereby granted to said company for the construction of said railroad and telegraph line," to the extent of two hundred feet in width on each side of the railroad where it may pass over the public lands, with a right to take the stone, timber, etc., from the adjacent lands for the construction of said railroad. It is also provided, in section 9 of said Act, that "the Central Pacific Railroad Company of California, a corporation existing under the laws of the State of California, are hereby authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento River, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this Act for the construction of said railroad and telegraph line first men-

John Doran et al. v. Central Pacific Railroad Company.

tioned." This section thus grants to the defendants the right of way over the public lands to the same extent as it is granted by section 2 to the Union Pacific Railroad Company.

It is contended by the appellants that the right of way was not granted by Congress to either of said companies over the mineral lands of the United States, but that the grant is confined to other public lands, and in support of that position, they rely upon the words of the proviso of section 3. That section, after making the grant of the alternate sections of the land, with certain reservations therein expressed, contains the proviso "that all mineral lands shall be excepted from the operation of this Act; but when the same shall contain timber, the timber thereon is hereby granted said company." But there is no exception in section 2 reserving the mineral lands from the operation of the grant of the right of way over the public lands.

The grand object of the Act is to procure the construction of a railroad and telegraph line from the Pacific coast to the Missouri River, not only as a great public enterprise, but for the direct benefit of the General Government, and for that purpose, and to aid in the construction of those works, the General Government has not only granted the right of way and the alternate sections of land, but has loaned its credit in a large amount to the companies engaging in the construction of those works.

It will be observed that it is provided by section 6 that these several grants of land, credit, and the right of way, are made upon the express condition that the company receiving the grants shall perform certain services for the General Government, and shall give the preference in the use of the railroad and telegraph line to the Government. The intention of the Government that the Missouri and the Pacific should be united by a continuous railroad and telegraph line is manifest from the whole tenor and spirit of the Act.

But, if the construction of the proviso of section 3, contended for by the appellants, could be maintained, it would be practically impossible to construct the railroad or telegraph

line under said Act while the present policy of Congress prevails of reserving the mineral lands from sale, for it would be manifestly impossible to run the line of the railroad or telegraph across the Sierra Nevada Mountains, by any route, without passing over public mineral lands.

The company cannot procure the right of way from the appellants, for the obvious reason that they have no title that is sufficient to enable them to make any grant.

The result that would ensue if the proposition contended for by the appellants could be maintained, would be that the company would be obliged to delay at the foot of the mountains until Congress shall change its policy, and bring the mineral lands into market, and until the lands shall have been sold by Congress, and the right of way shall have been procured by the railroad company from the purchaser.

Such a result is clearly in conflict with the meaning and intent of the Act as would practically defeat its operation, so far as California and Nevada are concerned.

But, in our opinion, that construction of the proviso is not warranted in view of the obvious meaning of the section and the plain intention of the whole Act. The first portion of the section sets forth the grant of the alternate sections, without any mention of or reference to the right of way, and immediately following that portion of the proviso above quoted, the section states that "all such lands so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company." This is substantially a condition annexed to the grant of the lands to the company that the company shall grant the right of pre-emption to its unsold lands, after the expiration of a time limited in the Act. Congress does not purport by the Act to grant to the company the lands over which the right of way is granted, and it would be contrary to all reason to presume that Congress intended

John Dohan et al. v. Central Pacific Railroad Company.

to direct or authorize the company to extend the right of pre-emption to lands not granted to it.

It was, perhaps, necessary in framing the proviso to employ the term "this Act," instead of the words "this section," inasmuch as by the ninth section, two other companies are authorized to construct railroads and telegraph lines "upon the same terms and conditions in all respects" as are contained in the Act for the construction of the railroad and telegraph line by the Union Pacific Railroad Company. Upon the construction of the whole section, in connection with the plain meaning of the Act, it is apparent that the proviso has relation only to the alternate sections granted, and not to the lands over which the road might pass under the grant of the right of way.

2. Have the appellants such right, title, or interest in the lands in controversy as will entitle them to the relief sought in this case?

It is admitted that the title in fee simple to the lands is in the General Government. That fact being established, the legal presumption arises that the General Government is entitled to the possession, as well as the whole beneficial interest, and that the grantee of the Government takes and holds whatever interest therein the Government purports to grant, subject to no conditions other than those expressed in the grant. The fact as admitted, and the consequent conclusions of law as to the right to the possession, casts upon the appellants the burden of overcoming the presumption and proving that they are entitled to the possession, or hold some other right, title, or interest in the land, derived under or through the United States.

In the complaint, the plaintiffs allege that they are, and have been since 1859, the owners in fee and in the actual possession of the premises, but they set up no other right in the land. The allegation of the ownership of the plaintiffs is denied in the answer. It does not appear from the agreed statement of facts, or the findings of the Court, that the plaintiffs have any right in the land, but simply that they have the present possession.

John Doran et al. v. Central Pacific Railroad Company.

The mere statement of these facts affords a complete answer to the question as to whether the plaintiffs are entitled to the relief they have prayed for in the complaint.

But in order to obviate the apparently inevitable conclusion resulting from these facts, that the appellants do not hold any right in the lands that will enable them to prevent the defendants from entering, in pursuance of the grant of the right of way, or that will entitle them to recover damages for the entry, the appellants say that the Court found that the lands in controversy were public mineral lands of the United States, and they earnestly urge that, by the policy of the United States and this State — by the *tacit consent* of the United States, and the hearty encouragement of this State, and by the *clear license* of both Governments, all citizens are encouraged and permitted to enter upon the public lands of the United States, and occupy them for agricultural and mining purposes; and that when they have entered into possession for these purposes, they, by means of such entry, or by some mode not very fully expressed or accurately defined, acquire and “have such a title as will hardly be divested, even by the act of the superior proprietor.”

Does the mere occupant of the public lands hold this undefined title of such a character that he can maintain the possession as against the United States or their grantees? It is scarcely necessary to say that the policy, the encouragement, the license, or even the grant of this State, cannot confer upon any person any right in the lands of the United States. The General Government does not hold its lands as a mere private proprietor, but its control and power of alienation and disposition of its lands are uncontrolled, save by the Constitution of the United States alone. By the Act admitting California into the Union, it is provided that “the people of said State, through their Legislature, or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to and right to dispose of the same shall be impaired or questioned.”

John Doran et al. v. Central Pacific Railroad Company.

The claim asserted by the appellants on behalf of the State, of the power to grant or license to occupy the public lands of the United States, is scarcely consistent with the Act of Congress for the admission of California into the Union, if it is meant thereby that the license is valid for any purpose, as against the United States or any one entering or holding under a right, title, or license granted by the General Government. The doctrine laid down in *Hicks v. Bell*, 3 Cal. 227, and partially affirmed in a few of the earlier cases in the late Supreme Court—that the mines of gold and silver in the public lands are the property of the State—is without foundation.

The occupation of the public lands, under the policy of the United States respecting their settlement, and with their tacit consent, it cannot be contended will give a right of possession as against the United States or their grantee; but there must be some right of a higher order conferred upon the occupant—at least a title to occupancy must be shown.

The only manner in which the right, title, or interest of the United States in or to any of the public lands can pass to or rest in any private person is by means of an Act of Congress directly making the grant, or authorizing the grant in their behalf to be made by some person or officer. No title will accrue to any person against the General Government by prescription, by adverse possession, or by estoppel *in pais*.

No presumption of a grant will arise as against the United States, but the legislative grants, or the letters patent, or something that is made by law their equivalent, must be produced. This view of the position of the naked possessor of the public lands does not conflict with the current of the decisions of this Court recognizing and affirming his right to be protected in his possession against trespass or intrusion, for he is deemed in law the owner as against all the world, until the General Government, or a person showing legal right or title under it, makes entry upon the lands; but his right or claim must yield to the paramount authority of the United States, or the demands of the grantees.

But it is said by the appellants that the questions discussed

John Doran et al. v. Central Pacific Railroad Company.

in this case have been decided in favor of the occupant in *California Northern Railroad Company v. Gould*, 21 Cal. 254. In that case the premises did not appear to be mineral lands, and Mr. Justice Norton, in delivering the opinion of the Court, after stating that the Government "may give him (the occupant) a pre-emption privilege," says: "There is scarce a doubt but this defendant will ultimately become the owner of one hundred and sixty acres of land he occupies, with all the improvements, upon paying the Government price of the unimproved land." In the present case the premises are mineral lands, and, under the laws of Congress, (10 U. S. Statutes at Large, p. 246, Sec. 6,) are not subject to pre-emption. In that case it was not found by the Court below that the lands were public lands. If they were public lands, and the occupant had acquired such rights therein that Congress would be bound to respect his possession, the railroad company could not acquire the right of way without making "just compensation" therefor; but if such rights had not accrued to the occupant in that case, and if the Act of Congress referred to in that case, (10 U. S. Stats. at Large, p. 28,) did, in effect, grant the right of way over the public lands to the railroad company, then the decision in that case cannot be sustained without impairing the right of the United States to dispose of their public lands; and in that view the decision is not sustained by the case cited, in the opinion of the Court—(*Robbins v. Milwaukee and Horicon R. R. Co.*, 6 Wis. 636)—for in the case cited the lands were not found to be public lands, nor did the railroad company claim a grant by Congress of the right of way; but the action was an appeal by a person in possession of a tract of land from the award of damages made by Commissioners for the value of his land taken by the company for the use of their railroad. The proceedings were commenced under the statutes of the State providing for railroad companies taking the lands of private persons for the use of the railroad, upon their making compensation and paying damages; the land so taken being deemed to be taken for public use. The Court held that "to enable the plaintiff to

John Doran et al. v. Central Pacific Railroad Company.

recover he must show some title. * * * There can be no presumption of title in a proceeding of this kind; it must be shown, and compensation awarded accordingly." The claimant was in possession, no title being found in the United States, and he was entitled to damages for the injury to his possession.

Proceedings under the statute of this State to procure the right of way over the premises in this case are useless, and would be nugatory if Congress had the power to make the grant of the right of way, for if Congress had the entire title, the grant is complete without the intervention or aid of any person or authority whatsoever. If the theory and arguments of the appellant are correct and sound, the company, in order to acquire the right of way over mineral lands now unoccupied, would be obliged to procure some one to enter into possession of each several parcel, for the simple purpose of buying from them the right of way, and after that had been done, the company would be trespassers against the United States.

A construction of the powers of Congress in making grants, and of the meaning of the Pacific Railroad Act, that will lead to such absurd consequences, should not be adopted unless it is clear and imperative.

In our judgment, the grant by Congress of the right of way over any portion of public land to which the United States have title, and to which private rights have not attached under the laws of Congress, vests in the grantee the full and complete right of entry for the purpose of enjoying the right granted, and no person claiming in his own right any interest in the lands can prevent the grantee from entering, in pursuance of his grant, or can recover damages that may necessarily be occasioned by such entry.

The judgment is affirmed.

Salmon v. Symonds et al.

FRANCIS SALMON v. ALFRED SYMONDS, S. D. HATHAWAY, A. W. THOMPSON, JOHN J. ELLIS, S. R. DICKEY, WM. D. BLISS, PETER SHELFORD, N. GREY, O. B. MATHEWS, J. F. EATON, GEORGE GANLIE, H. H. RALSTON, J. JAKES, E. MULLEN, G. GILL, AND A. J. MAYFIELD.

POSSESSORY ACTION — PLEADINGS IN.—A complaint in a possessory action to recover land, which avers an ownership and seisure in fee in the plaintiff of the demanded premises, and an ouster by the defendant on a day named, before the commencement of the action, is sufficient, without the further averment that the plaintiff is the owner in fee at the commencement of the action.

APPEAL from the District Court, Seventh Judicial District, Sonoma County.

The facts are stated in the opinion of the Court.

John Currey, for Appellant.

The plaintiff in ejectment must show that he has such an interest in the demanded premises as entitles him to the possession thereof, and that at a time anterior to the commencement of the suit the defendants entered and ousted him therefrom, and have from thence continued to withhold the possession thereof from him.

In the State of New York, the use of fictitious names of plaintiffs and defendants, and the names of any other than the real claimants and real defendants, and the statement of any lease or demise to the plaintiff, and an ejectment by a casual or nominal ejector, was abolished by statute, (2 R. S. 304, § 6,) and in that State, as well as in this, an action of ejectment must be prosecuted in the name of the real party in interest. In New York, before the adoption of the code of that State, as well as since, the forms of complaint in ejectment which stood the test of the judgments of their highest Courts, as to the question involved in this case, are, in substance and effect, the same as the complaint in the case at bar.

In Yates' Pleadings and Practical Precedents, 481, 482. the stating part of the declaration is in the following form:

Salmon v. Symonds et al.

"For that whereas the said plaintiff, on the — day of —, in the year —, was possessed of a certain dwelling house and garden, [describing the premises,] and the said plaintiff being so possessed thereof, the said defendant, afterwards, to wit, on the — day of —, in the year —, entered into said premises and ejected the plaintiff therefrom, and unjustly withholds from the plaintiff the possession thereof, to the damage of the plaintiff of — dollars, and therefore he brings his suit." (See, also, 1 Humphrey's Precedent, 26, 27; also, the declaration in *Sigler v. Van Riper*, 10 Wend. 415, and what the Court says of it, at pp. 417, 418.)

In 2 Van Sanford's Pleadings and Forms, under the New York Code, the form given for a complaint in ejectment is, after the title of the case, as follows: "The plaintiff complains of the defendant, and states the following facts constituting his cause of action: That on and after the 25th day of October, 1828, he was lawfully possessed of the premises and land hereinafter described, in the Town of Greenbush, County of Rensselaer, claiming to hold the said premises in fee; and being so possessed, the defendant, afterwards, to wit, on or about the *first* day of January, 1840, entered into such premises, and that he unlawfully withholds from said plaintiff the possession thereof, to the plaintiff's damage of one hundred dollars." Then follows a description of the premises and a prayer for their recovery. (See, also, Abbott's Forms, 357; *St. John v. Pierce*, 22 Barb. 363; *Garrison v. Sampson*, 15 Cal. 93; *Boles v. Cohen*, 15 Cal. 151; *Coryell v. Cain*, 16 Cal. 569.)

Wm. D. Bliss and W. A. Thompson, for Respondents.

The respondents, in support of the decision of the Court below, rely upon the following very simple propositions:

I. A plaintiff in ejectment must have title to the land sued for at the time of bringing his action. (*Burton v. Austin*, 4 Vermont, 105; *Carroll v. Norwood*, 5 Har. & J. 155, cited in Adams on Ejectment, p. 43, note; *Payne v. Treadwell*, 16 Cal. 243.)

Under the old practice in ejectment, the plaintiff declared on a lease for a term which had not expired when the suit was brought. (Chitty's Pleadings, Vol. 2, p. 879.)

II. The defendants may defeat the action by showing that though plaintiff had title at the time of the ouster, he has conveyed it away before bringing his action. (*Alden v. Grove*, 18 Penn. 377; *Cresap v. Hutson*, 9 Gill. 269; *Torrance v. Betsey*, 20 Miss. 129.)

III. A complaint should state every fact essential to the plaintiff's recovery in the action; and every fact which, if controverted by defendants, the plaintiff would be obliged to prove in order to maintain the action. (*Green v. Palmer*, 15 Cal. 416; *Jerome v. Stebbins*, 14 Cal. 458; Gould's Pleadings, 47, 49.)

IV. If the complaint does not state all the essential facts, the defendants are not obliged to answer, but may demur. (Gould's Pleadings, 46; *Green v. Palmer*, 16 Cal. 416, and the treatise on the New York Code there cited.)

V. Every pleading is taken most strongly against the pleader, and most favorably for his adversary. (Gould's Pleadings, 155; Chitty's Pleadings, Vol. 1, p. 237.)

VI. The statement that the defendants "unlawfully withhold," does not help out the complaint. It is a mere conclusion of law. If the plaintiff was not the owner, the withholding of the defendants, whether lawful or unlawful, gave him no cause of action. (*Payne v. Treadwell*, 5 Cal. 311.)

The appellant confounds the rules of evidence with the rules of pleading. He alleges that he was seized on the *first* of January, and asks the Court to presume, from that allegation, the fact that he was seized on the *tenth* of January.

If he really was seized on the day of bringing his action, this was the *ultimate* (*Green v. Palmer*) essential fact in his case, and should have been distinctly alleged. Instead of alleging this *ultimate* fact, he alleges a *probative* fact—the seizin on the *first* of January. If he had, in his pleadings, *alleged* the ultimate fact, he might, on the trial, have *proved* it, by showing the probative fact.

Salmon v. Symonds et al.

The presumption would then be in his favor; now it is against him. Presumptive *pleading* is not allowed in any Court. Presumptive *evidence* is relied upon in the trial of almost every cause.

Currey, for Appellant, in reply.

The Respondents' counsel say:

1. "A plaintiff in ejectment must have title to the land sued for at the time of bringing his action."

To sustain this truism they cite cases, among which is *Burton v. Austin*, 4 Vermont, 105. In that case the Court also say the plaintiff must have title *when the action is tried*. According to respondents' theory, the essential fact of title in the plaintiff, *at the time of trial*, should be alleged in the complaint.

2. "The defendants may defeat the action by showing that, though plaintiff had title at the time of the ouster, he has conveyed it away before bringing his action."

This is true. But how can they show this? By demurrer—because the plaintiff may not have averred in his complaint that he had not so conveyed the premises before bringing the action? Or, is this defense to be averred and proved by the defendants?

If the plaintiff had title on the *first* day of January, 1863, and was *then* ousted by the defendants, as is admitted by the demurrer, then, according to the *essential predicate* of the respondents' second proposition, above quoted, the burden was on defendants to show that plaintiff had so conveyed away the premises before the bringing of the action.

3. "A complaint should state every fact essential to the plaintiff's recovery in the action; and every fact which, if controverted by defendant, the plaintiff would be obliged to prove in order to maintain the action."

This proposition is not, critically, correct. If it were necessary for plaintiff to produce in evidence a grant by patent from the Government, to establish his right to recover, a state-

ment in the complaint of the existence of the grant or patent would not be essential or proper.

The allegation in the complaint that on the first day of January, 1863, the plaintiff was seized, as owner in fee, of the premises, and that afterwards, to wit, on the same day, the defendants entered and ousted him, and from thence hitherto have unlawfully withheld and still so withhold the premises from him, is a statement of every essential fact *entitling* the plaintiff to recover; and these facts admitted, or proved, though the action might not be commenced until six months after the day mentioned, would entitle the plaintiff to a judgment for the recovery of the possession of the premises. If the defendants had made default, and judgment had been entered for plaintiff against them, could the judgment be reversed because the complaint did not state facts sufficient to constitute a cause of action? No lawyer, I apprehend, would so pretend; and yet, if the defendants' position were tenable, such a judgment could not be maintained for a moment. The demurrer interposed was a general demurrer, and seems to have been intended for delay — and in this the defendants have succeeded undoubtedly beyond their original expectations.

It is unnecessary to notice respondents' 4th and 5th points.

The respondents' counsel further say:

6. "The statement that the defendants 'unlawfully withhold,' does not help out the complaint. It is a mere conclusion of law. If the plaintiff was not the owner, the withholding of the defendants, whether lawful or unlawful, gave him no cause of action."

If the complaint was infected with the infirmity alleged on the part of the defendants, then the averment that defendants unlawfully withheld the premises from plaintiff would help out the complaint, because such averment is of a fact that could not exist independent of plaintiff's right to the possession of the premises.

Is the statement that "defendants have from thence hitherto unlawfully withheld and still so withhold said premises from

Salmon v. Symonds et al.

plaintiff," a conclusion of law? Is the word *unlawfully* objectionable as a conclusion of law? If it is, expunge it. But this allegation is not a conclusion of law, but is an averment of a fact.

It is said: "If the plaintiff was not the owner, the withholding of the defendants, whether lawful or unlawful, gave him no cause of action." Do not respondents' counsel overlook the fact that the demurrer *admits* that plaintiff *was the owner in fee simple*, and lawfully seized of the premises, and that defendants ousted him, and withheld the premises from him, as alleged in the complaint?

By the Court, RHODES, J.

Salmon sued Symonds and others, in ejectment, to recover the possession of a portion of the Rancho Roblar de la Miseria, situated in the County of Sonoma. In his complaint, he alleges that on the first day of January, 1863, he was "the owner in fee simple and lawfully seized of" the tract of land described in the complaint, and says "that while he was so the owner and seized of said piece and parcel of land above described, to wit: on the day and year first aforesaid, the defendants unlawfully entered into and upon the same land and ousted the plaintiff therefrom," and that the defendants still withhold the same, to his damage, etc., and he concludes with the usual prayer. The complaint was filed January 10th, 1863. The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. In two of the demurrers other grounds were assigned, but they are not well taken, and are not urged in this Court. The demurrers were sustained, with leave to the plaintiff to amend his complaint, "upon the payment of twenty dollars for each demurrer, within two days, under the rule;" and the plaintiff refusing to amend, final judgments were entered for the defendants for costs.

The plaintiff appeals, and relies for error upon the order sustaining the demurrer.

The defendants, in support of their demurrer, urge that the

Salmon v. Symonds et al.

complaint does not allege that the plaintiff was the owner of the land at the time of bringing the action, or was seized after the 1st day of January, 1863.

It is usual to allege, in addition to the statement of seizin or ownership in fee at the time of the ouster, that the plaintiff was seized or the owner in fee at the commencement of the action; but this is not necessary. In *Payne & Dewey v. Treadwell*, 16 Cal. 242, the allegations that are necessary in a complaint in ejectment were fully considered by Mr. Chief Justice Field, who, in that case, rendered an elaborate opinion upon a review of the cases in this State and in New York; and after stating that it is the ultimate fact, not the prior or probative fact—or, in other words, the evidence—that must be alleged, he says: "It is sufficient, therefore, in a complaint in ejectment for the plaintiff to aver, in respect to his title, that he is seized of the premises, or of some estate therein, in fee, or for life, or for years, according to the fact." A fee simple is an estate of perpetuity, a pure inheritance, clear of any qualification or condition.

The demurrer admits the seizure in fee at the time of the ouster, and being once admitted, it is presumed to continue until a disseizin is proved; and it being unnecessary to allege a presumption of law arising from that fact, the plaintiff is not required to aver that he still continues seized as the owner in fee.

It is therefore ordered that the judgments be reversed and the case remanded, with directions to the Court below to overrule the demurrers, with leave to the defendants to answer the complaint upon the terms prescribed by the rules of said Court.

Mr. Justice CURREY, having been of counsel for Appellant, did not sit upon the trial of this case.

Buckman v. Whitney et al.

AMOS BUCKMAN v. GEORGE O. WHITNEY AND J. HENRY WOOD.

RECORDS OF COURTS — WHO CONTROL.— The Supreme Court has no control over the records of the Courts of an inferior jurisdiction from which an appeal lies, and cannot make an order supplying their records when lost.

APPEAL — EFFECT OF.— The taking of an appeal does not suspend or impair the power of the Court below over its own records, or its capacity to supply their place when lost.

SAME — LOST RECORD, HOW SUPPLIED.— Where an appeal has been taken to the Supreme Court, and the transcript cannot be made out by reason of the loss of a portion of the records of the case from the files of the Court, it is the duty of the appellant to move the Court below, at the earliest time possible to supply the lost papers by copies, or by some other means under its control.

APPEAL from the District Court, Seventh Judicial District, Solano County.

On the 24th day of May, 1862, Buckman, the plaintiff, recovered judgment against Whitney and Wood, the defendants, in the District Court of the Seventh Judicial District, Solano County, for the sum of two thousand five hundred dollars damages and costs of suit. On the 20th day of August, 1862, an application for a new trial was denied, and on the 9th day of September thereafter, an appeal was taken to the Supreme Court.

On the 2d day of February, 1864, the respondent moved that the appeal be dismissed.

The other facts are stated in the opinion of the Court.

Howell & Hopkins, and Shafter & Heydenfeldt, for Respondent.

B. C. Whitman and Wm. O. Wallace, for Appellants.

By the Court, RHODES, J.

The respondent moves to dismiss the appeal in this case on the ground that the transcript has not been filed in this Court. Affidavits are presented upon both sides, from which it appears that the transcript has not been made out by the Clerk of the Court below, because of the loss from the files of said Court

Carpentier v. Thirston et al.

of the judgment roll in said cause; but it does not clearly appear which party, if either of them, is accountable for the loss. This Court has no control over the records of the Court below, and cannot properly make any order to supply a lost record; but that duty is within the province of the District Court, and the taking of the appeal does not suspend or impair the power of that Court over its own records, or its capacity to supply their place when lost.

Upon proper application being made, it will be the duty of the Court below to supply the lost judgment roll by the aid of the copies, or by some other means under its control.

It is therefore ordered that the appellants have thirty days from and after the next term of the District Court of the Seventh Judicial District, for the County of Solano, in which to prepare and file in this Court the transcript on appeal in this cause, and that in the meantime all proceedings on the said motion in this Court be stayed.

Mr. Justice SHAFTEE, having been of counsel, did not sit on the trial of this case.

**HORACE W. CARPENTIER v. JOSEPH THIRSTON,
GEORGE ENGLEMEYER, A. W. WALL, A. W. HAM-
MITT, ORRIS FALES, AND DAVID P. SMITH.**

CONFIRMED MEXICAN GRANT — POSSESSION OF TILL SURVEY.—Where, by the decree of a Court of the United States, a specific quantity of land is confirmed to a grantee, from the Mexican Nation, or to his assignees, to be selected and surveyed within the exterior boundaries of a larger tract, the confirmee, by virtue of the grant and the confirmation, is entitled, until a final survey, to recover possession of any portion of the land embraced within the exterior boundaries of the larger tract, except as against a person holding title from or the right of possession under the Government.

PARTITION — PARTIES TO MUST HAVE TITLE.—An agreement to establish a partition line between the occupants of adjoining tracts of land is of no validity and cannot be enforced unless the title to the adjoining tracts has passed from the Government and become vested in the parties by whom the agreement is made. In order to render such agreement for a partition line effectual, each party must have the title to and right to dispose of the tract claimed by him, or in other words, they must be co-terminous proprietors.

Carpentier v. Thirston et als.

ESTOPPEL — WHAT NECESSARY TO CREATE.— A disclaimer of title to land made to one who has no claim or right to the land to which the disclaimer applies, cannot operate as an estoppel, unless the person to whom it is made is directly influenced to act upon it, and does so act upon it that it would be a fraud upon him to permit the disclaimer to be retracted.

WHAT JURY MAY PASS ON.— It is error for the Court to submit to a jury the question of the legal effect of written documents offered in evidence during the trial.

APPEAL from the District Court, Fourth Judicial District, Contra Costa County.

The decree of final confirmation of the Rancho San Ramon, made in the District Court of the United States, June 4th, 1862, contains the following description:

The land, of which confirmation is hereby made, is the equal undivided one half part of all that certain tract of land situated in the County of Contra Costa, and in the Northern District of California, and known by the name of San Ramon, and extending from [here follows the boundaries]; provided, that there be contained within the exterior boundaries of the tract hereinabove described no more than the quantity of two square leagues of land; but if there be more than two square leagues in quantity within said boundaries, then there is hereby confirmed to the said claimant, Horace W. Carpentier, the equal undivided one half part of a tract of land of the extent and quantity of two square leagues, and no more, to be selected and located at the choice and election of the said confirmer, his heirs, and assigns, anywhere within the exterior boundaries hereinbefore mentioned; provided, only, that the lands so selected and located be in one tract, and not in separate and distinct parcels.

On the 18th of January, 1844, the Romeros petitioned the Governor for a grant of the sobrante, and obtained an order to measure the land and report the result, in order that the sobrante might be conceded to the petitioners. The measurement was never made, however, nor was any grant made to the Romeros.

The Romeros, in expectation of a concession of the sobrante, took possession of the demanded premises in 1845, and they

and their assignees held possession up to the time of the commencement of this action.

The Romeros petitioned the Land Commission for the confirmation of their grant to the sobrante, but it was rejected, and on appeal to the District Court of the United States, was also rejected.

The jury found that the demanded premises were within the exterior boundaries described in the decree of confirmation to Carpentier, of June 4th, 1862.

The jury also found that there was an agreement made in 1844 between the Romeros on one part, and Lorenzo Pacheco on the other part, establishing a boundary line between their respective ranches, and that Mariano Castro assented to and acquiesced in the agreement.

At the time of the trial of this action no final selection and survey had been made of the two leagues confirmed.

The other facts are stated in the opinion of the Court.

Patterson, Wallace & Stow, for Appellants.

"The law is settled that where there is a specific tract of land confirmed according to ascertained boundaries, the confirmee takes a title upon which he may sue in ejectment." (*Stanford v. Taylor*, 18 Howard, 412.)

And in this Court such a confirmation is held to be equivalent to a patent for the land. (*Natoma Water Co. v. Clarkin*, 14 Cal. 548.)

Where the United States have consented to the decree and dismissed the appeal, the validity of the grant "*can never be questioned again*." (*Mott v. Smith*, 16 Cal. 533; See, also, *Clark v. Lockwood*, 21 Cal. 223; *Cornwall v. Culver*, 16 Cal. 428-9; *Teschmacher v. Thompson*, 18 Cal. 29; *Pioche v. Paul*, 22 Cal. 105.)

And, until survey and segregation, plaintiff can maintain ejectment to the exterior boundaries. (*Vanderslice v. Hanks*, 3 Cal. 45; *Ferris v. Coover*, 10 Cal. 621; *Cornwall v. Culver*, 16 Cal. 429; *Clark v. Lockwood*, 21 Cal. 223.)

The respondents having shown no title in the Romeros, the

facts found as to the agreement of Mariano Castro with the Romeros can have no effect. If *neither* Castro on the *one hand*, nor the Romeros on the *other hand*, had any title to the lands of which they were in occupation, it would be clear that they could not, by fixing lines, etc., interfere with the effect or boundaries of a valid grant made by the former Government, nor a decree of final confirmation made by the present Government. So, if, as in this case, Castro on the one part *had* a title and the Romeros *had none*, a mere fixing of a boundary of their respective possessions would not give the Romeros a title from the Government, and certainly would not convey any of the title of Castro to the Romeros.

As was said in the case of *Waterman v. Smith*, 13 Cal. 418, (where two *contiguous* owners of land, *each of whom had title*, had by award fixed a dividing line,) "the award could not bind the Government or control the effect of its patent;" neither could such an agreement, we submit, control the effect of the final decree of that Government confirming title to the land to one of the co-terminous occupants, and decreeing that the other *had no claim whatever to any portion of the land*.

It is an ascertained fact in this case, that neither at the time of making the supposed agreement fixing the dividing line, nor at any time before or since, did the Romeros have any title to the land in suit, or any adjoining land; that no one was or could be interested in the question as to where the line would run except Pacheco and Castro on the one side, and the Mexican Government then, and now the United States Government, on the other side.

As neither Government was a party to this *agreement*, there can be no estoppel, of course, against either Government.

The true theory upon which these parol agreements as to boundary lines is upheld, is stated in *Hagey v. Detweiler*, 35 Penn. 409: "But adjoining owners, who adjust their division line by parol, do not create or convey any estate whatever between themselves; no such thought or intention influences their conduct; after their boundary is fixed by consent, they

hold up to it *by virtue of the title deeds, and not by virtue of a parol transfer.*"

It will be observed that the Court speaks of "*owners*," "*adjoining owners*," as being the only ones who may make this parol division—*otherwise*, and except as between *owners*, no such agreement could be made.

Hence, if one has title and the other has not, there is no mutuality in the agreement, and neither is bound by it. (*Perkins v. Gay*, 3 Sergt. & Rawle, 331.)

This exact question was so decided in the case of *Terry v. Chandler*, 16 N. Y. (2d Smith) 355.

In all cases where the "consentable line" has been upheld, it is upon the idea that the parties are *contiguous owners*. (*Henry Thacker v. John Guardianier*, 7 Metc. 484; *Gray v. Berry*, 9 N. Hamp. 473; *Dibble v. Rogers*, 13 Wend. 537; *Adams v. Rockwell*, 16 Wend. 285; *Wilson v. Hudson*, 8 Yerger, 407; *Heirs of Houston v. Matthews*, 1 Yerger 46; *Pierson v. Mosher*, 30 Barbour, 81; *Dudley v. Elkins*, 39 N. Hamp. 78.)

And in *no case* has such an agreement ever been upheld where one of the parties was ascertained *not to be the owner*. The reason is obvious. The agreement is only maintained on the principle of "*estoppel*." The subject matter of estoppel is the boundary of land—such an estoppel can only be created by the acts of one *who is in fact owner of the land*. If so created, it operates against the land itself, into whose hands soever it may come, deriving title from the party making the agreement; the estoppel is affixed to the title thereafter; but none can so affix it unless he *have the title at the time*.

Suppose A., a party in possession, agrees with B., a co-terminous possessor, upon a dividing line, and afterwards the true owner of the premises claimed by A. recovers them from him in an action at law; can it be pretended that the owner who ~~so~~ recovered is bound or estopped by such an agreement? Surely not; and if he is not so bound, B. is not bound, because *estoppels must be mutual*.

Here the Government has, in the assertion of its just rights,

declared itself to be the owner of all the land claimed by the Romeros in this transaction. Is the Government estopped by the unauthorized act of Romero? Certainly not; and if not, there can be no estoppel on the other side either.

If the argument were worth pursuing upon this point, we might suggest that the final decree in favor of the appellant, entered by the consent of the Government, fixing the boundaries of this land, so lately as the 4th day of June, 1862, and confirming his title thereto, is conclusive, so far as the principle of an "estoppel" is concerned.

Again, the appellant derives his title from the United States Government, by decree of 4th June, 1862. That Government was never a party to any transaction with Romero or his successors, except in *rejecting their claim*. And appellant derives title also through the Mexican Government, which Government was never a party to any transaction with the Romeros about the land, except in *refusing to make them a grant for it*.

The United States Government being, then, free to act, could it not give the land to Carpentier by its action? — by its final decree, entered in its own Courts, by its own express consent?

Though Fremont had done enough to estop himself in the Mariposa Estate, yet, said this Court, in *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 373: "The Government could not be estopped from asserting its title and *disposing of it to whomsoever and whenever it thought proper*."

The reasoning of this Court in the *Biddle Boggs case*, (*vide pp. 372, 373,*) is peculiarly applicable to this case. Suppose that it was true that Pacheco and Castro did consider that the land in controversy was ungranted public land, belonging to the Government, "no prohibition existed against a subsequent acquisition of the title from the superior proprietor. The defendant could not acquire by mere occupation any rights which could control the action of the Government. The defendant could only hold so long as the superior proprietor permitted, and if that proprietor saw proper to give the land to Carpentier, or to any other person, the defendant could interpose no valid objection. The Government could not be estop-

ped from asserting its title and disposing of it to whomsoever and whenever it thought proper."

S. Heydenfeldt, also for Appellants.

The defense set up in the answer relies upon an agreement for a dividing line made between the Romeros and Domingo Peralta, so that both the evidence and the finding were departures from the pleadings. The plaintiff was not called upon to meet any proof of an agreement with any other than with Peralta.

The agreement was void for want of consideration, because the Romeros had no title to any land whatever. It must be too clear for argument that one having no title to land cannot make a valid and binding agreement as to boundary with one who has the title. The effect attempted here to be given to this supposed agreement is to make it confer title to land on one who had no title. This, of course, cannot be done, unless the Court can construe such an agreement into an absolute sale by the one who has title to him who has none. This cannot be, because no such thing is pretended or relied on. The Romeros do not set up a claim of title under Pacheco or Castro, or either of them, but under the Mexican Government, and it has been determined that their claim, as they set it up, is invalid. Nor can it be done, because the agreement as proved does not partake of the nature nor contain any of the incidents of a sale, even supposing that a sale of land could be made without writing.

The agreement cannot operate by way of estoppel. The Romeros, in order to set up estoppel, must show that the conduct, or word, or agreement, misled them, and induced them to alter their condition, and that they were ignorant of the facts. (See *Hastler v. Hays*, 3 Cal. 306; *Goodale v. Scannell*, 8 Cal. 29; *McCracken v. San Francisco*, 16 Cal. 626; *Burritt v. Dickson*, 8 Cal. 113.)

The doctrine of estoppel is construed with great strictness, because loose statements or recitals, so far from expressing the

truth, may exclude a party from alleging the truth. (*Osborne v. Endicott*, 6 Cal. 153.)

So in *Greene v. Bates*, 6 Cal. 272, in a case where a party owning land stands by and in silence permits another to occupy and improve, Judge Murray said: "Estoppel in such cases proceed on the ground of fraud or culpable silence," and therefore held in that case there was no estoppel.

In *Moore v. Wilkinson*, 13 Cal. 488, the plaintiffs had published a notice stating that they had become owners of the grant, and specifying its boundaries, and warning trespassers not to come within such boundaries; upon which Mr. Justice Field said: "Such notice could not operate as an estoppel upon the plaintiff. It was only evidence of the opinion the parties entertained of the boundaries of their claim."

J. B. Crockett, for Respondents.

If the facts found by the jury are true, (as they must be assumed to be on this appeal,) the important question is presented, whether or not, under such facts, the claimants can maintain ejectment for all the lands within the exterior boundaries. This Court has so often decided that, under ordinary circumstances, a Mexican grantee is entitled to the possession of all the lands within the exterior limits of the grant, until his claim has been located by a final survey, that I do not propose again to moot the question. But whilst the general proposition is conceded, it is equally plain that it does not hold good in all cases. The last case in which this question was considered by the Court is *Mahoney v. Van Winkle*, 21 Cal. 552, in which the prior decisions are fully reviewed and the whole question definitely settled. The Court in that case distinctly decides that if the grantee, in advance of a survey, selects his quantity and location, uses it, leases it, and sells it, and by his acts or in words disclaims title to the remainder, he is estopped to assert title or right of possession to any lands outside of his selection, prior to a final survey. That is precisely this case. The jury finds and the proof establishes that Pacheco and Castro not only consented to the occupation of Romero, and that the lands

might be granted to him, but agreed upon a dividing line, and restricted their possession and claim of title to that line. Romero went there with their consent, and occupied his lands, not only without remonstrance, but at their desire. Under the principle established in *Mahoney v. Van Winkle*, the plaintiff cannot disturb that possession in advance of a final survey, whether Romero had title or not. To defeat this action, it is enough to show that Pacheco and Castro consented to the occupation of Romero, agreed with him on a dividing line, confined their occupation and claim to that line, and disclaimed title to the remainder. It is not material whether Romero acquired any title from the Mexican Government. Under the facts found by the jury, and on the principles settled in *Mahoney v. Van Winkle*, the plaintiff is estopped to deny the right of possession of the defendants in advance of a final survey. I deem it useless to elaborate this point, for the reason that it is fully covered in the case referred to.

The appellant's counsel seeks to break the force of this position by invoking the dry, technical, common law rule, that no agreement for a partition line is valid, unless each of the parties to it has title to the co-terminous lands, and he says Romero had no title, and the agreement was therefore void. This principle has no application to the case. The partition line is not relied upon as a technical partition, and as a final settlement of a disputed boundary, but as evidence that Pacheco and Castro selected their location, and limited their occupation and claim by that line. Any other act establishing the selection and location would have been as effectual. If they had caused a private survey to be made of their two leagues, had marked the boundaries, and confined their occupation to these limits, and disclaimed title to the remainder, this would have been sufficient. This was precisely what was relied upon as a selection in *Mahoney v. Van Winkle*, and the Court held it bad only because the claimants were infants and married women, and, therefore, incapable of binding themselves by such acts. Except for this, the Court would have decided the selection to be obligatory in that case.

"But," the Court adds, "to restrict the possessory right of the grantee to the selection made, the selection must be made with such disclaimers as to the residue of the general tract as to operate as an estoppel upon him." The only question, therefore, is, did the grantee make his selection, accompanied by such disclaimers as to the residue as to operate as an estoppel upon him? We say Pacheco and Castro *did* make their selection; and as evidence of it, we prove that they agreed with Romero upon their northern line, and thenceforth limited their occupation and claim by it, and recognized this line as their northern boundary. And we say that they disclaimed title as to the residue, not only in terms, but that they expressly agreed that the residue might be granted to Romero, and they expressly assented to his occupation. We therefore say they are estopped by their own acts as against Romero and his vendees. In *Biddle Boggs v. Merced Mining Co.*, the Court held there was no valid estoppel against Fremont's *patent*; but if the suit had been brought in advance of the survey and patent, it is manifest from the whole opinion, the Court would have held the estoppel in that case to be valid.

The partition line, therefore, in this case, is relied upon only as conclusive evidence of the selection and location, and as evidence of a disclaimer as to the residue; and, therefore, the common law doctrine invoked by the appellant, as to the title of the co-terminous owners in settling disputed boundaries, has no application. The question is not whether a *valid* partition line has been finally and conclusively established between these parties for all time; but whether, in consenting to this line, limiting themselves by it, disclaiming title as to the residue, consenting to the grant to Romero, and to his occupation, Pacheco and Castro did not select their location, with such a disclaimer as to the remainder as to estop them *prior to a final survey*. I admit the estoppel may not bind them, if the Government finally locates the land so as to include the possession of Romero. But, until this is done, the estoppel operates. It would be most unjust if it were otherwise. The grantee is entitled to but *two leagues out of six*.

Carpentier v. Thirston et al.

Another person applies for the surplus. The grantee consents it may be granted. Whilst the proceedings are pending, the applicant goes into possession with the consent of the Government and of the first grantee, and they agree upon a partition line, which is respected by both for a series of years. Whilst matters remain in this condition, and before a final survey, the first grantee brings his action to oust the other from a possession originally acquired with his consent, and with the consent of the Government.

By the Court, RHODES, J.

This is an action of ejectment to recover the possession of a portion of the Rancho San Ramon, situated in the County of Contra Costa.

The plaintiff claims title under a grant issued by the Governor of California to Bartolo Pacheco and Mariano Castro, in 1833, and approved by the Territorial Deputation in 1834. Mariano Castro, by deed dated August 6th, 1852, recited that in 1843 he had conveyed, and he thereby again conveyed, all his right, title, and interest in and to the said rancho to Domingo Peralta, who, in 1857, conveyed the same to John B. Watson, and Watson, in 1858, conveyed the same to the plaintiff.

Domingo Peralta having filed his petition for confirmation before the Board of United States Land Commissioners, praying for the confirmation of the title to the one undivided half of said rancho, such proceedings were had before said Board and before the District Court of the United States that a final decree was filed in said Court on the 4th day of June, 1862, finally confirming to said plaintiff (who had been substituted for said Peralta) the undivided half of said rancho, the tract confirmed being restricted to two square leagues of land, the whole rancho containing six square leagues.

The complaint alleges that the plaintiff is the owner in fee and entitled to the possession of a certain portion of the rancho, described by metes and bounds, and contains the usual allegations of ouster and possession by the defendants.

The defendants, by their answer, deny that the plaintiff is the owner or is entitled to the possession of the premises; and allege that they are the owners in fee and entitled to the possession of the premises under title derived from Inocencio, José, and Mariano Romero, who were formerly the owners thereof. And they allege, for a further defense, that before the commencement of the suit the Romeros were in possession of the premises, claiming title under a grant from the Mexican Government, and that said Peralta was in possession claiming title to an adjoining rancho; that a dispute arose between the Romeros and Peralta in respect to the dividing line of the two ranchos; that thereupon, to terminate said dispute, the parties agreed upon and established a dividing line, and that thereby the premises in dispute were included in the rancho of the Romeros; that by mesne conveyances the defendants have succeeded to the rights of the Romeros. The pleadings are verified.

The case was tried by a jury, who returned a general verdict for the defendant, and special findings, in answer to the several interrogatories submitted to them on motion of the respective parties.

The plaintiff excepted to the general verdict, and to several of the findings on the special issues, and moved for judgment in his favor upon the special findings; and the motion having been overruled, and judgment having been entered for the defendants, the plaintiff moved for a new trial, which was denied.

The plaintiff appeals from the order denying the motion for a new trial and from the final judgment, and assigns many errors, which, however, may be reduced to a few general heads.

There is no question that the plaintiff is the owner in fee of the undivided half of the Rancho San Ramon, as confirmed by the final decree of the District Court of the United States, to the extent of two square leagues, and that by virtue of the grant under which he claims and said confirmation, he is entitled, until a final survey, to recover the possession of any portion of the whole rancho from any one, except a person claim-

ing title or the right of possession under or through Pacheco or Castro, the grantees, or the Government.

This principle has been so fully settled by this Court by repeated decisions, and particularly in the case of *Mahoney v. Van Winkle*, 21 Cal. 552, that it is unnecessary to give any reason therefor; and the learned counsel of the defendants admits the correctness of the general proposition. He insists, however, that this case falls within the exceptions to the general rule, as stated in the case last cited, viz: if the grantee, in advance of a survey, elects his quantity and location, uses it, leases it, and sells it, and by his acts or words disclaims title to the remainder, he is estopped to assert title or right of possession to any land outside of his possession prior to a survey; and he says that as Pacheco and Castro not only consented to the occupation of the sobrante by the Romeros, but agreed upon a dividing line between the rancho and the sobrante, and as both parties occupied in accordance with said dividing line, the grantees are estopped from claiming beyond the division line prior to a final survey. This brings us to the consideration of the principal question involved in the case.

The document introduced in evidence by the defendants against the objections of the plaintiff, consisting of the two petitions of the Romeros to the Governor, the first dated January, 1844, for the grant of the sobrante of the Ranchos of Moraja, Lorenzo Pacheco and Julian Wil, the other dated March, 1844, for a grant, provisionally, that they might commence sowing before the proper season should pass, with the orders for the *informe* and for the measurement of the land, and the two petitions to the Alcalde of San José, together with his orders respecting the same, fail to establish (as was decided by the District Court of the United States) any title in the Romeros, either perfect or inchoate, to any portion of the Rancho San Ramon as against the Government, and those documents, therefore, did not confer upon them any right of possession. No other evidence was offered by the defendants tending to show title or right of possession in them derived from the Government. The Romeros,

therefore, were not in a position to establish a partition line as between adjoining owners of the land.

But it is insisted by the defendants that the establishment of the division line, as testified to by the witnesses, though not sufficient as a technical partition line between co-terminous proprietors, was evidence of the selection of the location of the two square leagues by Pacheco and Castro, and that such selection of the location, accompanied by evidence of a disclaimer of the residue of the land not included within the location, amounted to an estoppel against the said grantees, and would effectually prevent a recovery of any of the lands outside of said location prior to a final survey. The estoppel claimed is of the class of equitable estoppels, which has grown up under the influence of equity in modern times, and not of the technical estoppels recognized by the old rules of the common law. An equitable estoppel is well defined by Mr. Chief Justice Field in *Biddle Boggs v. Merced Mining Company*, 14 Cal. 367. He says: "It must appear, *first*, the party making the admission, by his declarations or conduct, was apprised of the true state of his own title; *second*, that he made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud; *third*, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; and, *fourth*, that he relied directly upon such admission, and will be injured by allowing its truth to be disproved." The estoppel relied upon by the defendants is not claimed to have affected the title, but only that it attached itself to the possession, and continued effective until the person holding the title could proceed, upon a final survey, to take possession by virtue of his title and the survey; and, in order to create one of the requisites of such estoppel, they allege that the Romeros took and held possession of the sobrante with the *consent* of the grantees as well as the Government.

The consent of the grantees must be proved to have been one of the causes moving the Romeros to take possession, otherwise it could not operate so as to constitute one of the facts creating

the estoppel. Innocencio Romero testified, against the objection of the plaintiff, that he took possession under the order of the Governor — he evidently referring to the two petitions of the Romeros to the Governor, and the orders thereon — and the jury found as a fact, upon an interrogatory submitted to them, that the Romeros did take possession, in 1844 or 1845, by virtue of those two petitions and the orders thereon. His testimony concerning his conversation with Pacheco shows that the conversation related to the question as to whether Pacheco was willing that the Romeros should procure a grant of the *sobrante*, and he states that Pacheco was willing that it should be done; but there is no evidence showing that the Romeros expected to or did take possession by reason of such consent, nor that at that time there was any understanding or expectation that the Romeros would take possession before the land was granted to them by the Government.

It is contended by the defendants that the designation by Pacheco and Castro of the creek mentioned by the witnesses as their northern boundary, amounted to a location by them of their two square leagues, and a disclaimer as to the residue of the rancho — the land north of said creek — and that the disclaimer would continue operative against them and their grantees, by way of an estoppel, until a final survey of the rancho, (not considering the boundary line as a technical partition, and not regarding the disclaimer as a consent to the defendants' occupation of the residue so disclaimed,) and in support of this position they rely particularly upon the doctrine enunciated in the case of *Mahoney v. Van Winkle*, 21 Cal. 580.

The Court in that case holds that the grantee may make a selection and location of his specific quantity, "under such circumstances and accompanied with such disclaimers as to estop him from the assertion of any title or right to the possession of the remainder existing within the exterior boundaries of the general tract, until, by the action of the Government, it is determined that his claim under the grant shall be satisfied by land elsewhere selected." Mr. Chief Justice Field, in delivering the opinion of the Court, then proceeds to discuss the

nature and effect of the disclaimer; and in declaring its effect upon the question of the recovery of possession, he evidently regards it as one of the facts which, taken in connection with other circumstances may operate as an estoppel as to the residue not included within the location; for it could not be contended that a mere verbal disclaimer, be it as complete as it may, if made to one having no right or title to the lands to which the disclaimer applied, could, by its own proper force, operate as an estoppel, unless the person to whom it was made was directly influenced to rely upon it, and did act thereon in such a manner that it would be a fraud to him to permit the disclaimer to be retracted.

The decision in that case fully harmonizes, on this point, with that of *Biddle Boggs v. Merced Mining Co.* But, even assuming that the Court was considering the consequences of a disclaimer, taken by itself and disconnected from any other facts (except the possession of the defendants) which might, united with it, amount to an estoppel, the Court held, in that case, that the proof offered in the Court below was properly excluded, as it showed that a part only of the tenants in common of the rancho participated in the alleged disclaimer.

In the case at bar, Inocencio Romero testified that his conversation about the dividing line was with Pacheco, and not with Castro, his tenant in common; and he does not mention any conversation between him and Peralta, who succeeded Castro, and he does not pretend that any agreement was made concerning the division line, except the one mentioned as having been made in 1844, between him and Pacheco.

The testimony of Pico shows that several attempts were made by him to have the survey of the northern line of the Rancho San Ramon made, but in this he failed, when he told Romero to put himself in possession until a survey should be made; and Romero having put himself in possession, "it so remained until 1849, when a dispute arose between Romero and Peralta about the boundaries, and then a surveyor went to measure the land." This does not indicate that a location of the rancho was made and the line dividing the rancho agreed upon, but

rather the contrary; and it would seem that the true solution of the matter is found in Pico's testimony, when he states that the *rodeo* line of the ranch was near a creek which divides it. The defendant's witnesses — Victor Castro, Ignacio Sibrian, and José Maria Amador — all mention the creek as the *rodeo* line.

If we admit that there was some evidence that Pacheco agreed to a line as a dividing line between the rancho and the *sobranste* sufficient for the jury to find that he had so agreed, still there is no evidence that Castro or Peralta regarded such a line as anything more than a *rodeo* line, a line that might or might not coincide with the true line of the rancho. Their agreement or assent to that line as the *rodeo* line could not operate as a disclaimer on their part as to the residue of the rancho north of the line.

The evidence in the case fails to show the existence of other facts necessary to create the estoppel, as defined in the case above cited. (*Biddle Boggs v. Merced Mining Company.*) Neither Pacheco, Castro, nor Peralta, could at that time point out the limits of the two square leagues that would be surveyed for the Rancho San Ramon; the Romeros had the means of acquiring the knowledge of the true state of the title to the rancho, and they evidently did know it, and there is not sufficient, if any, evidence to prove that the Romeros relied directly upon the acts of admission of Pacheco or Castro for any purpose except to procure a grant of the *sobranste*; and the petitions of two of the Romeros, in 1847, to Burton, as Alcalde of San José, state that they had not then procured the possession of the lands they had petitioned for in 1844.

The view that we have thus taken of the case, renders it unnecessary to consider in detail the several errors assigned.

The Court should have given to the jury the fourth, seventh, and eighth instructions asked for by the plaintiff.

The following instructions given by the Court were erroneous, for the reasons already stated, viz: "That from all the evidence and circumstances, the jury might find an agreement between Inocencio Romero and Mariano Castro, relating to a

division line between them, notwithstanding the jury might find that said Romero had positively testified in this case that he did not make any agreement with said Castro, or have any conversation with him in relation thereto;" also, "that if Bartolo Pacheco or Lorenzo Pacheco agreed with the Romeros, or either of them, upon a dividing line prior to the occupation of the Romeros, and with a view to their occupation in expectation of a grant, and if Mariano Castro, while he was a part owner of the Rancho San Ramon, was informed of and acquiesced in said agreement, such an agreement was as obligatory upon him as if it had been made by him in person."

The Court also erred in submitting to the jury the fourth interrogatory requested by the defendants, for the additional reason that it leaves the jury the determination of the legal effect of the papers referred to in the interrogatory. The seventh, eighth, ninth, and seventeenth interrogatories of the defendants were improperly submitted to the jury.

The judgment is reversed and the cause remanded for a new trial.

By SAWYER, J., concurring specially:

I concur in the opinion that the judgment should be reversed and the cause remanded.

Mr. Justice CURREY expressed no opinion.

1890

1891

1892

1893

1894

1895

1896

1897

1898

1899

1900

1901

1902

1903

1904

1905

1906

1907

1908

1909

1910

APRIL TERM, 1864.

THE UNIVERSITY OF CHICAGO

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
APRIL TERM 1864.

M. M. RICHARDSON v. DANIEL WILLIAMSON AND
ISAIAH HANSCOM.

STATUTE OF LIMITATIONS—MEXICAN GRANT.—In an action to recover lands where the plaintiff claims title to the demanded premises derived from a Spanish or Mexican grant, and the defendant has been in five years adverse possession under a claim of title, he may rest with proof of his five years adverse possession, and the burden is cast upon the plaintiff of proving that less than five years have expired since the final confirmation of the grant, in order to defeat the defense of the Statute of Limitations.

SAME.—Where the plaintiff proves title derived from a Spanish or Mexican grant, and rests, and the defendant proves five years adverse possession under a claim of title, as a defense, and rests, the defendant is entitled to judgment unless the plaintiff shows in rebuttal that less than five years have expired since a final confirmation.

STATUTE OF LIMITATIONS—CONSTRUCTION OF.—Section 6 of the Act defining the time for commencing civil actions is the only section in the Act applicable to actions for the recovery of lands, and covers every case for the recovery of the possession of land; and the proviso to section 6 covers every case of title derived from the Spanish or Mexican Government.

SAME.—Section 7 of said Act, and the proviso thereto attached, refer to personal actions founded upon the title to real property, and not to actions for the recovery of such property.

Richardson v. Williamson et al.

SAME.—The proviso to sections 6 and 7 of said Act are not limited in their application to cases where the plaintiff claims under a Mexican or Spanish grant, and the defendant contests the validity of such grant, but apply to all cases where the original source of title is from such grant, even if both parties claim to derive title from the same grant.

APPEAL from the District Court, Seventh Judicial District, Solano County.

When the pleadings in the case at bar were completed, the statute regulating proceedings and pleadings required a replication to affirmative matter amounting to a defense to the action of the plaintiff.

The other facts are stated in the opinion of the Court.

Whitman & Wells, for Appellants.

The following question was submitted by the Court to the jury, and by them answered in the affirmative: "Has Williamson, the defendant, had possession of the premises in controversy for five years continuously, prior to the commencement of this suit, holding the same adversely to the plaintiff and his grantors?" It would seem that this finding of the jury was conclusive of the question. There is no dispute as to the actual and undisturbed possession of defendants, and the only question made in the Court below was that the statute could not run against the plaintiff in the case, as the holdings of himself and defendants were all, as stipulated, under the grantee of a Mexican grant. This position is untenable. The Act of 1855 simply gives to those claiming under a Mexican grant the indulgence of four years from the final confirmation thereof in which to bring suit. In other words, the assumption of the statute is that the non-confirmation of a grant is a disability, and during the continuance of that disability the statute shall not run against the party laboring thereunder. But *non constat*, in the case at bar, but the grant of Vallejo had been confirmed more than five years before the commencement of the suit. The onus, in all cases, lies upon the party seeking the benefit of the disability; and if the plaintiff wishes to avail himself of the fact that the grant never has been con-

Richardson v. Williamson et al.

firmed, or that five years have not elapsed since its final confirmation, it is upon him to show it. There is no evidence in the case upon the question; all that appears touching the original title, under which all parties claim, is contained in the stipulation previously cited. To the point of the burden of proof, we cite *Wheeler v. Webster*, 1 E. D. Smith, 1. Admitting this position to be incorrect, however, still we contend that the plaintiff cannot avail himself of the indulgences of the statute of 1855. They were not intended to apply to any such case. There is no question here of any adverse holding as against the original title, but the question is, which of the two adverse claimants has that original title as against the other? As has been said, the theory of the statute of 1855 is, that the non-confirmation of a Mexican title is a disability, and the statute shall not run against any person laboring under such disability, and shall only commence when such disability is removed by final confirmation. To persons, however, claiming under the same Mexican grant, no such presumption accrues. By their acknowledgment of the title, the disability as to them is removed and ceases. The title as to them, as between each other and their grantor, is finally confirmed. The reason of the rule, then, fails, and the rule should and does cease to exist. Neither party in this case, then, can claim the benefit of this indulgence as against the other, and the plea of the statute, without the proviso, holds good. (*The Trustees v. Payne*, 3 Monr. 161.)

John Currey, for Respondents.

Our Statute of Limitations, like those of other States, and the statute 21 James I, exempts from its operations persons laboring under specific disabilities (Wood's Dig., 47, 48, §§16, 22, 23); and it may be conceded, as it is undoubtedly the rule, that he who would avail himself of any particular disability must, in the first instance, establish its existence; but, when its existence appears, it will be presumed to have continued, unless the disability be of a nature that by the lapse of time must have become removed; for instance, where

the disability of infancy or imprisonment for a definite time may be pleaded, and the period of infancy or imprisonment appears to have expired; but if the disability may be without a limitation, as insanity or residence beyond the jurisdiction, then, in order to deprive the party pleading the disability of exemption from the operation of the statute, his adversary must affirmatively show that such disability was removed, so that the period of limitation had completely run before action brought. (*Adm'r of Anderson v. Smith*, 2 McCord, 269; Pothier on Obligations, App. 573; Matthews on Presumptive Ev. 18; *Hall v. Warren*, 9 Vesey, 611; 1 Fonb. Eq. 71.)

The 27th section of the Statute of Limitations of New York (2 N. Y. Rev. Stat. 297) is in substance the same as the 22d section of our statute above referred to, which provides that if, when the cause of action shall accrue against a person, he is out of the State, the action may be commenced within the term limited therein after his return to the State; and if, after the cause of action shall have accrued, he depart the State, the time of his absence shall not be part of the time limited for the commencement of the action. There has existed in Massachusetts a statute of like import with the first part of this 22d section of our Act, and the 27th section of the New York Act, which is in substance a transcript of the 4 and 5 Anne, c. 15, sec. 19. By the authorities involving the consideration of these statutes the questions of pleading and evidence are disposed of, as also the point arising in this case, as upon whom was the burden of proof after it appeared that the plaintiff's title to the demanded premises was derived from the Mexican Nation.

By the authorities it is plain that after it is established that a disability of a nature that might extend through all time existed, the burden of proof rests on the party who would avoid the disability to show it removed at a period from which the statute could have completely run. (*Fowler v. Hunt*, 10 John. 464; *White v. Bailey*, 3 Mass. 270; *Cole v. Jessup*, 2 Barb. 310; *Little v. Blunt*, 16 Pick. 359; *Faw v. Roberdeau*,

3 Cranch, 174; *Ford v. Babcock*, 2 Sand. 519; *Didier v. Davison*, 2 Barb. Ch. R. 478.)

Upon the theory that a disability existed because the plaintiff's title was derived from the Mexican Government, which would avoid the running of the Statute of Limitations until the final confirmation of such title, then, when it appeared that the title was so derived, the disability which obstructed the running of the statute was established, and afforded an effectual answer to the defendant's plea. If it might have been desired on the part of the defendants to avoid the effect of the fact of the disability so established, the burden of proof was upon them to do so, because the removal of such disability was essential to the maintenance of the plea of the Statute of Limitations.

If section six of the Limitation Act, as amended in 1855, was the only provision of the statute affording protection to the owner of land under title derived from the Spanish or Mexican Governments, there would be much greater strength in the appellant's position; because, by that section, it seems to me, there is no saving of the rights of such an owner, after five years possession by an adverse claimant, until a final confirmation of the title. It is quite evident that by this section the Legislature had in contemplation a party *claiming real estate under a title derived from the Spanish or Mexican Governments*, who had been, and was, and would continue to be, disabled from maintaining his action before a final confirmation of such title, and hence by said section provision was made for the protection of persons holding imperfect titles derived from a former Government, on which they could not maintain an action until after final confirmation. Provision having been made by section six for the protection of the class of titles above mentioned, there remained another and superior class of titles, derived from the Spanish and Mexican Governments, on which an action might be maintained, though, as experience had proved, the obstacles in the way might be of extreme difficulty. It was, therefore, provided by section seven, that, "No cause of action, or defense to an action, founded

upon the title to real property, or to rents, or to services out of the same, shall be effectual, unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person, was *seized or possessed* of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defense made, *or unless it appear that the title to such premises was derived from the Spanish or Mexican Governments*, or that the same was confirmed by the Government of the United States or its authorities within five years of the commencement of such action."

This section contains in itself an authentic interpretation of its meaning. Understanding it as its words plainly import, it embraces titles to real property of the following classes:

1st. Those evidenced by the *seizin* of the party, his ancestor, predecessor, or grantor.

2d. Those evidenced by the *possession* of the party, his ancestor, predecessor, or grantor.

3d. Titles derived from the Spanish or Mexican Governments.

4th. Titles confirmed by the Government of the United States, or its authorities.

In respect to the first, second, and fourth class of titles here mentioned, there is a fixed limit within which an action must be brought after the existence of a specified contingency; but, *in respect to the third class, viz., titles derived from the Spanish or Mexican Governments, there is provided no limitation*, for the section in its provision respecting Spanish and Mexican titles is, that no cause of action, or defense to an action, founded upon title to real property, etc., shall be effectual, *unless it appear that the title to such premises was derived from the Spanish or Mexican Governments*. Then, if it so appears that the title was derived from the Spanish or Mexican Governments, of what avail would it be to the disseisor that he had held the premises adversely to the true owner for twice five years?

If I be in error on the point that *titles* derived from the Spanish or Mexican Governments are excepted from the operation of the Statute of Limitations, I submit that it is sufficient to avoid the plea of limitation that it appears in evidence that plaintiff's cause of action was founded upon title to the demanded premises derived from the Mexican Government; for, by reference to said section seven, it will be seen that a confirmation, within five years or otherwise, is not at all necessary to be alleged or proved in order to meet the plea of the Statute of Limitations; and, therefore, upon the defendants was the burden of proof to show that a confirmation of the title to the demanded lot (which was admitted to have been in General Vallejo on the 29th of December, 1851, as the grantee of the Mexican Nation) was confirmed more than five years before this action was commenced.

It is said on the part of appellants that, as both parties claim from the same source, the title as to them and their grantor is finally confirmed; that, by their acknowledgment of the title, the disability as to them is removed and ceases; and that, as to persons claiming under the same Mexican grant, no presumption of disability can arise; and, it is concluded, that neither party can claim the benefit of the presumed disability, and that, therefore, the plea of the statute, without the proviso, holds good.

These positions may be answered in few words:

1st. Parties claiming title at the trial of a cause from the same source cannot confirm a title derived from the Spanish or Mexican Governments, either within the meaning of the Act of Congress of 1851 or the Statute of Limitations of 1855.

2d. There can be no objection to the plaintiff's claiming the benefit of the *status*, which appellant's counsel denominate a disability, because the defendant's position or relation to the property may not be in antagonism to the title at the source; and this is so because the statute has declared that no lapse of time shall bar the right of action until five years after the happening of a specified event, and no exception is pro-

the adverse possession of the premises for a period of five years before the commencement of the action. This, under the general provisions of the section, defeats the plaintiff's *prima facie* case. It then devolves upon the plaintiff to affirmatively show a state of facts which brings him within the exception mentioned in the proviso. It is not enough to show that he claims under the title derived from the Mexican Government—that fact alone does not bring him within the proviso; it is also necessary that the suit should be brought within five years after the final confirmation of the title. Both facts must co-exist to bring the case within the terms of the exception. That it rests upon the plaintiff to allege and prove a claim of title under a Mexican grant, in order to defeat the defense of five years adverse possession, is not controverted. If it is necessary for the plaintiff to allege one of the constituent facts of the exception, viz: that he holds under a Mexican grant, it is also necessary to allege the other fact, which is essential to constitute a case within its provisions; and if it is necessary for him to allege it, the burden of proving the allegation is on him. The fact of confirmation, if it exists, and its date, are affirmative matters, easily susceptible of proof; while to require proof that there was no confirmation would be to require the defendant to prove a negative.

The plaintiff, in his replication, alleged his Mexican grant, and that five years had not elapsed since its final confirmation. He evidently supposed it necessary to do so to avoid the Statute of limitations set up by Hanscom. In this supposition he was clearly right. If it was necessary for him to allege those matters, it was, of course, necessary to prove them. We think it clear that the burden of proof on this point rested on the plaintiff.

The next question is, as to whether the five years adverse possession of the defendants is a bar to the plaintiff's action?

It is admitted by respondent's counsel that the grounds relied on by appellants would have great force if section six, above quoted, contained the only provision of the statute bearing upon the rights of parties holding lands under titles derived

from the Mexican Government. But it is very ingeniously argued, that, in adopting this section, the Legislature had in contemplation only one class of Spanish or Mexican titles—those imperfect titles upon which the holders could not maintain an action at all until after final confirmation—that there is another, superior class of Spanish or Mexican titles, upon which actions might be maintained (though experience had shown with extreme difficulty) without confirmation; and that section seven was intended to provide for this class of cases, and the provision is—according to the argument—that this class of cases is not subject to the Statute of Limitations at all; that they are entirely excepted out of and withdrawn from the operation of its provisions. The argument is mainly based upon the use of the word “or,” in the clause “unless it appear that the title to such premises was derived from the Spanish or Mexican Governments, or that the same was confirmed by the Government of the United States, or its authorities, within five years before the commencement of such action.” We are unable to subscribe to this view. Had the Legislature intended such a result, it would have been easy to make the exception in clear and unambiguous terms. It is impossible to reconcile such a construction with the obvious policy and object of the law, as derived from the other provisions of the Act. The word “and” would doubtless have better expressed the idea intended; but the word “or” is often used *conjunctively*, as well as *disjunctively*, and we have no doubt it was so intended to be used in this instance. The construction contended for would render this section repugnant to the other provisions of the Act, and especially to section six, which is the controlling section in respect to actions for the recovery of real estate.

But, in our opinion, section six is the only section applicable to this action. Before the amendment in 1855 it read as follows:

“No action for the recovery of real property or for the recovery of the possession thereof shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor

was seized or possessed of the premises in question within five years before the commencement of such action."

This is broad in its terms, and covers every case for the recovery of the possession of land. There is no room for misconstruction. It was found in practice that it was expensive and difficult to prove up a Spanish or Mexican title in such a manner as to maintain an action upon it against intruders.

Under the laws of the United States, most of the claims under Spanish and Mexican grants had been presented to the Board of Land Commissioners for confirmation prior to 1855, and the statute of the National Government contemplated that all should be presented to that tribunal for adjudication within a prescribed time, or that, in default thereof, the lands should be deemed to be public lands. When the five years under the Statute of Limitations was about to expire—the time limited by the law of Congress for presenting claims for confirmation having already elapsed—it was found that great hardship would result to claimants under Mexican titles unless some change should be made in this provision of the Act under consideration. It was accordingly amended in 1855 by adding to section six these words:

"*Provided*, however, that an action may be maintained by a party claiming such real estate or the possession thereof under title derived from the Spanish or Mexican Governments, or the authorities thereof, if such action be commenced within five years from the time of the final confirmation of such title by the Government of the United States or its legally constituted authorities."

There was no change made in the language of the section as it originally stood; it was as broad as ever in its terms; but the foregoing clause was added, and this proviso pointed out the exceptions—and the only exceptions—intended to be engrafted upon this provision of the Act. The language of the proviso clearly covers every case of a title derived from the Spanish or Mexican Governments then existing in contemplation of law. There is no room for supposing that any class of cases was omitted to be provided for in some other section.

It is undoubtedly true that the profession have been not a little puzzled to give a proper construction to section seven — especially since the amendment in 1855. Its provisions have been frequently discussed in the District Courts in actions to recover lands, but we are not aware that this section has been construed by the Supreme Court. To whatever cases it may be supposed to apply, we are clear that its provisions were never intended to be applicable to an action for the recovery of real estate. There was no necessity for the provision of this section as applicable to an action to recover the possession of land. Section six provides fully for such cases. It is not to be supposed that the law-making power intended to repeat the provisions of the preceding section. Some other action depending upon the title to realty must have been contemplated.

To understand this section, it will not only be necessary to consider the terms of the section as it stood before the amendment of 1855, but also to trace it back to the statute from which it was borrowed, and consider the condition of things under which it was originally enacted.

Our Statute of Limitations is based upon the statute of New York; in fact, most of the sections are copied verbatim, with the exception of shortening the time. Section six, before the amendment of 1855, was a literal copy of section five of the statute of New York, except the New York statute has "lands, tenements, or hereditaments," in the place of the words "real property," in our Act. Section seven of the Statute of California corresponds to section six of the New York Act. The following is the section. When the two Acts differ, the language of the Act of New York is inclosed in parentheses, for which the words in brackets are substituted in the California Act:

"[No cause of action or defense to an action founded upon the title to real property] (No avowry or cognizance of title to real estate) or to (any rents or services) [rents or to services out of the same] shall be [effectual] (valid) unless it appear that the person [prosecuting the action or making

the defense] (making the avowry,) [or under whose title the action is prosecuted or the defense is made] (or the person in whose right the cognizance is made,) or the ancestor, predecessor, or grantor of such person, was seized or possessed of the premises in question within [five] (twenty) years before the [commencement of] (committing) the act, in [respect to which such action is prosecuted or defense] (of which such avowry or cognizance is) made." (2 Rev. St. N. Y. 293; Stats. Cal. 1850, p. 344, Sec. 7.)

It will be seen that the only change in the language is in substituting for the words "No avowry or cognizance of title to real estate," the words "No cause of action, or defense to an action, founded upon the title to real property," and such other changes as were necessary to make the remainder of the section correspond to this change in the phraseology. The terms "avowry" and "cognizance" had a well known signification, which had reference to proceedings growing out of taking property by distress. At the time this Statute of Limitations was enacted in New York, a landlord was authorized to distrain for rent; and there, also, as in England, the owner of land was authorized to distrain, when the cattle of another were found in his grounds, *damage feasant*. (2 Rev. Stat. N. Y. 517; 3 Black. Com. 7.)

When property was distrained, the remedy by the owner of the property taken was an action of replevin. "Upon this action being brought, the distrainer, who is now the defendant, makes *avowry*; that is, he avows taking the distress in his own right, or the right of his wife, and sets forth the reason of it, as for rent arrears, damage done, or other cause; or else, if he justifies in another's right, as his bailiff, or servant, he is said to make cognizance; that is, he acknowledges the taking, but insists that such taking was legal, as he acted by the command of one who had a right to distrain; and on the truth and legal merits of this avowry, or cognizance, the case is determined." (2 Black. Com. 149.)

In this way, it will be seen there would arise an "avowry, or cognizance of title to real estate;" and such cases are pre-

cisely the cases provided for in this section of the statutes of New York.

The first Legislature of this State—as some other States had done before—finding a well digested Statute of Limitations, with its meaning already settled by construction, adopted it almost bodily, as will be seen by comparing the different sections of the two Acts. But the Legislature did not see fit to adopt the practice of distraining for rent, damage done by cattle, etc., and when they came to consider section seven, they found the terms used in the New York statute inapplicable to the condition of things in California. But the action for rent, damage done by cattle, and perhaps other personal actions, dependent upon title to real estate, remained; and it doubtless occurred to them that the terms “avowry and cognizance” might be dropped and other words substituted, and the provisions of this section be thus adapted to such cases and made applicable to the prosecution made necessary by the non-adoption of the law relating to distress, as well as to the defense, and hence the retention of the section thus modified. Such may reasonably be supposed to have been the case. Whether or not these are the precise cases or the only cases intended to be provided for, or whether or not the section is of any practical utility under the condition of the law in California relating to such cases, it is not necessary now to determine. But this brief review of the origin and history of this section will serve to throw some light upon its construction, and whatever other cases may or may not be embraced within the scope of its provisions, we think it clearly shows that the section, as it stood in the Act of 1850, was not designed to cover the same cases provided for in the preceding section. It must have been intended for some other purpose. Granting this view to be correct, it follows that the amendment of 1855 (which was only an addition, in the nature of an exception, to the section as it before stood) must have referred to the classes of cases already provided for in that section—that is to say, personal actions founded upon the title to real property, and not to actions for the recovery of such property.

It may be well to remark, in passing, that the substitution in our Act of the word "effectual" for the word "valid" does not appear to be very happy, as "effectual" does not seem to be the precise word to use in connection with the phrase "cause of action;" and the substitution of the words "commencement of" for the word "committing" is still more infelicitous.

The object of the change is not very apparent, and the tendency of the use of the words "*commencement of the Act*" in the place of the words "*committing the Act*" is to obscure the sense rather than to make it clear. Possibly the change may have originated in a clerical error.

The judgment must be reversed on the points already discussed. But there is another question made in the case and argued by counsel—one that has also been frequently raised in the District Courts. The question will doubtless arise again on the new trial in the Court below, and for that reason it is better that it should be decided now.

It was stipulated by the parties, and found as a fact by the jury, that both parties claim title under the same Mexican grant, through Vallejo. It is insisted that, because both parties claim under Vallejo, and the Mexican title was not in question—the action was necessarily founded on the conveyance from Vallejo only, and not upon a Spanish title, and that the proviso contained in section six is, therefore, inapplicable to the case.

But the plaintiff does, nevertheless, claim under a title derived from the Mexican Government. It is so stipulated and found. He comes clearly within the language of the law: "*Provided, however, that an action may be maintained by a party claiming such real estate or the possession thereof under title derived from the Spanish or Mexican Governments, or the authorities thereof, if such action be commenced within five years from the time of the final confirmation of such title,*" etc., etc. This language is clear and unmistakable. There is no exception in favor of cases in which the defendant claims under the same grant, and does not contest the validity of the Spanish or Mexican title. The exemption from the bar stated in

the first clause of the section is made to depend upon the fact of "claiming such real estate" under a Spanish or Mexican title, and not upon the question as to whether the defendant upon the trial shall put him to the trouble of tracing his title back to its source. It is doubtless true that the policy of the law was founded upon the extreme difficulty and great expense of proving up a Spanish title before final confirmation. And it may be that, in a particular instance arising in practice, the reason upon which the law was founded may not operate with full force; but the law deals in generalities, and cannot provide for every case that may arise. In this instance it has provided for a whole class of cases, and the distinguishing characteristics of the class is that the land is claimed under a certain kind of title. In this case the complaint alleges a title in fee simple in the ordinary general terms. The answer denies every allegation. It also sets up the Statute of Limitations in avoidance. The plaintiff replies, that he claims under a Mexican grant, and that five years have not elapsed since the final confirmation, and these are the issues presented by the pleadings. They certainly present a case within the proviso. The pleadings put the plaintiff upon proving his Spanish title. The defendant is in possession, and the plaintiff must show a title of some kind to enable him to recover. The defendant has denied generally the allegations of the complaint. He may fold his arms, and quietly rest until the plaintiff shows his title. Would any lawyer say that the plaintiff could safely rest by showing a title from Vallejo without going beyond him? He might possibly be able to show a possession in Vallejo, and thus make out a *prima facie* case; but then, again, he might not. But admitting that he could, would it be prudent for a plaintiff holding under a Mexican grant to risk a nonsuit by resting without connecting himself with his ultimate source of title? But it is said in this case there was a stipulation that both parties claimed under a Mexican grant. True, upon the trial this stipulation was made, and it obviated the necessity of proving what otherwise would have been necessary under the pleadings. But how can the plaintiff know

in advance what stipulation the defendant may be willing to make, or upon what title he may base his defense? In every instance the defendant may, by denying the allegation of the complaint, put the plaintiff to the trouble of tracing his title to its source, and if he fails in this, subject him to the risk of a non-suit before disclosing at all the title upon which he rests his defense.

A party holding lands under a Spanish grant, knowing that a defendant could, and reasonably presuming that he would, put him to the proof of his Spanish title, might well be deterred by the well-known obstacles of litigating an unconfirmed title, from bringing suit until the title under which he claimed should be finally confirmed, and in such case the construction sought to be put upon this provision of the Act might be the means of defeating the acknowledged policy of the law. Under such a construction, a party, while waiting for the final confirmation of the title under which he claims, relying upon the proviso of section six, might defer bringing suit against the occupants of his land for a period of five years, and then, when his action is barred, learn, for the first time, that the occupants set up some shadowy claim under the same title, but sufficient to give them color, and set the statute in motion and cut off his right of action. The Legislature did not contemplate that claimants under Spanish grants should be subjected to such risks. Such a law would prove a snare rather than a protection.

If we follow the obvious import of the language of the statute, and give it the construction that the great mass of men would naturally put upon it, we shall have a simple, plain, and unchangeable rule of action, easily understood, and not liable to mislead.

But if, upon an argument, however ingenious and able, drawn from the supposed policy of the law, we attempt to engraft upon this provision an exception not clearly imported by the language of the Act itself, we shall have a rule difficult of application, and one that is liable in practice to lead to injustice and inextricable confusion.

In our opinion, then, the exemption specified in the proviso under consideration does not relate to cases merely in which the validity of the Spanish or Mexican title is the question to be litigated and determined, but that it extends to all cases in which the plaintiff claims land under such a title; that it applies to all cases in which the plaintiff is liable to be called upon to connect himself with the Spanish or Mexican Government as the source of his title, and does not depend upon the contingency as to whether or not the defendant does in fact call upon him to establish by proof a Spanish or Mexican title.

The plaintiff's right, under the statute, to maintain his action, depends upon the condition and character of his ultimate title, and not upon the volition of the defendant.

This case presents important questions not before decided by this Court. There are some technical difficulties on the face of the record in the way of rendering judgment for the defendants, if it were otherwise proper. But, independent of these considerations, we think the ends of justice, under the circumstances of this case, require that a new trial should be had. As the case goes back for a new trial, we will add the suggestion, that there is no finding of the fact that Williamson was the tenant of Hanscom—an important fact, as the pleadings stand, for the reason that Williamson did not set up the Statute of Limitations—and the findings of the jury only state that *Williamson* had been in adverse possession for five years. It is averred in the statement, however, that “defendants introduced evidence tending to show that defendant, Williamson, was, and that he had been for more than five years, a tenant of Hanscom.” And no testimony to the contrary appears in the statement. It is also stated that “it was admitted by the parties hereto that defendants have been in possession for five years prior to the commencement of this suit.” The jury, then, would necessarily have found these facts in the special verdict had the question been submitted to them. It is not found, however, and the general verdict is for plaintiff. The general verdict is, therefore, contrary to the evidence and stipulated facts on this point, and the

Rush et al. v. Jackson et al.

special verdict fails to find one of the facts essential to control the general verdict. The argument of the case seems to have been on the hypothesis that Williamson was Hanscom's tenant.

The fact of a final confirmation of the grant is not distinctly alleged in the replication. It can only be inferred from the allegation that "five years had not elapsed since the final confirmation," etc. It would be better in such cases to allege directly either that the claim has been presented for confirmation, and the proceeding is still pending, or that the claim has been finally confirmed, stating the date of the confirmation.

We allude to these points so that the parties may, upon the next trial, avoid any occasion for taking an appeal upon technical grounds.

The judgment is reversed and a new trial ordered, with leave to either party to amend his pleading as he may be advised.

Mr. Justice CURREY, having been of counsel, did not sit in this case.

HIRAM RUSH AND E. P. HILBORN v. ANDREW P. JACKSON AND E. C. McCOMB.

LEGISLATIVE GRANT — CONSTRUCTION OF.—An Act of the Legislature granting to the parties therein named the right "to build a wharf as long as twelve hundred feet near the island in the tule in Suisun Valley, County of Solano, on the land of the State," is not void for uncertainty, but is good as a grant from the State of such rights and privileges as can be held to have passed by a fair and reasonable construction of its terms.

SAME — APPLIED TO A WHARF.—Under the terms of such a grant, the grantees therein named have a right to select any point on the slough which was near the island in the tule, in Suisun Valley, for the erection of their wharf, and to build it of any length they may elect, not exceeding twelve hundred feet.

SAME.—No obligation is imposed on the grantees, but it is left to their choice and election whether they accept the grant or build a wharf, and of what length the wharf shall be, so that it does not exceed twelve hundred feet.

SAME.—Under such a grant the grantees must, within a reasonable time, select the site of their wharf and prosecute its erection with ordinary diligence, and the extent of the grant will be determined by the length of wharf built, or amount of appropriation made within a reasonable time.

Rush et al. v. Jackson et al.

SAME.—Where the Act making such grant was passed in 1852, and in the same year the grantees selected the site for their wharf, and built it two hundred feet in length, and from that time up to 1858 made no further erection or appropriation; *Held*, that the grantees thereby determined their acceptance of the grant, and the extent of their acceptance, and the grant became inoperative beyond the two hundred feet appropriated.

APPEAL from the District Court, Seventh Judicial District, Solano County.

This action was commenced in March, 1861. The other facts are stated in the opinion of the Court.

Shafters & Heydenfeldt, for Appellants.

The grant was exclusive, and such rights are always protected. (*Newburgh T. Co. v. Miller*, 5 Johna. Oh. R. 111; *Groton T. v. Ryder*, 1 Johna. Oh. R. 611; *Benson v. City of N. Y.* 10 Barb. 228; *Norris v. F. & T. Co.* 6 Cal. 590.)

The grant to plaintiff became definite and complete as soon as the land was segregated by the survey. (*Smith v. Waterman*, 13 Cal. 373.)

The right to locate and survey was vested in the grantees, and their action in that regard must be held as effectual to confer a definitive right of property as if it was the action of the Government. (*Riley v. Heisch*, 18 Cal. 198.)

Crockett and Crittenden, for Respondents.

The Act of 1852, by which Moody & Hart were authorized to build the wharf, is void for uncertainty. It defines no place at which the wharf is to be built, nor prescribes any time within which it is to be commenced or finished, nor the character of the structure, nor the time for which it is to continue.

The privilege granted by the Act is not a grant of property, but a *licence*, and is not assignable. The plaintiffs, therefore, can claim nothing as the successors to Moody & Hart, or Wing. The permission to erect a wharf for commercial purposes was a personal license, and as such was not assignable. (*Munsell v. Temple*, 3 Gillman, 98; 1 Morris, 199; *Cowles v. Kidder*, 4

Rush et al. v. Jackson et al.

Foster N. H. 364; *Monroe v. Thomas*, 5 Cal. 471; *Thomas v. Armstrong*, 7 Cal. 287.)

The survey under which the plaintiffs claim, and which they allege was an appropriation of the twelve hundred feet, as set out in the complaint, can have no effect as an appropriation of that particular land. They might have made a new survey at any time, varying the location, or a dozen surveys, each different from the others, and each survey would have been as operative as the present one to appropriate land. The survey was a superfluous and void act, not binding on Wing or his assigns—was not required by the Act of the Legislature, and had no effect whatever on the question of appropriation.

The privilege granted to Moody & Hart, and subsequently, by the Act of 1857, to Wing, attached to no particular land until it was actually used and appropriated, and there could be no appropriation except by the erection of a wharf. (*Lombard v. Cheever*, 3 Gillman, 469.)

The license to Moody & Hart, or Wing, is not such a contract as binds the State not to grant a similar privilege to another in the same vicinity; and by the Act of 26th April, 1858, the right was granted to Jackson to erect a wharf on the precise ground occupied by defendants' wharf. Neither the plaintiffs nor their predecessors, at the passage of this Act, had, in any valid manner, appropriated the land covered by defendants' wharf, the survey being ineffectual for that purpose. The grant to Jackson must, therefore, prevail over that under which the plaintiffs claim. (Story on the Constitution, §1395, *et seq.*; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420.)

By the Court, SANDERSON, C. J.

This is an action brought to abate a wharf erected and maintained by respondents in the tule, in Suisun Valley, near Suisun City, Solano County, upon the ground that the same is a nuisance, and an obstruction to the free use and enjoyment by appellants of certain wharf rights and privileges claimed by them.

When the case was called for trial in the Court below, the defendants moved for judgment of nonsuit upon the pleadings, consisting of the complaint, answer, and replication. The motion was granted by the Court, and judgment rendered accordingly, from which plaintiffs appeal. The question to be determined is whether upon all the facts stated in the complaint, and those stated in the answer and not denied in the replication, the plaintiffs have any cause of action against the defendants. It appears from the pleadings that in 1852 an Act was passed by the Legislature purporting to grant to William Moody and Morgan Hart certain "wharf privileges near the island in the tule, in Suisun Valley, County of Solano, on the land of the State." The Act in question is worded as follows, to wit:

"SECTION 1. It shall be and is hereby made lawful for William Moody and Morgan Hart to build a wharf, as long as twelve hundred feet, near the island in the tule, in Suisun Valley, County of Solano, on the land of the State.

"SEC. 2. The State hereby grants to the said William Moody and Morgan Hart the use of the overflowed and tule land on both sides of said wharf for the distance of one hundred feet from each side of it, for twenty-five years from the passage of this Act; *provided*, that the navigation of the slough upon which it is built is not obstructed by said wharf."

This Act was passed on the 3d day of May, 1852. On the 1st day of July, 1852, one Josiah Wing, claiming to be interested with Moody & Hart in the franchise granted by said Act, erected a wharf between the west bank of the slough and island mentioned in said Act, but this wharf was less than two hundred feet in length. On the 15th day of September, 1852, Moody & Hart conveyed by deed, to Wing, an undivided third interest in said franchise; and on the same day Hart in like manner conveyed his remaining interest to Wing, who thereby, as is claimed by plaintiffs, became vested with an undivided two thirds interest in said franchise. On the 24th of February,

Rush et al. v. Jackson et al.

1853, the Legislature amended the first section of the Act above quoted by striking out "twelve" and inserting "two," making it read "as long as two hundred feet," instead of twelve hundred. (Statutes of 1853, p. 30.) In February, 1855, Wing caused a survey to be made of twelve hundred feet in length, running along the bank of the slough, and embracing at its northern end the wharf erected by him in 1852. This survey was recorded in the Recorder's office of Solano County, and a copy is annexed to and made a part of the complaint. The land embraced in the survey was swamp and overflowed land, belonging to the State, and in December of the same year was patented to the defendant Jackson. On the 25th of April, 1857, the Legislature passed an Act extending and confirming to Wing the rights and privileges granted to Moody & Hart by the Act of the 3d of May, 1852, "with the same force and taking effect from the same time as if they had been granted to the said Josiah Wing instead of the said Moody & Hart, on the 3d day of May, 1852." (Statutes 1857, p. 249.) This Act makes no mention of the amendatory Act of 1852, reducing the length of the wharf from twelve hundred to two hundred feet; but in 1858 another Act amendatory thereof was passed, reviving the limitation of the Act of 1853 respecting the length of the wharf. (Statutes of 1858, p. 74.) In 1858 an Act was passed by the Legislature authorizing and empowering the defendant Jackson to erect a wharf on the slough, at a certain point commencing at the southern extremity of the twelve hundred feet embraced in Wing's survey. Pursuant to the provisions of said Act, a wharf two hundred feet in length was built by Jackson at the point designated. The plaintiffs' and defendants' wharves are separated by a space of eight hundred feet. The plaintiffs claim to have succeeded to all the rights of Wing to the franchise and wharf by a series of mesne conveyances, but do not aver that it is now or ever was their intention to extend the wharf over the whole twelve hundred feet embraced in Wing's survey, nor that the defendants have in any manner prevented them from doing so. They simply aver that the defendants have erected, without their

Bush et al. v. Jackson et al.

license or consent, a wharf two hundred feet long on the southern extremity of Wing's survey, and that it seriously impairs the value of their franchise.

Under the view which we have taken of this case, it becomes unnecessary to decide many of the points which have been made and ably argued by counsel. For the purposes of our decision, we shall assume that the Act of 1852, by which Moody & Hart were authorized to build a wharf "near the island in the tule, in Suisun Valley," is not void for uncertainty, (of which we have serious doubts, however,) but, on the contrary, is good as a grant by the State to them of such rights and privileges as can be held to have passed by a fair and reasonable construction of its terms. We shall also assume that Wing, although not named in the Act, was interested with Moody & Hart in the easement thereby created, and built the wharf now claimed by the plaintiffs in this action, in acceptance of the grant, and for the purpose of securing to himself and his co-grantees the benefits thereof. We shall also assume that the plaintiffs have acquired and become vested with all the rights and privileges of Moody & Hart, granted to them by the Act in question, and are entitled to the same protection which would be accorded to Moody & Hart, were they still the owners of the franchise, and invoking the aid of the Court. We shall also disregard the Act of 1853, reducing the length of the wharf from twelve to two hundred feet; the Act of 1857, extending the right of Moody & Hart, acquired under the former Act, to Wing; and the Act of 1858, revising, as to Wing, the limitations imposed upon the Act of 1852 by that of 1853, as having no material relation to the grounds upon which our conclusion is based. The case is thus placed upon grounds most favorable to the plaintiffs, and made to depend for its solution upon the construction to be given to the Act of 1852, in ascertaining the nature and extent of the rights and privileges thereby conferred upon Moody & Hart, and by them secured through their acts of acceptance.

The first section of the Act makes it lawful for Moody &

Hart to erect a wharf "near the island in the tule, in Suisun Valley," but designates no particular locality further than the term wharf itself imports. The second section, however, contains a proviso to the effect that the navigation of the slough upon which it is built shall not be obstructed by the wharf. This proviso, together with the meaning and import of the word "wharf," limits the more general description of locality contained in the first section, and restricts the location of the wharf to some point on the slough which is near the island. From the terms of the grant no more definite locality for the erection of the wharf can be fixed. The wharf which Moody & Hart are thus granted the right to erect, is described in no manner or respect except that it shall not exceed twelve hundred feet in length; but in what direction or upon what line that length is to be extended; whether along the bank and parallel with the slough, or obliquely, or at right angles, is not stated in terms. But the second section "grants the use of the tule and overflowed land on both sides of the wharf, for the distance of one hundred feet from each side of it." This language seems to indicate that, in the understanding of the granting power, the length of the wharf was to be extended at right angles, or nearly so, to the slough, and not along its bank. If the length of the wharf was not to be extended along the bank, we are unable to ascertain from the record or the briefs of counsel how there can be any tule or overflowed land on the side next the slough to grant, or if so, how there could be any occasion or necessity for a grant of its use in specific terms, since the grant of the right to erect the wharf carried with it the unobstructed use of its frontage. "A wharf is a perpendicular bank or mound of timber or stone and earth, raised on the shore of a harbor, river, canal, etc., or extending some distance into the water, for the convenience of lading or unlading ships and other vessels." Necessarily, therefore, the wharf was to be built upon the bank, at the water's edge, or extending into the water far enough to be accessible to vessels navigating the slough. Hence, the grant of the tule or overflowed land, for one hundred feet in front of

the wharf, or upon the side next the slough, is absurd and meaningless. Nor, for like reasons, was there any necessity for a grant of the use of the land upon the opposite side, (assuming the length of the wharf to be along the bank,) for the grant of the right to erect the wharf would carry with it the use of land in its rear sufficient for its convenient enjoyment and use for commercial purposes. There is no utility apparent in the grant of the land upon both sides of the wharf upon any other theory than that it was to be built at right angles to the slough, or nearly so. Upon the latter theory, the utility of the grant is manifest. It affords ready and unobstructed access to the wharf for vessels navigating the slough, and confers an exclusive right to the extent of one hundred feet upon each side of it.

If this construction of the Act of 1852 be correct—and we are inclined to the opinion that it is—it follows that the defendants' wharf, being about eight hundred feet distant from that of the plaintiffs, is not within the limits granted to Moody & Hart, and by them segregated through the appropriation of Wing in 1852, and that the rights and privileges of the plaintiffs have not been intruded upon.

But it is not necessary to rest the decision of the case solely upon the foregoing construction of the Act of 1852. Assuming that the theory of the plaintiffs is correct, and that under the terms of the grant Moody & Hart had the election of the line upon which the length of the wharf was to be extended, and could lawfully extend it along the bank of the slough, or at right angles, or obliquely thereto, we still think the judgment of the Court below was correct.

Under the terms of the grant, Moody & Hart were allowed to select any point on the slough which was near the island in the tule, in Suisun Valley, for the erection of their wharf, and were allowed to build it of any length they might elect, not exceeding twelve hundred feet. No obligation is imposed upon them to build a wharf twelve hundred feet long, nor of any other determinate length, nor any wharf whatever. Except as to the limitation of twelve hundred feet, the extent

Bash et al. v. Jackson et al.

of the grant, with regard to the length of the wharf, is indeterminate, and designedly left to the choice and election of the grantees. They had the right, therefore, when they determined to accept the grant, to determine also its extent, and say whether the wharf should be twelve hundred feet in length or any number less than that. The Act provides no mode or manner by which the grantees are to signify their acceptance of the franchise, or the extent of that acceptance, and in the absence of such a provision we know of no way in which they could do so, except by selecting within a reasonable time the site of their wharf, and prosecuting its erection with ordinary diligence, and determining the extent of the grant as accepted by them by the extent of their appropriation. On the first day of July, 1852, within a reasonable time after the passage of the Act, the grantees selected a site for a wharf, and built one not exceeding two hundred feet in length, and from that time to the present no further appropriation has been made, nor is there even an averment in the complaint that they now desire or intend to extend their wharf, or that the same is demanded by the wants of commerce. In this manner they signified their acceptance of the grant and the extent of that acceptance. Thereby they determined, as they had the right to do within the limitations imposed by the Act, the site and length of the wharf. By these acts all the conditions of the grant which were left for them to determine became fixed, and the Act was made operative as a grant to the extent of their appropriation, and no further. By the erection of the wharf, the land covered by it and within one hundred feet on each side became segregated from the other land of the State, and to it the grant attached, and passed the estate therein specified. All the land outside of the boundaries thus established remained the property of the State as absolutely as before the passage of the Act, and the subsequent grant to the defendant, Jackson, and his wharf, erected in acceptance thereof, in no way infringes upon the rights and privileges acquired by Moody & Hart.

Judgment affirmed.

Fogarty v. Kelly et al.

Mr. Justice CURREY and Mr. Justice SHAFER, having respectively been of counsel, did not sit upon the trial of this case.

PATRICK FOGARTY v. RICHARD KELLY, AMOS McDONALD, JOHN WISE, AND WILLIAM McCLENNAN.

FORCIBLE DETAINER — WHAT CONSTITUTES.— A naked avowal of an intention to keep possession, and actually keeping possession, do not necessarily constitute such force, or threat of force, as to render a detainer forcible, where there has been an unlawful entry, unless such an avowal is made in answer to a demand for possession by the party claiming to have been ousted, and is accompanied by some act or word of the party making the unlawful entry showing an intent on his part to maintain the possession by force.

SAME — INSTRUCTIONS TO JURY.— F. brought an action against K. for an unlawful entry and forcible detainer. F. did not reside on the premises, and his only possession consisted in an inclosure and cultivation. K. went within the inclosure in the night time, erected a cabin, and, at some subsequent period of time, declared he would keep possession by force. The Court instructed the jury that if they found "that the defendant entered upon the premises in the night time, during the hours of sleep, while plaintiff was in the actual and peaceable possession of the same, and that he took possession and avowed the intention to keep possession, and actually did keep possession, it was sufficient evidence of force to maintain the action of forcible entry and detainer, and the jury should find for the plaintiff." *Held*, that the instruction was erroneous, as applied to the testimony of this case, because that portion of it relating to K.'s intention to keep possession made no reference to any demand on the part of F. for possession, and because the instruction was framed as though it related to a question of forcible entry, and not forcible detainer.

The case of *Scarlett v. Lamorque*, 5 Cal. 63, commented on and explained.

APPEAL from the County Court of Napa County.

Plaintiff recovered judgment in the County Court, and defendants appealed.

The other facts are stated in the opinion of the Court.

Moore & Laine, for Appellants.

The instruction of the Court does not apply to the case at bar, as plaintiff sues for an unlawful entry and forcible detainer, and not a forcible entry and detainer, as this instruction contemplates.

Fogarty v. Kelly et al.

Said instruction is against law, for if forcible entry is relied on, it must be proved. (*Preston v. Kehoe*, 15 Cal. 318.)

A. A. Cohen and Wallace & Rayle, for Respondents.

By the Court, SAWYER, J.

This is an action under the "Act concerning Forcible Entries and Unlawful Detainers."

The premises in controversy are three hundred and odd acres of agricultural lands in Napa County—the north half of a larger tract of upwards of six hundred acres. The whole tract has a fence on three sides, and Napa Creek on the fourth side, forming an inclosure of the entire tract. The plaintiff, Fogarty, claims the north half, being the premises in dispute, and James Glassford the south half. Part of the way between Fogarty and Glassford there is a division fence, and part of the way a furrow. Fogarty appears, from the testimony, to have cultivated the premises for three years. At the time of the alleged entry there was a volunteer crop growing on the premises. It does not appear that Fogarty resided or had any building on the land in dispute. Glassford testified that on the morning of the 5th of June, between four and five o'clock, he saw two cabins of the defendants on the half belonging to Fogarty; that he heard the sound of hammers, and went up to the stable loft and saw the cabins; that he afterwards informed Fogarty that the cabins were there. This is the only testimony as to the original entry. There was testimony tending to show that defendants, at some subsequent time, avowed an intention to keep possession, and that they actually did remain in possession. There was also evidence tending to show that they intended to maintain their possession by force if necessary.

On this state of the evidence, the Court, at the request of the plaintiff, and under exception on the part of the defendants, gave the following instruction, viz: "If the jury find that the defendants entered upon the premises in the night time, during the hours of sleep, while plaintiff was in the actual and

Fogarty v. Kelly et al.

peaceable possession of the same, and that they took possession and avowed the intention to keep possession, and actually do keep possession, it is sufficient evidence of force to maintain the action of forcible entry and detainer, and the jury should find for the plaintiff." The giving of this instruction is assigned as error.

The instruction, in the form given, is liable to mislead a jury. It is altogether too loose in its terms, when considered in connection with the testimony in the case. A naked avowal of intention to keep possession, and actually keeping possession, do not, necessarily, amount to force, or a threat of force. Such avowal should have some relation to a demand of the possession by the party claiming to have been ousted, and it should, at least, be accompanied by some act or word tending to show an intent to maintain the possession by force, and these qualifications should be embraced in the instructions. The plaintiff relies upon the case of *Scarlett v. Lamarque*, 5 Cal. 63, to support this instruction. The language of the Court in that case is very similar to that in this instruction; but it is applied to an entirely different state of facts, as shown by the record, although it does not appear in the published report of the case. Scarlett was in possession of a quartz mill, under a lease; the mill had been run until one or two o'clock in the morning, when the employés of the plaintiff closed up and retired to rest in the mill. Before daylight, and while the hands were actually sleeping in the mill, and the products of the last day's work were still in the amalgamating tubs, the defendants — some five or six in number — entered the mill, took possession, commenced tearing down the stamps under pretense of making repairs, and retained possession against the repeated demands and protest of the plaintiff and his employés. On this state of proofs, the Court, at the close of plaintiff's testimony, on defendant's motion, granted a nonsuit, and plaintiff appealed. The question was whether there was sufficient testimony to entitle the plaintiff to have his case submitted to the jury. The late Supreme Court held that there was, reversed the

Fogarty v. Kelly et al.

judgment, and remanded the cause. In deciding the case, the Court said:

“ When a party of four or five men *enter a building* occupied by another, in the night time, during the hours of sleep, and take possession, and avow the intention to keep possession, and actually do keep possession, it is sufficient evidence of force to maintain the action of forcible entry and detainer.”

This may have been proper, when applied to that particular case, with reference to the question then before the Court as to the propriety of granting the nonsuit. But when used in an instruction given to a jury, in a case where the entry is upon a tract of three hundred acres of land having only a volunteer crop growing on it, and the only evidence of present possession, in addition to the inclosure, is the fact that it had before been cultivated by the plaintiff, we think the language requires, at least, the qualifications before suggested. Besides, in the case cited the question was as to whether or not the *original entry* was forcible, and the language used was not in an instruction to a jury, but a general expression in relation to the point then under discussion.

The present action is brought on the theory that the action may be maintained where there is an unlawful entry without force, and a subsequent forcible detainer. There is no pretense that the entry was forcible; the complaint does not charge a forcible entry; it charges only an *unlawful entry* and a *forcible detainer*. The instructions should have been pointed at the *unlawful* entry and the subsequent forcible detainer, and the two ideas should have been kept separate and distinct. But the instruction is framed as though it related to the question of force at the time of the entry, when, in fact, the transactions referred to in the commencement of the instruction, and those referred to in the latter part of it, were totally distinct, and occurred at different times. An entry by a number of men in the night time might have a tendency to prove it to be in bad faith and unlawful, but it would have little tendency to prove a detainer at some subsequent period of time to be forcible. Admitting, then, that such an entry is proved to be unlawful,

we come to the other element in the action, as alleged: Was there a forcible detainer? The only part of the instruction directly applicable to this point, under the testimony, is the naked statement that "if the defendants avow an intention to keep possession, and actually do keep possession, it is sufficient evidence of force to maintain the action." This cannot be true as a legal proposition. This instruction, taken in connection with the testimony in the case, combines principles applicable to the different elements of the cause of action—the unlawful entry, and a subsequent forcible detainer—as though they applied to a single and different ground of action, viz: a forcible entry, and thereby it leads to uncertainty and confusion. The instruction, therefore, lacks that precision necessary to keep these different elements separate and distinct, and to present the law clearly to the minds of the jury.

This action is highly penal in its character, and Courts, in such cases, should be careful in giving instructions to see that the proposition is expressed in such terms and with such qualifications as not to be liable to mislead the jury. In this case the Court was undoubtedly misled by not having before it the facts upon which the opinion of the Court in the case cited was based.

We are not prepared to say that there was not, in this case, sufficient evidence of an unlawful entry, within the meaning of the Forcible Entry and Detainer Act, as uniformly construed by our predecessors, and a sufficient manifestation of an intent to detain the premises by force, to entitle the plaintiff to recover, had there been no error in the instructions. But this would have been a question for the jury under a proper charge from the Court, and we cannot tell how far they may have been misled by the objectionable instruction under consideration.

The judgment is reversed and a new trial ordered.

Mr. Justice CURREY, having been of counsel, did not sit on the hearing of this case.

Ashley v. Vischer.

**DELOS R. ASHLEY, ADMINISTRATOR OF THE ESTATE OF
JOHN MORRISON, DECEASED, v. EDWARD VISCHER.**

RECEIPT FOR MONEY.— A mere naked receipt in writing, acknowledging the delivery of money, is not a contract, and does not import a promise, obligation, or liability, and an action upon it is therefore barred by the Statute of Limitations in two years.

RECEIPT WHEN A CONTRACT.— A receipt or acknowledgment in writing for money, which also contains a clause stating that the money received is to be applied to the account of the person from whom received, partakes of the double nature of a receipt and contract, and shows upon its face a liability to account, and an action upon it is not barred by the Statute of Limitations until four years have expired.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

This action was commenced on the 23d day of February, 1859.

The other facts are stated in the opinion of the Court.

Henry H. Haight, for Plaintiff and Appellant.

"Received of John Morrison, Esq., the sum of two thousand seven hundred and fifty dollars.

"San Francisco, February 24th, 1855.

"(\$2,750.)

EDWARD VISCHER."

Is this receipt an instrument in writing within the meaning of this section? It is granted that it is not a contract perfect in every term; but perfect contracts are not the only ones comprehended within the letter of the statute. Were it so, many of the most sacredly and formally executed documents would be excluded from the statute, because parol evidence is admitted in Courts daily for the purpose of explaining defective and ambiguous provisions.

What, then, is a sufficient instrument of writing within the Statute of Limitations? Any document which affords the evidence in writing of the essentials of the contract; any written evidence which "instructs" the mind as to the limit of the liability and the party liable. That this is a correct definition is proved by the meaning given to it in the Statute of Frauds.

Ashley v. Fletcher.

"A contract, or some note or memorandum thereof in writing, expressing the consideration, and subscribed by the party to be charged," is declared to be an instrument of writing. (Compare the 8th and 9th sections, Arts. 396 and 397 Wood's Dig.; also the 12th, 13th and 19th sections, Arts. 400, 401, and 407.)

This instrument is, in its terms, defective in but one particular. No *express* promise is apparent on its face. In everything else—in date, amount, party from whom the money was received, and the signature of the party receiving—the contract is complete. But in this one particular, nothing on the face of the contract *expresses* the liability. That liability, I contend, is not essentially necessary to appear in terms, but may be *implied* by law. Is the paper less an instrument because defective in this particular? Where a man receives another's money, the law *implies* an agreement to repay it. That which is implied by law is unnecessary to appear expressly, and the instrument, linked with the implication of law, completes the contract.

It cannot be objected that this paper negatives the idea of liability on its face, by manifesting that the money might have been received in payment of a pre-existing debt. It is not such a receipt. It has not the universal characteristics of such a receipt—the evidence of the debt to which the payment is to be applied, or the degree of liquidation of that debt. It neither expresses that the money was received "on account" nor "in full," which is always incorporated with every business receipt. It stands before the Court as a naked acknowledgment of a receipt of money, and the law will imply a liability to repay that money.

Sidney L. Johnson, for Defendant and Appellant.

There is nothing in the receipts themselves which can be said to be a foundation for an action in these terms, or in any form of assumpsit. There is neither promise to pay, nor acknowledgment of indebtedness.

The money given might have been in discharge, total or

Ashley v. Vischer.

partial, of a debt of Morrison to defendant; the money that might be collected from the checks, and was to be carried to Morrison's account, might be more than overbalanced by other items of the other side.

The receipt of money by the defendant in a check drawn by the plaintiff on his banker, *prima facie* imports a payment, and not a loan. (*Cary v. Gerriah*, 4 Esp. N. P. O. 9; 1 Stevens' Nisi Prius, 316.

The written proof of the receipt of money can raise no other presumption than the parol proof. By itself it is no evidence to establish a debt. No action can be said to be founded on that which does not by itself, *prima facie*, establish a right of action.

The counsel for plaintiff speaks of the receipt as a contract. On this point we refer to 1 Greenl., Sec. 305; *Hawley et al. v. Bader et als.*, 15 Cal. 44, 46; 2 Pars. on Cont. 68; *Brannan v. Mesick*, 10 Cal. 108. The first receipt is a bare statement of a fact, that so much money was received by one person from another. The second writing differs in form, but amounts to the same thing so far as this action is concerned. Certain checks are to be converted into cash and applied to the account of John Morrison. It is merely saying that John Morrison is the one whose account is to be credited with the proceeds of the depreciated paper. No light whatever is thrown by this upon the state of the account upon the question of indebtedness. The presumption would be against John Morrison. Why give depreciated paper to be converted into cash at the best possible rate and applied to another's account, unless for the sake of covering or diminishing an unfavorable balance?

It is argued that because no expressions are used, such as "on account," or "in full," by which these receipts would have been conclusive in our favor, they are therefore conclusive against us. But the plaintiff has to make out an action against us founded on an instrument in writing, not we to make out a defense in writing; and the question is, whether either of these writings is in itself such an instrument, not

Ashley v. Vischer.

whether it proves the original absence of any cause of action against us.

By the Court, SAWYER, J.

The question in this case is, whether, under the Statute of Limitations, the two causes of action set out in the complaint are barred in two or four years. The following are the instruments to be construed:

"Received of John Morrison, Esq., the sum of two thousand seven hundred and fifty dollars. San Francisco, February 24, 1855.

"(\$2,750.)

EDWARD VISCHER."

"This is to state that I am holder of three checks on Page, Bacon & Co., (viz: \$380.70, \$514.40, \$227.44,) amounting to eleven hundred and twenty-two dollars and sixty-three cents, to be converted into cash as best possible, and to be applied to the account of John Morrison. San Francisco, February 24, 1855.

"(\$1,122.63.)

EDWARD VISCHER."

The Court below held that an action to recover the money referred to in the first instrument was barred in two years; in the last, not till four years; and, accordingly, entered judgment in favor of defendant on the first, and against him on the second. Both parties have appealed.

A party may commence "within four years, an action upon any contract, obligation, or liability, founded upon an instrument in writing." * * * "Within two years, an action upon a contract, obligation, or liability, not founded upon an instrument in writing, except an action on an open account for goods, wares, and merchandise, and an action for any article charged in a store account." (Wood's Dig. p. 47, Sec. 17.)

The first instrument is a receipt for a specified sum of money—a mere naked acknowledgment that so much money had been received. There is no contract connected with it—no promise or undertaking in regard to it. It is a mere naked

Ashley v. Vischer.

acknowledgment, without any intimation as to the character in which the money was received, or of any intention or purpose with respect to its future disposition. It does not appear to whom the money belonged. As an instrument of evidence, a mere receipt is governed by rules different from those applicable to other writings expressing contracts or obligations; and this fact serves to illustrate the character of the instrument under consideration. As an acknowledgment of payment or delivery, it would be merely *prima facie* evidence of the fact, and not conclusive. The fact it recites might, therefore, be contradicted by other evidence. A receipt may have connected with it—embodied in the same instrument—a contract to do something else; and in that case it would possess a double character. As a receipt it might be contradicted; while as a contract it would stand on the footing of all other contracts in writing, and could not be contradicted or varied by oral testimony. (1 Greenl. Ev., Sec. 305.) And the reason why a different rule of evidence is applied to a mere receipt seems to be because it is not in any sense a contract, as it does not express or import a promise, obligation, or liability. It is an admission, only, upon which other parties do not ordinarily act, and are not liable to act to their prejudice. (Id., Sec. 212; 1 Phil. Ev. 474, Note 131.)

Professor Parsons says: "A receipt for money is peculiarly open to evidence. It is only *prima facie* evidence either that the sum stated has been paid, or that any sum whatever was paid. It is, in fact, not regarded as a contract, and hardly as an instrument at all, and has but little more force than the oral admissions of the party receiving. But this is true only of a simple receipt. It often happens that a paper which contains a receipt, or recites the receiving of money or of goods, contains also terms, conditions, agreements, or assignments. Such an instrument, as to everything but the receipt, is no more to be affected by extrinsic evidence than if it did not contain the receipt; but, as to the receipt itself, it may be varied or contradicted by extrinsic testimony, in the same manner as if it contained nothing else." (2 Para. Cont. 68.)

Ashley v. Vischer.

In the instrument under consideration no promise or obligation is expressed. Unless a promise or obligation is implied by law from the mere acknowledgment of the receipt of the money, no liability is imported on the face of the instrument.

Mr. Phillips, in his work on Evidence, Vol. 3, p. 426, edition of 1859, says: "In order to recover under a count for money lent, it will not be sufficient merely to prove the receipt of money from the plaintiff by the defendant, since the presumption of law is that money, when paid, is in liquidation of an antecedent debt." And several authorities are cited where money had been paid on checks. (See also *Headley v. Reed*, 2 Cal. 325; 1 Greenl. Ev., Sec. 38, and cases cited.) The principle applicable to checks is the same as in this case, for it matters not whether the evidence is a check or a written acknowledgment of the receipt of the money, so long as the evidence only extends to the fact of the receipt of money from one party by another.

All this instrument shows is the receipt of money from Morrison by the defendant—precisely what is stated in the rule as laid down by the authorities cited. Under this rule, (and we think it is correct,) no promise or obligation is imported by the instrument. No liability can fairly be implied from its terms. If there was any contract, or promise, or liability, it arises from facts entirely outside of this receipt. By itself it is not evidence of a debt. It does not acknowledge or state a fact from which the law implies an obligation, and we do not think that a liability can be said to be "founded upon an instrument of writing," from the terms of which the law does not, *prima facie*, imply any liability whatever. The first cause of action is, therefore, subject to the two years' limitation, and is barred.

Second—The second instrument contains these words: "To be converted into cash as best possible, and to be applied to the account of John Morrison." This, in our opinion, goes beyond the mere acknowledgment of the receipt of money. It indicates to whom the money belongs, and contains a promise to apply it to the account of John Morrison. It is true, the instru-

Ashley e. Vischer.

ment does not state the condition of that account—whether Morrison is already indebted to defendant or not, or, if so, to what amount. But whatever the state of the account between them may be, the fair construction of the instrument is that it was Morrison's money, and that Vischer was to account to him for it. The instrument shows upon its face a liability to account, and this action seeks to enforce that liability.

In the case of *Sannickson v. Brown*, 5 Cal. 57, a number of accounts for labor and services, and for goods and materials furnished for the use of defendants, under the name of the "Laura Virginia Association," had been presented to the Board of Trustees, and allowed. The Board had written thereon the words "audited and approved," and "we certify the above to be correct." The Court held that these accounts, thus indorsed, constituted instruments of writing within the meaning of the statute.

So in *Neighbors v. Simmons*, 2 Blackf. 75, an account had been presented against the defendant, upon which he had indorsed these words: "I acknowledge this account to be just," and appended his signature. This was held to be an instrument in writing within the meaning of the Statute of Limitations of Indiana.

In *Raymond v. Simonson*, 4 Black. 85, the Court say: "This suit is bottomed on written receipts. These receipts are very special; they clearly show the trust and acknowledge the claim; they distinctly state that he, John H. Rackafellow, the guardian, received the several sums of money of the said administrator, Kizer, for the use of Joseph Russell, as guardian for said Joseph, etc. These receipts are, without controversy, instruments of writing within the saving clause of the statute." The receipts were signed by the defendant.

In these cases there was no express promise to pay—no obligation in express terms assumed; but in each there was a state of facts acknowledged in writing to exist, which imported an obligation to pay—from which the law itself implied a liability, and they were held to be instruments in

Keyes v. Fenstermaker et al.

writing within the meaning of the respective Statutes of Limitations under which they arose.

In our judgment, the instrument under consideration presents quite as strong a case as those just cited. It partakes of the double character of a receipt and contract. The defendant expressly undertakes to apply the proceeds to the account of John Morrison; and although the state of the account between the parties is not shown, yet the instrument does show that the money belonged to Morrison, and that defendant was liable to account to him for it.

The state of the accounts would have to be adjusted on the trial; but a liability to account is shown — and, in our judgment, the liability is founded upon an instrument in writing within the meaning of the Act, and the action was not barred till four years had expired. The record shows that the whole amount was, in fact, due from the defendant to the estate of Morrison.

The judgment is therefore affirmed — each party to pay one half the costs.

Z. W. KEYES v. D. FENSTERMAKER AND COREL HOWK.

NOTE — WHEN PAYABLE. — When no day or time of payment is specified in a promissory note, it is to be considered as payable on demand.

INDORSER — LIABILITY OF. — In order to charge an indorser of a note payable on demand, presentment must be made within a reasonable time, and what is a reasonable time depends upon the facts of each particular case.

INDORSER — CONTRACT OF. — The contract of the indorser of such note is, that the maker will pay the note upon a demand made within a reasonable time, and that in the event of his failure to do so the indorser will pay it.

INDORSER — PROOF NECESSARY TO CHARGE. — In order to charge the indorser of such note, the burden is cast upon the holder of proving that the demand of payment was made within a reasonable time, and if any delay has occurred in making the demand, the holder must prove the circumstances excusing the delay.

INDORSER — NOTICE TO. — When demand of the payment of such note is made upon the maker, and the note is dishonored, notice of demand and non-payment must be given to the indorser within the same time which is required in the case of a note or bill made payable at a particular day.

SAME. — At common law, notice of dishonor must be given the indorser on the day following the demand, unless some good reason exists for not doing so.

Kaye v. Fenstermaker et al.

PROMISE BY INDORSER TO PAY.—A promise to pay a note, made by an indorser after its maturity, where no demand has been made or notice given, and made with full knowledge of the holder's laches, is binding upon the indorser, but this promise must be established by clear and distinct evidence.

APPEAL from the District Court, Seventeenth Judicial District, Sierra County.

The following is a copy of the note sued on:

“SIERRA VALLEY, June 3d, 1862.

“For value received, I promise to pay Corel Howk or order, the sum of (\$487) four hundred and eighty-seven dollars, with two per cent interest per month till paid.

“D. FENSTERMAKER.

“(Indorsed:) COREL HOWK.”

The other facts are stated in the opinion of the Court.

Williams & Johnson, for Appellant.

It has been holden that the indorser of a note, after maturity, stands in the position of a new maker, or as the drawer of a bill on a man without funds; in neither case is a demand or notice necessary. (*Gray v. Bell*, 3 Rich. 71; *Bank of North America v. Barriese*, 1 Yates, 360.)

The great weight of authorities declare that the same strictness as to notice which apply to indorsers of notes before maturity, do not apply to indorsers of notes after maturity. (*McKinney v. Crawford*, 8 S. & R. 351; *Hill v. Smith*, 1 Bay, 330; *Brock v. Thompson*, 1 Bailey, 322.)

It is now well settled that no precise time can be laid down by the Courts in which due diligence may be exercised; it is also settled that as cases vary, so must the rules vary as to diligence in giving notice.

If Howk understood his liability, or want of liability, and still promised to pay plaintiff in August, he cannot claim that no demand and notice had been given; he cannot claim that as a defense. (See *Parsons on Notes and Bills*, Vol. 1, p. 595, *et seq.*, and the numerous cases there cited.)

Keyes v. Fenstermaker et al.

There is no lack of authorities upon the point that no legal demand and notice had been given, and Howk, knowing these facts, still promised to pay — that he is liable on the note, and cannot hold us to the proof of demand and notice, as they are immaterial questions, not bearing on our right to recover.

Then we will assume that if the promise was made, plaintiff made out his case, and should not have been nonsuited.

That Howk did promise to pay, is settled by Parsons on Notes and Bills, 596, and cases cited. The rule laid down by the author just cited, and the cases he cites, are conclusive that the promise was made, and that no demand and notice need be proven.

Vanclief & Bowers, for Respondent.

By the Court, SANDERSON, C. J.

This is an action upon a promissory note against the defendant Fenstermaker, as maker, and the defendant Howk, as indorser. The note is dated on the 3d day of January, 1862, and specifies no day or time of payment. It was indorsed in blank by Howk, on the 24th or 25th of April, 1862, and delivered by him to one Bartholemew, who, on the same day, transferred it by delivery to the plaintiff. Some time during the first week in May, 1862, the plaintiff demanded payment of Fenstermaker, who failed "to make payment," and, some time in the forepart of August, 1862, gave Howk notice of the demand and non-payment. At the time this notice was given, Howk told the plaintiff "that he did not want him to sue, and if he felt like doing so he would rather pay it, as he did not want to pay costs." Upon this state of facts the Court below rendered a judgment of nonsuit as to defendant Howk, from which the plaintiff appeals to this Court.

Two questions are presented:

First — As to the sufficiency of the demand and notice; and,
Second — As to the waiver of demand and notice.

No day or time of payment being specified in the note, it is to be considered as payable on demand, and so far as the liabil-

Keyes v. Fenstermaker et al.

ity of the indorser is concerned, is governed by the same rules as a note in terms so payable. In order to charge an indorser of a note payable on demand, presentment must be made within a reasonable time. What is a reasonable time, must, of necessity, depend in a great measure upon the facts of each particular case, and cannot be determined by any fixed rules of law. In the present case the demand was made in about two weeks after the note came into the hands of the plaintiff. The precise time cannot be determined from the record. No reason is shown why the demand was not made sooner, and, in the absence of any reason justifying it, we are inclined to think that a delay of two weeks is unreasonable. If the holder and maker reside in the same city or neighborhood, the demand, in the absence of sickness or other accident, should be made in less time; but, if they reside at a distance, or the holder is prevented by sickness or other accident from making presentment, two weeks, and even a much longer time, might not be unreasonable. The most that can be said upon the subject is, that the contract of the indorser is to the effect that the maker will pay the note on demand made within a reasonable time, and that in the event of his failure so to do, he will pay it himself; and, in order to charge the indorser, the holder must show reasonable diligence, under the circumstances of the case, in making demand of payment. The burden of proving such diligence rests upon the holder, and circumstances excusing a delay, which is *prima facie* unreasonable, must be established by him. But whether the demand, in the present case, was made with sufficient diligence or not, it is not material to decide; for, supposing it to have been so, it is clear that no notice of the dishonor, sufficient to charge Hawk as indorser, was given. The note, as we have already seen, is to be considered as payable at sight, or on demand, and although a reasonable time is allowed the holder in such cases within which to make demand of payment, yet, when the demand is made, and the note dishonored, the same notice of non-payment must be given which is required in the case of a note or bill made payable at a particular day. The contract and liability of the

indorser is no greater in the former than in the latter case. Upon principle, his liability rests upon the same conditions in the one case as in the other. The importance to the indorser of immediate notice of non-payment, that he may take measures for his own protection, is equal in both cases. It is a settled principle of commercial law that notice of dishonor must be forwarded on the following day, where no sufficient reason exists for the omission to do so. In the present case the notice was not given until at least three months after the demand, and no reason for this delay is attempted to be shown, other than that of distance, which was only thirty miles, and could certainly have been travelled in much less time by the holder, or a messenger, admitting there were no other means of communication. The notice being insufficient to charge Howk as an indorser, it only remains to determine whether the laches of the plaintiff in that respect were waived by Howk.

It is well settled in England and in the United States that a promise to pay by an indorser, made after maturity, and where no demand has been made, or notice given, and made with full knowledge of the holder's laches, is binding upon him, and entirely cures any negligence on the part of the holder in making demand or in giving notice of dishonor. (1 Parsons on Notes and Bills, 596.) But the promise to pay must be established by clear and distinct evidence. The testimony in this case falls short, in our judgment, of establishing such a promise on the part of Howk. All he said, in substance, was that he had rather pay the note than be sued.

This was the expression of a wholesome dread of a lawsuit, rather than a promise to pay the note, notwithstanding the laches of the plaintiff.

The judgment is affirmed.

Sacramento, Placer, and Nevada Railroad Co. v. Harlan.

SACRAMENTO, PLACER, AND NEVADA RAILROAD COMPANY v. C. T. HARLAN.

ERROR—WRIT OF.—A writ of error does not lie in any case where an appeal is given to the Supreme Court by statute.

SAME—WHEN LIES.—In a proceeding to condemn land for railroad purposes, the decision of the Court by which the merits of the matter are finally determined is a final judgment rendered in a special proceeding, from which an appeal may be taken, and cannot, therefore, be reviewed by a writ of error.

WRIT OF ERROR to the District Court, Eleventh Judicial District, Placer County.

On the 27th of August, 1862, the Sacramento, Placer, and Nevada Railroad Company petitioned the District Court, setting forth the necessity of a right of way over the defendant's land for its railroad, and asking for the appointment of commissioners to appraise the damages, etc. The usual proceedings were had, and commissioners were appointed, who reported to the Court that the value of the land required by the railroad was one hundred and fifty dollars, and that it would cost Harlan one thousand and twenty-five dollars to build a fence each side of the railroad—for which sum they also assessed damages. The plaintiff moved to strike out so much of the report as assessed damages for the fence, which motion the Court overruled. The Court then made an order confirming the report.

It was to review this order confirming the report that the writ of error was asked.

The other facts are stated in the opinion of the Court.

James Anderson, for Plaintiff.

If the matter in dispute exceeds two hundred dollars, the 4th Section, Article VI, of the Constitution of California, expressly declares that this Court "*shall* have jurisdiction."

Now, if respondent does not insist that the award of the commissioners in this cause was for more than one hundred and fifty dollars, then he agrees with appellant, and appellant

Sacramento, Placer, and Nevada Railroad Co. v. Harlan.

concedes that this Court has no jurisdiction of the case. But this concession of respondent should appear in the judgment of the Court.

The section of the Constitution above referred to declares that the Judges of this Court shall have power to issue all writs and process necessary to the exercise of their appellate jurisdiction.

Sections 336 and 347 of the Practice Act specifies in what cases one may, in the technical sense, appeal. The case at bar does not come within the rules there laid down.

The Judge or Court *confirms* and *certifies* the report of commissioners. (See Stats. of 1861, p. 621, Sec. 32.) This is not an order; it does not direct anything to be done, or forbid the doing of anything; it simply indorses the appraisalment of the commissioners. It is not a judgment; plaintiff need not take the lands unless he please; but if he please to take them, he must do so as per appraisalment.

A party may move for a new trial, (Sec. 31,) and the granting or refusing that would bring an appellant within the technical rules of an appeal. But suppose, (as is the case at bar,) you do not desire a new trial? You simply wish corrected that which is plainly of record and palpably wrong, and is not within the rules of appeals.

Hereford & Williams, for Respondent.

It is sought to review the action of the District Court by writ of error. Yet this Court cannot acquire jurisdiction by that process. This is only an appellate Court. It cannot acquire jurisdiction except by appeal, and has power only to issue writs necessary to the exercise of its appellate powers after having obtained jurisdiction.

Writ of error is not an *appellate* process, but a *new suit*, in which there may be other or different parties than those in the lower Court. (Bouvier's Institutes, Vol. 3, pp. 537-48; *Fermo v. Dickinson*, 4 Denio, 84; *Bullard v. Leach*, 1 Verm. 491.)

By the Court, SAWYER, J.

This is a proceeding under the Railroad Act of 1861, to acquire lands for the use of the Sacramento, Placer, and Nevada Railroad Company. The cause was brought into this Court by writ of error to the District Court of the Eleventh Judicial District, for the County of Placer.

The respondent raises an objection that this Court has no jurisdiction to review the proceeding on a writ of error, and insists that jurisdiction can only be acquired by an appeal in the ordinary mode prescribed by the Practice Act.

"The Constitution only empowers this Court to issue such writs and process as may be necessary to the exercise of its appellate jurisdiction; if this appellate jurisdiction can be exercised without this process, then it cannot be necessary, and should not be issued." (*Haight v. Gay*, 8 Cal. 300.)

The old Constitution, Article VI, section four, and the Judiciary Act of 1855, section five, in force at the time when this writ was sued out, provide that "the Supreme Court shall have appellate jurisdiction in all cases where the matter in dispute exceeds two hundred dollars;" and section six of the Act of 1855 provides that "the Supreme Court shall have jurisdiction to review upon appeal * * * a judgment in an action or proceeding commenced in * * * the District Court * * * when the matter in dispute exceeds two hundred dollars" — language as broad as the Constitution. The amended Constitution and the Judiciary Act of 1863 contain equivalent provisions.

To give effect to these provisions, Title Nine of the Practice Act prescribes the mode in which the appellate power of this Court shall be exercised in all cases embraced within the purview of the Act. Section three hundred and thirty-three provides that "a judgment or order in a civil action, except when expressly made final by this Act, may be reviewed as prescribed by this title, and not otherwise."

In *Haight v. Gay*, the late Supreme Court, in giving a construction to this section, say: "This provision is plain and

positive, that a judgment or order may be reviewed as prescribed by that title, and not otherwise. If, therefore, an appeal be given by that title in a particular case, the judgment or order can only be reviewed in the manner therein prescribed. In reference to cases where no appeal is given, this negative provision, 'not otherwise,' could not apply. Our conclusion is that in all cases where an appeal is given by the statute the remedy is exclusive, and must be pursued, and that a writ of error will only lie in cases where no appeal is given by the Act."

Is an appeal given by the statute in the case now before the Court? If the decision is subject to review by this Court in any form, we think the remedy is by appeal in the usual form. Section six of the Judiciary Act of 1855 has already been cited. Section three hundred and forty-seven of the Practice Act provides that "an appeal may be taken to the Supreme Court from the District Courts in the following cases: First, from a final judgment rendered in an action, or *special proceeding* commenced in those Courts," etc.

This is unquestionably a special proceeding, commenced in a District Court, and the determination of the Court in the proceeding, we think, is a final judgment rendered in a special proceeding, within the meaning of the Act. The Court acts judicially: a petition is filed, setting up the grounds upon which the railroad company claim to acquire the right to the land; the parties interested are summoned to appear and contest the claim. In this case they did appear and answer the petition. It was adjudged that the petitioners had brought themselves within the provisions of the Act; commissioners were appointed in pursuance of the Act to assess the value of the land; testimony was taken and a report made to the Court; and this report was confirmed by the judgment of the Court. This was a judicial investigation, and the rights of the parties, and the conditions upon which the petitioners could acquire the land, were litigated and finally adjudged. The action of the Court confirming the report of the commissioners was the definitive sentence or decision of the Court, by which the

Lubeck v. Bullock.

merits of the matter in dispute in the special proceeding were determined; and this determination appears to us to possess all the essential attributes of a final judgment, within the definition given in *Belt v. Davis*, 1 Cal. 137.

It follows from the view that we have taken that a writ of error does not lie in this case, and that it must be quashed.

It is so ordered.

D. W. LUBECK v. L. L. BULLOCK.

NEW TRIAL.—Where a cause is tried by the Court, without a jury, and an appeal is taken from an order denying a new trial, and the error assigned is that the finding and judgment are contrary to the evidence, the Supreme Court will not disturb the judgment if the testimony is conflicting.

APPEAL from the District Court, Eleventh Judicial District, Placer County.

The facts are stated in the opinion of the Court.

Plaintiff recovered judgment in the Court below, and defendant appealed.

George R. Moore, for Appellant.

Tuttle & Fellows, for Respondent.

By the Court, SANDERSON, C. J.

This case comes before us on appeal from an order overruling a motion for a new trial upon the sole ground that the finding and judgment are contrary to the evidence. The case was tried by the Court, without the intervention of a jury.

The testimony upon the question of fraud involved in the case is somewhat conflicting, and in such cases the result mainly depends upon the credibility of the witnesses, of which we have no opportunity to judge. In such cases we cannot disturb the judgment of the Court below.

Judgment affirmed.

Richardson v. McNulty et als.

JOHN W. RICHARDSON v. THOMAS McNULTY,
JAMES BRADY, JOHN FURLONG, M. FURLONG,
JOHN DOOLY, P. CODY, M. CODY, H. F. NICHOLS,
JOHN SHARP, JOHN KIRK, M. SAFFON, AND S.
NOLAND.

MINING CLAIM — ABANDONMENT.—In an action to recover possession of a mining claim, where the defense is an abandonment of the claim by the plaintiff, the judgment roll in an action brought by the plaintiff against third parties to recover possession of the same ground, and in which plaintiff recovered judgment, is admissible in evidence to rebut the presumption of abandonment.

SAME — INSTRUCTION.—In such case the Court should guard the jury, by proper instructions, from giving the judgment any weight as evidence, except upon the question of abandonment.

MINERAL LANDS — OCCUPANTS OF.—The public mineral lands of this State are open to the appropriation of any one, and the one first occupying any portion of the same makes it his by the act of occupancy, and once his, it continues his until he manifests his intention to part with it in some manner known to the law.

SAME.—The occupant may part with his interest by selling it, or giving it to another, or by any other mode authorized by law, or he may abandon it.

ABANDONMENT — WHAT CONSTITUTES.—An abandonment can only place where the occupant leaves the land free to the appropriation of the next comer, whoever he may be; without any intention to repossess or reclaim it for himself, and regardless and indifferent as to what may become of it in future.

SAME.—When an abandonment takes place, a vacancy in the possession is created, and without such vacancy no abandonment can take place.

SAME.—If the possession of the occupant be continued in another, by the expression of a wish or desire of the occupant to another that he succeed to the possession, and he thereupon takes possession, a gift is the result—there is no vacancy in the possession, and, consequently, no abandonment.

SAME.—A mere wish or desire of the occupant, when he leaves the possession, that another may next occupy, without being communicated to that other person, and assented to by him, and accompanied by a transfer of possession, does not amount to a gift.

ERRONEOUS INSTRUCTION.—If an erroneous instruction is given to the jury, the judgment will be reversed, unless it appear from the record that the appellant was not prejudiced thereby.

MINING CLAIMS.—In actions to recover possession of mining claims located on the public lands, the doctrine that the plaintiff, if he recover at all, must recover on the strength of his own title, has no application, for neither party has any legal title.

SAME.—In such actions, where prior possession is relied on by the plaintiff, the defendant cannot justify his entry by showing the true title outstanding.

APPEAL from the District Court, Seventeenth Judicial District, Sierra County.

The facts are stated in the opinion of the Court.

Vanclief & Bowers, and Niles Searls, for Appellants.

To rebut the evidence proving abandonment, plaintiff offered to show that he had sued some third persons (Donahue and Westfield) for his claim. Will' he be allowed to do it? Would it not be equally proper to allow him to show that he had privately informed Donahue and Westfield—"or any other men"—that he intended to hold his claim. The second point made by us is, that the Court erred in instructing the jury that an abandonment must be made without any desire that any particular person should acquire the property; and that if such desire exists, the transaction might be considered a gift. This instruction is supposed to be in accordance with the opinion of the Court in *Stephens v. Mansfield*, 11 Cal. 365; but we contend that it is not. In that case, Stephens transferred the possession of a lot in Placerville to defendant's grantor, for a consideration of six hundred dollars. Here was a delivery of possession for a consideration, with the plain intention of conveying the title. The Court held that this transaction did not and could not constitute an abandonment. This is all that was decided by the Court, and all that could be considered authoritative. True, the Court quoted a loose definition from Bouvier's Law Dictionary, for which we can find no authority which contains the words of the instruction to which we object. Portions of this definition seem to us to be not only without authority, but squarely opposed to some of the elementary rules of the law. To constitute a gift, there must be a delivery and acceptance of the possession. (*Noble v. Smith*, 2 John. 52; *Grangiac v. Arden*, 10 John. 293.)

But this instruction says that the mere *desire* of the party leaving a mining claim that some particular person should acquire it, might constitute a gift without delivery or acceptance of possession, or even any communication of such desire.

But the most objectionable feature of the instruction is that it precludes any abandonment in all cases where this desire exists. Now, we understand that if a party lease a mining claim, voluntarily, with the intention of never returning to it,

Richardson v. McNulty et al.

or repossessing it, he abandons it, even though he may *désire* that some particular person may acquire it.

If the rule contained in the instruction is to prevail, no abandonment can be made out in any case where the party alleged to have abandoned will swear that he even secretly desired that some particular person should acquire the property.

The third and last assignment is, that the Court erred in instructing the jury that "if plaintiff has shown a right in himself to the property in dispute, then, however weak his title appears, he must recover, if it be better than defendant's title."

We think this instruction opposed to the rule of law which requires the plaintiff in ejectment to recover, if at all, on the strength of his own title. (*Roe v. Harvey*, 4 Bur. 2,484; *Parker v. Baldwin*, 11 East. 494; *Covert v. Irwin*, 3 S. & R. 287; *Williams v. Ingell*, 21 Pick. 289.)

In the last case above cited Mr. Chief Justice Shaw says: "It is difficult to perceive from the documents and other evidence furnished by the case that either party has given any very satisfactory evidence of good title. It becomes necessary to see who has the burden of proof, and to apply the familiar maxim of the law applicable to such a case. In a controverted question of title, the plaintiff is bound to make out his case by satisfactory proof, and he must recover by the strength of his own title — not by the weakness of his adversary's; *potior est conditio defendentis*. The question, then, is whether the plaintiff has established a good title."

In *McGarrity v. Byington*, 12 Cal. 431, a similar instruction was assigned as error. The Court admitted the instruction was bad, but undertook to show that it did no harm, as both parties relied on *prior possession alone*, no outstanding title appearing, and as all the instructions did not appear on the record.

Johnson & Williams, and Creed Haymond, for Respondent.

The judgment roll in the case of *J. W. Richardson v. Donahue & Westfield* was admissible for two reasons.

Richardson v. McNulty et al.

Because the fact that Richardson, the plaintiff in this action, died on the 8th day of November, 1860, commenced and carried on, down to the day before the commencement of this action, a suit for the recovery of the very piece of property in dispute, was the very best evidence that he had not abandoned during that time his interest therein.

It was both an act and declaration of the highest character, showing that no intention existed of abandoning or giving up the property.

Defendants occupied the position of intruders, giving no evidence of title in themselves.

Professor Walker, in his work on American Law, pages 306 and 307, says: "One of the elementary principles in the action of ejectment is, that the plaintiff must rely solely upon the strength of his own title, and not upon the weakness of the defendant's title. The reason is, that actual possession is *prima facie* evidence of title, and gives the occupant a right against every person who cannot show, not simply a better, but a good title. If, however, the person in possession be a mere intruder, he is not permitted to question the validity of plaintiff's title unless the latter was also a mere intruder; for any shadow of right in the plaintiff will be sufficient against mere possession without right. The first step, then, is for the plaintiff to exhibit sufficient title; and until he does this, the defendant may rely simply upon his possession without further proof. But when this is done, the defendant must meet it by showing a better title, either in himself or a third person."

By the Court, SANDERSON, C. J.

This is an action of ejectment to recover an undivided sixteenth interest in a certain mining claim, situated in the County of Sierra. The defense mainly relied upon is abandonment. On the trial, the plaintiff offered in evidence the judgment roll in a certain action brought by him against one Donahue & Westfield to recover the same interest sued for in this action, to which the defendants were not parties or privies. The judg-

Richardson v. McNulty et al.

ment roll was admitted by the Court under the exception of the defendants. Touching the effect of the judgment roll as evidence, the Court instructed the jury as follows:

"None of the defendants in this action were parties to the action in which Richardson was plaintiff and Donahue & Westfield were defendants; and the papers in the last named action which have been introduced in evidence in this case do not tend to show that the plaintiff herein has title to the ground in dispute as against the defendants in this action; and the defendants in this action are not bound by any order, judgment, or decree rendered in said action of *Richardson v. Donahue & Westfield*. The jury, however, in considering the other question of abandonment, may take into consideration the fact that such suit was brought by Richardson in determining the intent of the party."

For the purpose for which it was received by the Court, the judgment roll was clearly admissible. The fact that Richardson had, long prior to the commencement of the present action, brought another suit to recover the same ground against other parties who were then in possession and claiming it adversely to him, and had prosecuted it successfully to final judgment, was strong evidence, if not conclusive, upon the question of abandonment. The fact could not be proved more satisfactorily than by a production of the record itself. The fact that, unexplained, it might mislead the jury upon some other question involved in the case, does not affect its admissibility. In such a case it is the duty of the Court to guard against any unlawful effect, as was done in the present instance, by proper instructions to the jury; and if the Court fails to do so, it is the duty of counsel to ask instructions to that end.

The next error assigned is as to an instruction given by the Court, in the following words, viz: "The abandonment must also be made without any desire that any particular person should acquire the property, for if such desire exist, the transaction might be construed a gift."

This is but part of a long instruction upon the question of abandonment, given by the learned Judge of the Court below,

remarkable for its clearness of diction and soundness in principle, and to which no other objection is made. The sentence above quoted appears to be based upon the authority of *Stephens v. Mansfield*, 11 Cal. 365, and it is claimed by counsel for appellants that the opinion in that case, so far as it gives sanction to this definition of abandonment, is mere *obiter dictum*. In that case the plaintiff, Stephens, was in possession of a town lot in the City of Placerville, part of the public domain, under a deed from another, who was in possession at the time the deed and possession of the lot was given. After remaining in possession under his deed for some months, Stephens made a verbal sale of the lot, for six hundred dollars, to one Hunter, who occupied for about two years, and sold to the defendant, Mansfield. It was claimed by the defendant that the transaction between Stephens and Hunter amounted to an abandonment of the lot in favor of the latter; but the Court held otherwise, and that "admitting the interest of the plaintiff in the premises such as could be divested by abandonment, there can be no such thing as abandonment in favor of a particular individual or for a consideration. Such act would be a gift or sale."

It is true, as contended by counsel for the appellants, that so far as the case of a gift is concerned, this decision goes outside of the facts; but, upon principle, there is no difference between the act of selling and the act of giving, so far as their effect as evidence upon a question of abandonment is concerned. If the gift be complete—that is to say, if the thing given be delivered, and accepted by the donee, a transfer is the result, which transfer as much precludes the idea of abandonment as a transfer resulting from a sale. No question of abandonment can arise where a transfer has been had by the act of two parties. To an abandonment of the character involved in this and all similar cases, there can be but one party. The mining ground in controversy, before it was occupied by the plaintiff, so far as the right to mine the same by parties without title is concerned, (and this is true of all the public mineral land of the State,) was *publici juris*, and

open to the appropriation of any one desiring it. By the act of occupancy, the plaintiff made it his, and manifested his intention to do so. Once his, it continues his until he manifests his intention to part with it in some manner known to the law. He may sell it, or give it to another, or transfer it in any other mode authorized by law, (thereby preserving the continuity of possession,) or he may abandon it. In doing the latter he must leave it free to the occupation of the next comer, whoever he may be, without any intention to repossess or reclaim it for himself in any event, and regardless and indifferent as to what may become of it in the future. When this is done, a vacancy in the possession is created, and the land reverts to its former condition, and becomes once more *publici juris*, and then, and not until then, an abandonment has taken place. There can be no abandonment except where the right abates, and ceases to exist. If it be continued in another, by any of the modes known to the law for the transfer of property, there has been no abandonment, for the right, first acquired by the occupancy still exists, although vested in another, and the continuity of possession remains unbroken. But the occupant cannot continue his right in another by the mere act of volition; nor is his right kept alive by a mere desire that it may become vested in a particular person. Such a volition or desire does not amount to a gift, for there can be no gift without an acceptance. If the wish or desire is expressed to the person in whose behalf it is entertained, and thereupon he occupies the land, a gift is the result, and the transfer is made complete — and not otherwise. The mere wishes and desires of the occupant are only effectual to preserve the right in himself, and not to transmit it to another; and the case of *Stephens v. Mansfield*, so far as it can be fairly construed to go beyond the views here expressed, is not law.

From what has been said, it follows that the charge in question, so far as it instructs the jury that there can be no abandonment where the transaction amounts to a gift, is correct, but that it is erroneous so far as it instructs them that leaving the claim, with a desire that a particular person may acquire

Richardson v. McNulty et al.

it, might be construed to be a gift. The error is in the definition of a gift, rather than in that of an abandonment.

It only remains to be seen whether the error, such as it is, could have affected the verdict of the jury to the prejudice of the defendant. The general rule is, that where an erroneous instruction has been given, the judgment must be reversed, unless it appear from the record that the appellant has not been prejudiced thereby. The testimony upon which, as the appellants claim and admit, this instruction was founded, is to the effect that while the plaintiff was absent at Frazer River, he had a correspondence with one Cody about the claim, in which Cody asked him to send him (Cody) a bill of sale of the claim, and he would "keep up the claim for him;" that thereupon, after consulting a lawyer as to whether Cody, under such circumstances, could hold the claim as against him, he sent Cody a bill of sale, but that the same was never received by Cody. It also appears from another part of the testimony, that Cody had offered to pay the assessment levied by the company upon the plaintiff's interest, but the Secretary refused to receive the money from Cody, upon the ground that he had no authority to receive it from any one but the plaintiff. This was evidently done with a view to work a forfeiture and sale of the plaintiff's interest under the by-laws of the company, and doubtless induced Cody's application for the bill of sale.

How it can be claimed that this evidence tends to establish an abandonment, we are unable to perceive. In our judgment, its tendency is directly the reverse, and the Court would have been justified in refusing to give any instructions founded upon such a theory, as calculated to mislead a jury. And, had the verdict been different, we are inclined to think that the plaintiff, on appeal, would have been entitled to a reversal on that ground. Giving the instruction greater purpose than is claimed for it by appellants, and assuming that the charge, in effect, instructs the jury that they cannot find an abandonment from the facts disclosed in the evidence, no error, in our judgment, has been committed. It follows that the instruction, in view of the evidence upon which it was founded, and as to

the legal effect of which it was given, could not have operated to the prejudice of the appellants, and that, therefore, they are not entitled to a reversal upon that ground.

The next and last error assigned is found in the following instruction: "If the plaintiff, however, has shown a right in himself to the property in dispute, then, however weak his title appear, he must recover if it be better than the defendant's title." This is but one clause in the instruction upon the question as to what title or right the plaintiff must prove in order to recover; and in determining its force and effect it must be considered in connection with that portion immediately preceding, which is as follows: "The defendants being in actual possession of the ground in dispute, then, although they have no right there whatever, yet the plaintiff cannot, from that circumstance alone, recover in this action, for the rule of law is that he must recover, if at all, upon the strength of his own title. In other words, the plaintiff must show a right in himself, although there be none in the defendants."

In *McGarritty v. Byington*, 12 Cal. 426, which was an action like the present, to recover a mining claim, an instruction, in substance the same as that to which the appellants except, was given, and came before the late Supreme Court for review, and Mr. Justice Baldwin said: "It is true, in ejectment the plaintiff must recover on the strength of his own title; but here, the charge must be taken in connection with the case. There was no outstanding title, and only a question of prior possession. The charge did not amount to much, but what there was of it was very harmless. It amounted to telling the jury to find for the plaintiff if they thought they ought to."

It is insisted that the present case differs from that of *McGarritty v. Byington*, because, as is claimed, it involves an outstanding title. There may be an attempt to raise a question of that kind, but under numerous decisions of the late Supreme Court no such question can be made in an action of ejectment in which the plaintiff, as in the present case, relies solely upon prior possession, and the defendant fails to connect

Richardson v. McNulty et al.

himself in any manner with the outstanding title. (*Bequette v. Caulfield*, 4 Cal. 278; *Bird v. Lisbros*, 9 Cal. 1; *Hubbard et al. v. Barry*, 21 Cal. 321.) In this case only a question of possession is involved. The naked prior possession of the plaintiff is pitted against the naked present possession of the defendants. Strict title is not involved. The doctrine that the plaintiff must recover upon the strength of his own title is applied to cases where the strict legal title in contradistinction from a mere possession, is involved. In such a case the defendant may defeat the legal title, relied upon by the plaintiff, by showing the true legal title to be outstanding. Ejectments for mining claims where neither party has, strictly speaking, any legal title, but both, in strict law, are intruders upon what belongs to another, are mere contests for possession, and their solution is only embarrassed by an attempt to adhere to language only adapted to cases where the strict legal title to land is involved. Such ejectments might be more properly called actions to determine the right to mine in a certain locality. Practically, the real question involved in all such cases is, which, as against the other, has the better right to mine the land in question. Generally, the solution of this question depends in a great measure upon the rules and regulations of the mining district in which the ground is located, established by the miners themselves, and not unfrequently its just solution is prevented, rather than aided, by an adherence on the part of counsel and Courts to a phraseology hardly applicable, when the character of the right involved is considered. That portion of the charge under consideration which is objected to by the appellants, taken in connection with what immediately precedes it, states the general propositions governing this class of cases correctly. More apt words might have been employed, but we cannot for that reason reverse the judgment. If it is deficient in any respect, it is because it does not state what, in such cases, constitutes the better right, or "title," as the Court terms it. If the Court had said, in connection, that the prior possession of the plaintiff, if proved to their satisfaction, was better than the subsequent possession of the

Edmondson v. Alameda County.

defendant, there would have been no room for criticism.

All the testimony which was given upon both sides is embraced in the statement, and we are satisfied therefrom that no injustice has been committed, and that, upon the whole case, the verdict of the jury was right, and the judgment ought to stand.

Judgment affirmed.

POWHATTEN E. EDMONDSON v. ALAMEDA
COUNTY.

BRIEFS IN SUPREME COURT.—When a cause is submitted in the Supreme Court, with leave to file briefs within a time fixed, and no briefs or points are filed within the time, the Court will not examine the record, but the judgment will be affirmed.

APPEAL from the District Court, Third Judicial District, Alameda County.

Defendant recovered judgment in the Court below, and plaintiff appealed. The other facts are stated in the opinion of the Court.

N. Hamilton, for Appellant.

W. W. Crane, Jr., for Respondent.

By the Court, SAWYER, J.

This cause was submitted, without oral argument, on the 4th of February. Each party had ten days in which to file briefs. No briefs or points are on file, and there is no assignment of errors in the record. This Court will not perform the duties of counsel; it will not examine a record to see if it can find any errors upon which to reverse a judgment. If the appellant's counsel does not choose, in some form, to call the attention of the Court to the points, provisions of the statute,

Ex parte Burrill et al.

and the authorities upon which he relies, the judgment will be affirmed.

Judgment affirmed.

EX PARTE BURRILL *et al.*

COSTS WHEN NEW TRIAL AWARDED.—When a judgment is reversed by the Supreme Court, and the case remanded for further proceedings, and costs are awarded in general terms, the costs awarded include only the costs made on the appeal to the Supreme Court. The costs of the former trial abide the event of the suit.

WHEN BILL OF COSTS SHOULD BE FILED IN COURT BELOW.—A memorandum of the costs of filing notice and undertaking on appeal, and preparing the transcript for the Supreme Court, should be filed in the office of the Clerk of the Court below at the time of filing the remittitur there, or within the time thereafter prescribed by the statute in other cases.

EXECUTION FOR COSTS OF PREVAILING PARTY.—The Clerk of the Court below can issue an execution, if required by the prevailing party, for the costs included in the memorandum, and the costs of the Clerk of the Supreme Court as certified by him on the remittitur.

WHEN THE JUDGE MAY ORDER STAY OF EXECUTION.—When a judgment is reversed by the Supreme Court, and the case remanded for further proceedings, and the Clerk of the Court below issues an execution for all the costs, as well those of appeal as those accruing before notice of appeal was filed, the Judge of the court below has power to make an order staying the execution in the hands of the Sheriff until an application can be made to the Court to re-tax and adjust the costs.

APPLICATION for mandamus to the Judge of the Fifth Judicial District, San Joaquin County.

The facts are stated in the opinion of the Court.

M. G. Cobb, for Petitioners.

A. M. Heslep, for Respondent.

By the Court, CURREY, J.

This is an application for a writ of mandamus to compel the District Judge of the Fifth Judicial District to vacate certain orders by him made in an action wherein L. Cohn was plaintiff and one Goldstein was defendant, and Knapp, Burrill & Co. were intervenors, occupying an antagonistic position to

Ex parte Burrill et al.

the plaintiff. The action was tried in San Joaquin County, in said district, and judgment was obtained there by the plaintiff against the intervenors. From this judgment the intervenors appealed to the Supreme Court. The Supreme Court, in December, 1863, reversed the judgment and remanded the cause for a new trial. Within ten days after this reversal, the appellants filed a verified bill of costs in the Clerk's office of the Supreme Court, amounting, in the aggregate, to the sum of three hundred and eighty-five dollars and forty-five cents. This amount consisted of seventy dollars and sixty cents, costs that accrued in the Supreme Court, and three hundred and fourteen dollars and eighty-five cents, costs that accrued in the District Court. In due time a remittitur, with which was a copy of the bill of costs, duly certified, was issued and filed in the Clerk's office of the District Court, in San Joaquin County. Upon the remittitur was indorsed by the Clerk of the Supreme Court the costs in the case, as consisting of seventy dollars and sixty cents, paid by appellants to the Clerk of the Supreme Court, and three hundred and fourteen dollars and sixty-five cents, costs in the Court below. After the remittitur, with the certified copy of the bill of costs, was so filed, an execution was issued in the case by the Clerk of the District Court, to enforce payment of the whole sum of three hundred and eighty-five dollars and forty-five cents, and placed in the hands of the Sheriff of San Joaquin County, who, by virtue thereof, collected the entire amount. Before the money was paid over to the appellants, and before the return of the execution, the respondent, Cohn, applied to the Judge of the District Court to stay the execution, and also the money in the Sheriff's hands, until he could move the District Court for a re-taxation of the costs; upon which the Judge made an order granting the application. At the term of the Court subsequently held in the County of San Joaquin, the order previously made was modified. By the modified order, the Sheriff was directed to return the execution as unsatisfied, and the Clerk of the Court was directed to issue, upon the request of the appellants, an execution in their favor against

Ex parte Burrell et al.

said Cohn for the sum of seventy dollars and sixty cents, as the whole amount of costs to which the appellants were entitled on appeal. From the petition it appears that the Sheriff has not returned the execution, as directed by the Court below, and he still has in his hands the money collected thereon.

The petitioners allege that the orders made by the Judge of the District Court are an illegal and unwarrantable interference with the judgment of the Supreme Court, and they therefore ask that a writ may be issued commanding the Judge of the Court below to vacate and annul the orders made by him, and that the Sheriff may be required to complete the performance of his duty under said execution.

The statute provides that there shall be allowed to the prevailing party in an action in the Supreme Court, District Courts, and County Courts, his costs and necessary disbursements in the action, (Practice Act, Sec. 494,) and that the party who claims his costs shall deliver to the Clerk of the Court, within two days after the verdict or decision may be rendered, a memorandum, duly verified, of the items of his costs and necessary disbursements in the action or proceeding. (Ibid, Sec. 510.)

From these provisions of the statute, we should be inclined to hold, if the question was *res integra*, that the memorandum of costs, duly verified, should be filed in the office of the Clerk of the Supreme Court, in cases decided therein. The practice for a few years after the Courts of this State were organized was, to some extent, to file a bill or memorandum of costs in the Supreme Court; but this practice fell into disuse, probably because of its great inconvenience. Then, for some time, it was the practice for the party prevailing in the Supreme Court to file his memorandum of costs in the Clerk's office of the District Court upon the filing of the remittitur, or within the time specified by the statute thereafter. This practice has been very generally adopted by the bar, and may be said to have been approved by the late Supreme Court in *Eaton v. Palmer*, 11 Cal. 341. In the case here cited it was objected

Ex parte Burrill et al.

that no bill of costs had been filed in the Supreme Court, as required by section five hundred and ten of the Practice Act, to which the Court said: "We think that section does not apply to costs upon appeal. The costs upon appeal are properly the costs of this Court, and the costs of making up the appeal in the Court below, including the costs of making out the transcript." And, after remarking upon the oppressiveness of requiring the party to file his bill of costs in the Clerk's office of the Supreme Court, the Court said: "When a case is remanded for further proceedings and costs awarded in this Court, in general terms, we mean only to include the costs upon appeal, leaving the costs of the former trial to abide the event of the suit."

It may be observed in this connection that it has become the custom to a very great extent to regard the memorandum of the costs, indorsed on the remittitur, and certified by the Clerk of the Supreme Court, as a sufficient bill of the costs which have accrued in the Supreme Court on the appeal, and this seems to be warranted by the decision in *Eaton against Palmer*. But the Clerk of the Supreme Court cannot certify as to the costs of making out the transcript of the record to be filed in the office of the Clerk of the Court of appeal, and it may be proper to suggest, that if the prevailing party intends to collect the fees for filing the notice of appeal and the expenses of preparing the transcript of the record, the same should be embodied in a memorandum of costs and filed in the Clerk's office of the Court below at the time of filing the remittitur there, or within the time thereafter prescribed by the statute in other cases.

In the case under consideration, the appellants were not entitled to the costs that accrued in the Court below prior to filing the notice of appeal, and when the attention of the Judge of that Court was called to the fact that execution had been issued for the collection of the costs taxed as accruing in the District Court previous to the filing of the notice of appeal, as well as for the costs of appeal, and that the whole amount had been collected by the Sheriff, and was in his hands,

Bear River and Auburn Water and Mining Co. v. Boles et als., No. 1.

and when his authority over the subject was invoked, we think it was justly exercised in staying the execution and the money in the hands of the Sheriff until an application could be made to the Court to re-tax and adjust the costs which the respondents should pay to the appellants. If the Sheriff continues to refuse compliance with the order of the Court made at the term, to return the execution as directed, or if the Clerk refuses to issue an execution upon the application of the appellants for the costs which accrued by reason of the appeal, the same District Court possesses the power to enforce obedience to its orders.

The application for a mandamus must be denied.

THE BEAR RIVER AND AUBURN WATER AND MINING COMPANY v. JOHN BOLES, WILLIAM STRAP, AND JOHN TYLER. No. 1.

NEW TRIAL—NOTICE.—Notice of intention to move for a new trial must be given to the opposite party or his attorney within the time required by the one hundred and ninety-fifth section of the Practice Act, or the right to move for a new trial is waived.

SAME—STATEMENT.—Where no notice of an intention to move for a new trial is given by the opposite party, or waived by him, the making and filing of a statement does not give the Court jurisdiction over the subject matter of a new trial, and an order granting a new trial will be reversed.

SAME—ORDER EXTENDING TIME.—An order made by the Court, after the time fixed by the one hundred and ninety-fifth section of the Practice Act for filing a statement on motion for a new trial has expired, extending the time to file a statement, is void. The Court made the following order the day after the rendition of judgment: "It is ordered that all proceedings under the judgment recovered by plaintiff against defendants be and they are hereby stayed and superseded until the 5th day of May next, in order that counsel may present and prepare his statement on motion for new trial." *Held*, that this order did not extend the statutory time within which to file a statement. A notice of motion for a new trial should be in writing.

APPEAL from the District Court, Eleventh Judicial District, Placer County.

The plaintiff recovered judgment in the District Court, and

Bear River and Auburn Water and Mining Co. v. Boles et al., No. 1.

the Judge made an order granting a new trial, from which order plaintiff appealed.

The other facts are stated in the opinion of the Court.

Tuttle & Fellows, for Appellant.

Jo Hamilton, for Respondents.

By the Court, SAWYER, J.

This is an appeal from an order granting a new trial. The verdict was returned and judgment thereon entered on the 21st of April, 1862. On the next day, April 22d, an order was entered in the minutes of the Court in these words:

“Now come the defendants herein, by Hamilton & Williams, their attorneys, in open Court, and give notice of a motion for a new trial upon statement to be hereinafter filed, and on motion of counsel aforesaid it is ordered that all proceedings under the judgment recovered by plaintiff against defendants be and they are hereby stayed and superseded until the 5th day of May next, in order that counsel may present and prepare his statement on motion for new trial.”

On the 4th day of May, defendant's counsel asked the Court for three days further time to prepare and file their statement, and it was “ordered that said motion be and the same is hereby granted; and that defendants' attorneys be and they are hereby allowed three days from the date hereof in which to file said statement.”

The appellant assigns as error the granting of a new trial, on the grounds, among others, that a new trial was waived, because:

Firstly—No notice of a motion for new trial was given to appellants.

Secondly—No statement was filed within the time required by law.

Section one hundred and ninety-five of the Practice Act expressly provides that “the party intending to move for a

new trial shall give notice of the same as follows: When the action has been tried with a jury, within five days after the rendition of the verdict." It then provides for filing affidavits or statement within five days after giving such notice, etc., and "if no affidavit or statement be filed within five days after notice, or within such further time as the parties may agree upon, or the Court or Judge thereof may by order grant, the right to move for a new trial shall be deemed waived."

The only notice of the motion for a new trial given, is that which appears in the minutes of the Court, just quoted. We do not think this sufficient. The entry was made on the next day after the verdict was rendered and judgment thereon entered. It does not appear that the party to be affected by it, or his attorney, was in Court, or had any knowledge of this proceeding. The case had been disposed of and judgment entered in plaintiff's favor on the preceding day, and that was the end of the matter as to him till some other proceedings should be taken of which he was entitled to notice. After the entry of his judgment, the plaintiff was not bound to watch the Court to see whether or not any other proceedings would be taken. The law provides that notice of a motion for a new trial shall be given, and the notice intended is a written notice. Perhaps a notice given him in open Court, and entered in the minutes, in his presence, would be sufficient; but, in such case, the record should at least affirmatively show, with reasonable certainty, that the party was present, and actually had notice. As the record notice in this case is fatally defective in this particular, it is unnecessary to determine the question whether any notice thus given would be sufficient. At best it is a doubtful question. The only safe mode to pursue, especially since the amendment to section one hundred and ninety-five, in 1863, requiring the grounds of the motion to be stated in the notice, is to give a formal notice in writing. A written notice, even where another form is admissible, is less liable to lead to mistakes, and is always preferable.

If the notice in the minutes of the Court was sufficient, the statement should have been filed on or before the 27th, unless

Bear River and Auburn Water and Mining Co. v. Boles et al., No. 1:

the time had been extended by the Court or agreement of the parties. The order of the 22d of April does not, in terms, purport to extend the time to prepare and file a statement. It merely stays proceedings on the part of the plaintiff to enforce the judgment till the 5th of May, "in order that the counsel may present and prepare his statement on motion for new trial." This language does not necessarily import that he shall have an extension of the time allowed by the statute to prepare and file his statement. The other party might not agree to the statement when filed; and, in that event, it would be necessary to have it settled before the Judge, upon notice — all of which would require time; and it may reasonably be supposed that the stay was designed to cover this period of time, as well as the time occupied by the moving party in preparing his statement. The object was to prevent the execution of the judgment, not only till a statement should be filed, but till settled, and the question of a new trial should be in a condition to be determined by the Court. If it was intended, in this instance, to procure an extension of the statutory time for preparing and filing a statement, that intention should have been expressed in apt words, and not left to be implied from ambiguous terms. We have already been compelled to waste much time in the investigation and determination of similar questions, not affecting the merits of cases, growing out of the loose manner in which proceedings have been conducted and records made up. We are anxious to decide all cases brought before us upon their merits rather than upon mere technical grounds. Often less time would be required to dispose of the case upon the real questions at issue than upon such preliminary objections as are presented in this case; and such a disposition would certainly be more satisfactory to the Court as well as the appellant.

While we are willing to construe pleadings and proceedings liberally for the purposes of advancing the ends of justice, we are not disposed, by indulging in latitudinarian presumptions and implications in the construction of proceedings, to encour-

age a loose practice, and thereby unnecessarily increase the labors of this Court and the burdens of litigation.

There is no difficulty in understanding the requirements of the section of the statute under consideration. Its language is precise and unmistakable, and the appellants seem to understand what was necessary, as the order of May 4th is clear enough, for it "allowed three days from date in which to file said statement." There is no misunderstanding this language. But it was too late, unless the order of April 22d also extended the time. Without such extension the right to a new trial had already been waived, and the Court had no power to revive it. But whatever intention may be extorted, by implication or otherwise, from the language of the order of April 22d, and without deciding that point, we are satisfied that no such notice of a motion for a new trial as is contemplated by the statute appears. We have carefully examined the record to see if any act of the appellant is disclosed from which we can infer that notice has been waived, or, perhaps, more properly speaking, from which it can be inferred that the appellant, in fact, had notice, but we find nothing to justify such an inference. It is not shown that he appeared in the case at the hearing of the motion for a new trial, or, indeed, that any hearing was had. We have commented at some length upon the points of practice presented by this case, for the purpose of calling attention to the subject, in hopes that attorneys will be more careful to studiously follow the provisions of the Practice Act, and that, in procuring orders from the Court, they will see that the order entered expresses, in apt language, the object intended.

From the views expressed, it follows that the appellants failed to take the proper steps to entitle them to a new trial.

The order granting a new trial is reversed.

Bear River and Auburn Water and Mining Co. v. Boles *et al.*, No. 2.

THE BEAR RIVER AND AUBURN WATER AND MINING COMPANY v. JOHN BOLES, WM. STRAP, AND JOHN G. PRAGUE. No. 2.

NUISANCE — WHEN MAY BE ABATED.— While a ditch by which the waters of a stream have been appropriated is out of repair, and not in condition to carry any water, an action will not lie to abate, as a nuisance, a reservoir constructed across the bed of the stream, above the head of the ditch, by which the water of the stream is collected and detained, and caused to flow unequally.

SAME.—The reservoir does not become a nuisance until the ditch has been repaired, and placed in a condition to carry the water.

WITNESS — OBJECTION TO.—An objection to the competency of a witness, on the ground of interest, should be made at the time his interest is first shown, or it will be deemed waived.

APPEAL from the District Court, Eleventh Judicial District, Placer County.

The facts are stated in the opinion of the Court.

Tuttle & Fellows, for Appellant.

The instruction given by the Court was calculated to mislead the jury, under the facts of the case. If plaintiff owned the ditch and water right, the fact that the ditch was out of repair would not justify defendants in stopping the flow of water. But defendants, themselves, had washed away the head of the ditch, and refused to allow plaintiff to repair it.

We contend that plaintiff's instruction, asked and refused, correctly states the law. It is not for defendants to say what use plaintiff should make of its own property, or when it shall use it.

Under the law, as laid down by the Court, if A. erects an oil mill close by B.'s house, where he resides with his family, and B. is thereby compelled temporarily to move, an action to abate the nuisance would not lie, or, in other words, B. and his family must continue to inhale the offensive odor until the jury deliver their verdict. (See Practice Act, Sec. 249; *Eberhard v. Tuolumne Water Co.*, 4 Cal. 308; *Hudson v. Doyle*, 6 Cal. 102; *Parke v. Kilham*, 8 Cal. 77.)

Jo Hamilton, for Respondents.

If the ditch of plaintiff and appellant was not in condition to carry water, then, as a matter of course, plaintiff could maintain neither of these suits.

The damage, or injury, or right of action, must be present, existing, and not prospective or problematical. As well might the creditor sue on his debt a year in anticipation of its maturity, as could the plaintiff in this suit maintain an order abating what may, perchance, some time *in future*, prove itself to be a nuisance. Hence, in no view of the case, could appellant recover in this action.

By the Court, SAWYER, J.

The complaint alleges that the plaintiff is the owner of a ditch cut for the purpose of conveying the waters of Rock Creek to certain mining localities, for sale; that defendants, before the commencement of the suit, constructed two reservoirs in the bed of Rock Creek, above the head of plaintiff's said ditch, by means of which the waters of Rock Creek are collected and detained from one day to a week at a time, and then let down in large quantities by opening the gates of said reservoirs; that, by these means, the waters of said streams are not allowed to flow regularly, or with a uniform current, to said ditch; that if said waters flow down said ditch with an uniform and uninterrupted current, said plaintiff has now, and has had for more than six months last past, a market for the same, by which it now can and could heretofore have realized about one hundred dollars per week for the same, by sale to quartz and placer miners—and that he would have said market for a great length of time hereafter; that by the interruption of the regular flow of the waters, as before stated, the plaintiff's customers are unable to use the same; that the market and sale of the said waters depend entirely on the uniform and natural flow of said waters; that if the interruption continues, the plaintiff will lose from fifty to one hundred dollars per week; that defendants are insolvent, and will be

unable to respond in damages; that said reservoirs are a nuisance; and that the damages already accrued amount to five hundred dollars. Plaintiff prays judgment for the damages alleged, that the nuisance be abated, and the defendants be enjoined from obstructing in future the regular and uniform flow of said water.

The defendants, in their answer — after denying most of the material allegations of the complaint, and claiming a right to the waters in themselves — allege, among other things, that for a long term of years said ditch has ceased to convey any water, and has been mined away at its head, and at various other places, and since 1856 has been disused, and has neither carried nor been in a condition to carry any water; that said plaintiff, in and since 1856, sold water to various miners from another ditch owned by plaintiff, and that said miners, with the waters so purchased of plaintiff, with the knowledge, approbation, and consent of the plaintiff, washed away and destroyed the ditch described in the complaint to such an extent that it was wholly destroyed and unfit for conveying any water, and that since 1856 to the present time, the said ditch, by reason of said washing away and destruction, has been and still is wholly unfit to carry any water. They deny that said waters have flowed in said ditch since 1856, or that said reservoirs have in any manner affected the flow of said waters into said ditch. They aver that if plaintiff had a ditch to convey the waters collected in said reservoirs, they would be as useful to plaintiff as they otherwise would be; that for the want of any ditch sufficient or fit to carry the said waters, the same flow down Rock Creek, after being used by defendants, past the head of the ditch described in the complaint; that plaintiffs are not in a condition to use said waters until they rebuild the ditch which has been washed away as before stated.

The verdict of the jury and the judgment thereon were for the defendants, and plaintiff appealed.

On the trial, defendants introduced testimony, under objection and exception on the part of the plaintiff, tending to prove

the destruction and condition of the ditch as alleged in the answer, and the Court instructed the jury as follows: "In determining the proposition whether defendants' reservoirs are a nuisance, you will look at all the evidence as to plaintiff's ditch and dam being out of order, and unable to carry the water, and take all the testimony that has been given into consideration." To the giving of which plaintiff excepted, and these rulings are relied on as error.

We think there was no error in admitting the testimony, or giving the instruction based upon it. The question was, whether the reservoirs were a nuisance in the then present condition of things—not whether they might become a nuisance at some future time, when the plaintiff might see fit to put its ditch in a condition to enjoy its right to the water. The plaintiff only had a right, by virtue of prior appropriation, to the use of the water in its natural flow. Other parties above were equally entitled to its use, so long as it was used in such a manner as not to injure the plaintiff. If plaintiff's ditch and dam had, for seven years, or any less period of time, as defendants claim, been in such a condition that it was impossible to turn the water into the ditch, or for the ditch to carry it, the plaintiff could not be injured, or the reservoirs become a nuisance, until the ditch should be repaired and placed in a condition to be available for the purpose designed. An action could not be maintained to abate the reservoirs, as a nuisance, till they actually became such. There is no claim that plaintiff was entitled to or desired the water for any other purpose than to convey in their ditch for sale.

But the plaintiff says there was also evidence tending to show that in 1860, a year or more before the reservoirs were built, the defendants themselves washed away plaintiff's ditch and dam, and that plaintiff at that time endeavored to repair it, and was prevented from doing so by the defendants, and for this reason the instruction was erroneous and liable to mislead the jury. There are two answers to this: Firstly—the plaintiff is suing to abate a present nuisance, erected long since the transactions referred to, and not to recover damages

for destroying plaintiff's dam and ditch in 1860, and a recovery must be had, if at all, upon the case stated in the complaint. Secondly — it is a question for the jury to determine what facts are established by the evidence, and they might have found against the plaintiff on that point. They were, therefore, entitled to "look at the evidence" referred to, as directed by the Court, in connection with the other evidence in the case. For the same reasons, the instruction asked by plaintiff (which was precisely the reverse of the one given and just considered) was properly refused.

The defendants called one John Tyler as a witness. His first testimony was: "I am a member of the Boles claim; bought in when he did, and purchased from the same parties." He then went on, without any objection, and testified at considerable length upon the merits of the case. After which the "plaintiff, by his attorney, moved to strike out the testimony of said witness, Tyler, because he was interested. Defendant objected, and the Court sustained the objection, and plaintiff excepted to the ruling of the Court." This ruling is assigned as error. Admitting, for the purpose of the decision, the notice given under section four hundred and twenty-two of the Practice Act to be insufficient to authorize the witness to testify, we think the plaintiff waived the objection on the ground of interest by not taking it in time. The witness distinctly informed them at the threshold of his testimony that he was interested. Then was the time to make the objection. Parties will not be permitted to experiment upon a witness by admitting his testimony without objection, and, if it turns out to be favorable, accept it; but, if unfavorable, move to strike it out. Had the plaintiff been ignorant of the interest of the witness till it was developed by his testimony at this point of the trial, and the plaintiff, as soon as the interest was discovered, had moved to strike out his previous testimony, the Court would, doubtless, have granted the motion, if there was no other legal reason for denying it. But all the testimony sought to be struck out was taken without objection, after the witness had informed plaintiff and the Court of his interest;

Flateau v. Lubeck.

and the motion was properly denied on the ground that the objection came too late.

The last error relied on in appellant's brief is that the verdict is not warranted by the evidence, and is against law. It is hardly necessary to say that the record does not present a case which, under the uniform decisions of this Court, would justify us in reversing the judgment on this ground.

No error having been brought to our notice, the judgment is affirmed.

L. FLATEAU v. D. W. LUBECK.

NEW TRIAL.—If no notice is given of an intention to move for a new trial, a statement made and filed, and agreed to by the parties, or settled by the Judge, cannot be made the foundation of a motion, nor annexed to the record of the judgment or order from which the party may appeal. A notice of motion for a new trial should be in writing.

MISTAKE IN NOTICE OF APPEAL.—If there is enough in the notice of appeal to show that the judgment or order contained in the transcript are the same intended to be appealed from, the appeal will not be dismissed, although the notice may contain mistakes as to the date of the order or judgment.

APPEAL from the District Court, Eleventh Judicial District, Placer County.

The facts are stated in the opinion of the Court.

George R. Moore, for Appellant.

Tuttle & Fellows, for Respondent.

By the Court, CURREY, J.

The respondent in this case makes certain preliminary objections to the transcript on appeal, on the grounds:

1st. That no notice appears to have been given by the plaintiff to the defendant of his intention to move for a new trial, and that, therefore, the statement purporting to be a statement on motion for a new trial cannot be considered on appeal.

2d. That the notice of appeal is radically defective, and insufficient for the purpose intended by the appellant.

From the transcript in the case it appears that the verdict was rendered on the tenth day of November, 1863, in favor of the defendant, against the plaintiff, and that on the day following, on motion of plaintiff's counsel, the Court, by order, granted to the plaintiff ten days from that time in which to prepare and file a statement to be used on motion for a new trial; that on the 17th day of the same month, a statement, which the parties agreed to as correct, was filed; and that between the time the order was made and the day when the statement was filed, namely, on the 13th day of said month, the counsel for plaintiff moved for a new trial, which was then denied by the Court. There is nothing in the transcript from which it can be inferred that the defendant or his counsel had any notice of the motion for a new trial, or that he or they appeared or participated in the argument of the motion.

As to the first objection, the statute provides that the party intending to move for a new trial shall give notice of the same, when the action has been tried by a jury, within five days after the rendition of the verdict, and that the notice shall designate, generally, the grounds upon which the motion will be made. (Laws of 1863, p. 643.) In *Borland v. Thornton*, 12 Cal. 448, the Court say: "When the statute speaks of notice, it means written notice, or notice in open Court, of which a minute is made by the Clerk." That a notice in legal proceedings should be in writing, we deem essential to the protection of the rights of the party to be affected by it. Any other practice would, in many instances, be attended with mischievous results, and hence should be discountenanced. (*Gilbert v. Columbia Turnpike Company*, 3 Johns. Cas. 107.) The statute does not provide for any other than a written notice, and we are not satisfied that a notice in open Court, entered in the minutes of the Clerk, in such cases, can properly serve as a substitute for the notice contemplated by the statute. If it can, then it should contain all the substantive elements of the statutory notice, and should be brought to the

attention of the party entitled to notice; and all this should appear, by proper entry, in the minutes of the Court.

If there was no legal notice of a motion for a new trial, it necessarily follows that the statement, the use of which is dependent on a valid and effectual notice, cannot be made the foundation of a motion for a new trial, nor annexed to the record of the judgment or order from which the party may appeal.

As to the second objection: The notice of appeal was filed on the 19th day of December, 1863, and purports to be an appeal from a judgment rendered in the cause on the 10th day of September, 1860, and from an order overruling the motion for a new trial on the 14th day of December, 1863. The judgment in the cause was rendered on the 10th of November, 1863, and the order overruling the motion for a new trial was made on the 13th of that month.

The Act of the Legislature of 1861, entitled "An Act to regulate appeals in this State," provides that no appeal shall be dismissed for insufficiency of the notice of appeal. There is enough upon the face of this notice to show that the judgment and order mentioned in the transcript of the record were the same referred to in the notice, and we think the Act of 1861 was designed to relieve parties in such cases from injurious consequences because of such mistakes.

The first objection of the respondent which we have here noticed we are compelled to regard as precluding any examination of the evidence and the proceedings in the case embodied in the statement; and, inasmuch as no error is manifest in that portion of the record which we are permitted to consider, the judgment must be affirmed.

Judgment affirmed.

Wixon v. Bear River and Auburn Water and Mining Co.

**JOHN WIXON v. THE BEAR RIVER AND AUBURN
WATER AND MINING COMPANY.**

APPEAL—ASSIGNMENT OF ERRORS.—A statement on appeal, or on motion for a new trial, should set forth distinctly the grounds upon which the party appealing intends to rely for a reversal of the judgment. The Supreme Court will not look into or regard any alleged error which is not clearly assigned in the transcript.

WATER DITCHES—GARDENS—PRIOR RIGHTS.—If a tract of land in the mineral region, bordering on a natural stream, is inclosed and appropriated for garden or orchard purposes, and the waters of the stream are afterwards appropriated for mining purposes at a point above the inclosed land, the water thus appropriated must be so used as not to materially injure the fruit trees or garden.

SAME.—One who appropriates for mining purposes the waters of a ravine or stream, upon the public lands in the mineral region, must take and use the same in such manner as not to injure or destroy orchards or gardens bordering on the stream, which have been inclosed and planted before the water was appropriated.

ORCHARDS—MINERAL REGION.—One who incloses a tract of public land in the mineral region, and plants the same with fruit trees, acquires a vested right which will be protected as against one subsequently entering upon the same for mining purposes.

APPEAL from the District Court, Eleventh Judicial District, Placer County.

This action was commenced May 26th, 1861. Plaintiff averred in his complaint that in 1854 he inclosed with a substantial fence a tract of land containing about two acres, across the road from his residence, and planted the same with peach and apple trees; and that since said year he had annually cultivated the same with vegetables and strawberries, for the use of his family. That defendant was the owner of a ditch conveying water from Bear River for mining purposes, and passing a short distance above plaintiff's field; that in 1856 defendant constructed a reservoir, about one half mile above plaintiff's orchard, across the same ravine on which the orchard bordered, into which defendant turned and accumulated the water flowing from the ditch; that the water flowing in defendant's ditch contained large quantities of mud and sediment, which settled in the reservoir; that since the summer of 1860, defendant had been in the habit once in each week of opening the gate of the reservoir, and allowing the water accumulated

Wixon v. Bear River and Auburn Water and Mining Co.

therein to rush out and carry with it the said mud and sediment, which water, mud, and sediment flowed over and upon the garden, and injured and destroyed the fruit and destroyed the vegetables; that a part of the fruit trees had already been destroyed, and if defendant was suffered to continue its said acts, the trees would be all destroyed, and the garden rendered unfit for cultivation.

The complaint prayed for judgment for damages and for a perpetual injunction.

The answer averred, that the land of plaintiff was public land, in the mineral region, and contained valuable mines of gold; and that it was situated along and across a ravine, a natural water course, and that for a long time defendant had been in the habit of using the ravine for the purpose of conveying the water of its ditch to mines below, to be used for mining; that the injury to plaintiff's garden, if any, had been caused by miners digging up the bed of the ravine above plaintiff's garden, and by obstructions placed in the ravine below the garden; that defendant was engaged in selling water to miners for mining purposes, and had a right to the use of the ravine as a channel for the conveyance of its water, etc.

The answer also denied all the material allegations of the complaint, except the fact that plaintiff had inclosed his garden and planted his fruit trees in 1854, and that defendant's reservoir was constructed in 1860.

The jury found a verdict for plaintiff for damages, and the Court decreed a perpetual injunction restraining defendant from allowing the water or mud or sediment from its reservoir to flow down upon plaintiff's garden so as to injure the same.

The following are the instructions given by the Court to the jury, to which defendant excepted:

"If the plaintiff was in the possession of his premises before the construction of the defendant's reservoir, then the defendant has no right to run out the water accumulating therein, carrying with it sand and sediment, on to the plaintiff's premises, and to his injury, and if defendant has done this, you will find for plaintiff.

"If the plaintiff possessed his premises prior to the appro-

priation of the water of the ravine by defendant, than the defendant's appropriation was subject to the prior rights of the plaintiff, and if this is so, then the defendant is liable for injuries resulting to the plaintiff's premises from its use of such water subsequently appropriated."

The following are the instructions asked by defendant and refused, to which refusal defendant excepted:

"If the jury find that defendant is a company for the purpose of supplying water to miners for mining purposes, and that the premises and ravine mentioned in this case are within the mining district of this State, then the defendant has the right to appropriate, by means of a reservoir or otherwise, the natural waters of Miners' Ravine, and also the right to the necessary means for such enjoyment.

"The plaintiff cannot by appropriation of land or otherwise prevent the free flow of water and tailings in a natural ravine situated in a mineral district; and any improvements created or erected in the channel of a ravine, must be subject to the right of miners upon the ravine, and also the right of defendant to a free enjoyment of its right, and a free and unmolested flow of water.

"All miners, and defendant as a company organized for mining purposes, have the right to the free use and benefit of natural water courses and reservoirs, and plaintiff has no right to interfere in any manner with such right, and if by reason of plaintiff's interference with the free use of the reservoir he has suffered injury, defendant is not responsible.

"The right to use and enjoy the ravine and its privileges carries with it the right to such privileges as are necessary to the enjoyment of the right."

The following are the only grounds of appeal set forth in the statement:

"Defendant's grounds of appeal are as follows:

"The Court erred in giving the instructions to the jury which were excepted to by defendant, and also erred in refusing to give the instructions requested by defendant, by reason

Wilson v. Bear River and Auburn Water and Mining Co.

of which the jury were induced to render a verdict contrary to law and contrary to the evidence."

A. S. Higgins, for Appellant.

The two instructions with respect to the rights of the parties by reason of the times of their location, are clearly erroneous.

Such a doctrine, if sustained, would result in the greatest injury to the mining interests of the State, and one person may, simply by *prior location* in a ravine, so fill up and obstruct the same as to prevent any mining operations above, even in the richest mineral districts; because it might, and probably would, result in flowing water, tailings, and sediments, around and upon his premises.

In granting to the people of the State the right to mine, the Legislature and laws of the State grant the right to the enjoyment of *such privileges as are necessary to the enjoyment of the right*; and the seventh instruction and other instructions asked by defendant and refused, relating to the subject matter of the seventh, should have been given to the jury, and the Court erred in refusing them. (*Clark v. Duval*, 15 Cal. 88; *Tartar v. Spring Creek W. & M. Company*, 5 Cal. 398.)

A license to work the mines implies a permission to extract and remove the mineral. (*Boggs v. Merced Mining Company*, 14 Cal. 374.)

It is not necessary to multiply authorities upon the question so often settled by this Court, that miners, and this appellant and company organized for mining purposes, *have* the right to enter upon mineral lands for the purpose of extracting gold therefrom, and also to appropriate and use the water of ravines and natural water courses for mining purposes; and such a right would be barren and of no avail, if any person may so obstruct and destroy the means of enjoying the right as to render its enjoyment absolutely impossible.

If, therefore, one desires to appropriate the bed of a ravine, and divert or obstruct the channel, he must leave or construct

Wilson v. Bear River and Auburn Water and Mining Co.

such channel or outlet as will be sufficient for the purpose of the rain, and such as to allow the water to flow off. *And the Court erred in refusing to give to the jury the instructions asked upon this point. (The Bear River and Auburn W. & M. Co. v. York Mining Co., 8 Cal. 333.)*

S. Heydenfeldt, also for Appellant.

The first instruction at request of defendant, which was refused by the Court, ought to have been given.

The simple right of appropriation has been recognized in many previous decisions. (*Stoakes v. Barrett*, 5 Cal. 39; *Irwin v. Phillips*, 5 Cal. 143; *Conger v. Weaver*, 6 Cal. 556.)

So with the second instruction refused.

A ravine is one of the natural drains of the earth's land surface, and should no more be obstructed from the purposes of its natural creation than the bed of a river.

Tuttle & Hillyer, for Respondent.

It is defendant, and not plaintiff, who has impeded the channel of the ravine.

Had the water been allowed its natural flow every day in the week, plaintiff would have sustained no injury, and this action would not have been brought.

If we use defendant's own argument, it would abate his reservoir as a nuisance, and compel him to construct it in some place where he would not entirely stop the flow of water down the ravine.

He has constructed a high wall entirely across a natural channel.

Besides, the argument, if good for anything, proves too much. The argument, as here made by defendant, would allow this corporation to build its reservoir anywhere.

They might go immediately above the residence of a family, and in a short time cover up or destroy the house; yet, defendant would say, as do its counsel here, that the house was but of *little value*, and miners had a right to mine on pub-

Wixon v. Bear River and Auburn Water and Mining Co.

lic lands; that the right to mine carried with it all the incidents necessary; that defendant was the sole judge of what these incidents were—and, therefore, family residences, gardens, orchards, etc., were all held and occupied at defendant's mercy.

Defendant's instructions, which were asked and refused, in the first place had no application to the case in point; and second, as abstract propositions of law are incorrect.

The instructions given are fully favorable to defendant as the circumstances warrant. (See *Smith v. Doe*, 15 Cal. 100; *Gillan v. Hutchinson*, 16 Cal. 153; *Burdge v. Underwood*, 6 Cal. 45; *Clark v. Duval*, 15 Cal. 185; *Esmond v. Chew*, 15 Cal. 142.)

By the Court, SANDERSON, C. J.

We cannot notice the argument of counsel for appellant as to the sufficiency of the evidence to sustain the verdict, nor as to the question of costs, nor the correctness of the decree for an injunction, because they are not embraced in the grounds of appeal set forth in the statement. (*Barrett et al. v. Tewksbury and Wife*, 15 Cal. 354; *Reynolds v. Lawrence*, 15 Cal. 359.) Under the rule laid down in those cases, we can only consider the points made upon the instructions given and refused by the Court.

Nor do we deem it necessary to notice in detail the instructions of which the appellant complains. It is sufficient to say, that after a careful examination we are satisfied they correctly present the law applicable to the facts, and to the legal effect of which they are addressed.

As to the instructions asked for by the defendants: The first was properly refused, because it is so broad and unqualified in its terms that it might have misled the jury. As an abstract proposition, even, it is too general, because it ignores entirely the idea of prior vested rights in others, to which the right claimed by defendant might be subordinate; and, as applicable to the particular facts of this case, it ignores entirely the prior rights of the plaintiff, and by necessary

Owen v. Morton et als.

implication negatives the idea that he had any such rights; thus striking from under it the very foundation upon which his cause of action rested, although such rights were conclusively established by the testimony.

The second instruction is undoubtedly law, but it had already been twice given in substance, and that was doubtless the reason why it was refused.

The four remaining instructions refused by the Court are founded upon the theory that, in the mineral districts of this State, the rights of miners and persons owning ditches constructed for mining purposes are paramount to all other rights and interests of a different character, regardless of the time or mode of their acquisition; thus annihilating the doctrine of priority in all cases where the contest is between a miner or ditch owner and one who claims the exercise of any other kind of right or the ownership of any other kind of interest. To such a doctrine we are unable to subscribe, nor do we think it clothed with a plausibility sufficient to justify us in combating it.

The judgment is affirmed.

JOHN W. OWEN *v.* THOMAS H. MORTON, JOHN PIERCE, H. HUBBERD, A. CHRYSLER, P. ANDERSON, C. JOHNSON, R. M. CLARK, ANTONIO DE SANTOS, AND JOHN FERRILL.

POSSESSION OF ONE TENANT IN COMMON.—Where one tenant in common is in the exclusive possession of land, the presumption of law is that he holds for himself and his co-tenant, and, to rebut such presumption, there must be proof of acts or declarations on his part indicating his intention to exclude his co-tenant.

WHAT AMOUNTS TO OUSTER OF CO-TENANT.—To enable the tenant out of possession to maintain ejectment against the co-tenant in the exclusive possession of the land, it is not necessary to prove an actual ouster; but proof that the tenant in possession appropriates the entire use or profits of the land, under a claim of exclusive right, or with a manifest intent to possess the whole exclusively, is sufficient.

SAME.—Any act of the co-tenant in the exclusive possession which manifests an intention on his part to hold exclusively for himself, is equivalent, in law, to an actual ouster.

WHAT DOES AMOUNT TO OUSTER OF CO-TENANT.—Proof that the co-tenant is in

Owen v. Morton et al.

the exclusive possession, and that he does not claim by deed or lease from his co-tenant out of possession, is not sufficient to show an ouster or adverse possession.

FINDINGS OF FACT—WHEN PRESUMED CORRECT.—When the record shows that all the evidence introduced on the trial is not embodied in the statement, the presumption is that the findings and judgment of the Court below are warranted by the evidence, although the statement contains no evidence upon which to base such findings and judgment.

SAME.—Every intendment is in favor of the verdict or decision of the Court below, and it will be presumed that the omitted evidence warranted the judgment.

PROOF NECESSARY TO RECOVER IN EJECTMENT.—In order to entitle a plaintiff in ejectment to recover, he must show a right of possession in himself and a possession in the defendant of the demanded premises at the time the action is brought.

APPEAL from the District Court, Seventh Judicial District, Solano County.

The facts are stated in the opinion of the Court.

M. A. Wheaton, for Appellants, cited *Pico v. Columbet*, 12 Cal. 420, and as to De Santos' case, *Garner v. Marshall*, 9 Cal. 268; *Clink v. Cohen*, 13 Cal. 623.

Whitman & Wells, for Respondent.

The title being deraigned under patent from the State, and the possession of defendants admitted, the ouster is fully admitted by the stipulation. Defendants having occupied exclusively, is an ouster of their co-tenants, and there is no error in the judgment. (*Adams on Ejectment*, 137; 1 Greenleaf's Cruise, Secs. 20, 13; *Jackson v. Tibbetts*, 9 Cow. 241; *Reay v. Goodwin*, 16 Mass. 1.)

By the Court, CURREY, J.

This is an action of ejectment, commenced by the plaintiff, on the 11th of April, 1860, against Thomas H. Morton and others for the recovery of the possession of a tract of land in Solano County, whereon is situated the City of Suisun. The complaint is in the usual form in such cases, counting on title in the plaintiff on the 24th day of November, 1855, and entry and ouster of the plaintiff on that day by the defendants, and an unlawful withholding of the premises by them from thence to and at the commencement of the action, to the great dam-

age of the plaintiff, etc. To this complaint nine of the defendants appeared and answered, to which answers the plaintiff filed replications. Subsequently the same defendants, by leave of the Court, made and filed amended answers, by which they pleaded — first, the general issue; and in the second place, that they were each in the possession of a small piece of the land described in the complaint, which they respectively held in severalty under deeds of conveyance of the one undivided third interest in the respective portions by each of them held in possession, derived from the plaintiff or his grantees, and that when they obtained such deeds each of them was already in the peaceable possession of the parcels of land respectively described in such deeds of conveyance; and the defendant Chrysler further averred that as to one parcel of the premises, he had a conveyance of the whole of the plaintiff's interests therein, derived from the plaintiff or from his grantees.

To the amended answers the plaintiff replied, denying each and every allegation of new matter therein contained.

At the trial the plaintiff gave in evidence a patent from the State, bearing date the 24th day of November, 1855, granting to him the land described in his complaint. By a stipulation entered into for the purposes of the trial, it appears that each of the nine defendants limited his defense in the action to parcels of the premises described therein; and the parties agreed by this stipulation that each defendant had a deed of conveyance of the undivided third part of the parcel of land in respect to which he defended, by which he acquired the plaintiff's title to such undivided one third of the parcel of the premises by him occupied.

At a term of the District Court, held in Solano County in April, 1863, a judgment was rendered in favor of plaintiff against each of the defendants for the recovery of the undivided two third parts of the parcels of land which the defendants respectively had in possession and for costs of the action. At a subsequent day a motion for a new trial was made, and the same was denied. From these judgments, and from the order denying a new trial, the defendants duly appealed.

The counsel for appellants assigns as a ground requiring the reversal of the judgments, that the evidence did not show or tend to show that defendants, or any or either of them, held the possession of the premises, or any part or parts thereof, adversely to the plaintiff; nor that the plaintiff had even demanded the possession; nor that he had even been kept out of the possession of the same by the defendants.

By the answers of these defendants, as also by the stipulation of the parties, it appears that the defendants were severally tenants in common with the plaintiff of the distinct portions of the land of which they were in possession, and with him had the right to its enjoyment. The rule seems to be settled that where one having title as a tenant in common is in the exclusive possession of premises, he is presumed to hold for himself and his co-tenant, and to rebut such presumption there must be proof of acts or declarations on his part indicating his intention to exclude his co-tenant. (*Humbert v. Trinity Church*, 24 Wend. 587; 2 Washburn on Real Property, 491.) Proof of an actual ouster—that is, as was said by Lord Mansfield in *Fishar v. Prosser*, 1 Cowper, 217, “a turning out by the shoulders” by one tenant in common of another—is not indispensable to the maintenance of an action of ejectment by the tenant out of possession against his co-tenant in the exclusive occupancy of the estate owned in common; but an appropriation by him who is in possession of the entire use or profits of the land, under a claim of exclusive right, or with a manifest intent to possess the whole exclusively, is equivalent, in law, to an actual ouster of his co-tenant. (*Parker v. Proprietors, etc.*, 3 Metcalf, 102; *Manchester v. Doddridge*, 3 Indiana, 360.) In *Ricard v. Williams*, 7 Wheat. 121, the Court say: “An ouster or disseisin is not, indeed, to be presumed from the mere act of sole possession; but it may be proved by such possession, accompanied with a notorious claim of an exclusive right.” Mr. Preston, in reference to this subject, says: “It is a rule of law that the seisin of one joint tenant is the seisin of his companions as well as himself. The same rule is applied to co-parceners and tenants in com-

mon. The possession of one of them is constructively the possession of all; and hence it seems to follow that possession or seisin of one will be the seisin of others as against all strangers, and the possession of one will constructively be held for the benefit of himself and his companion. To disseise his companions, there must be such acts as are constructively equivalent to an ouster—as the denial of right to the rent, or any part, or the possession of any part of the land, or an exclusive possession for a long time, so as to afford the presumption of a disseisin.” (2 Preston on Abstracts, 291; See, also, *Barr v. Gratz*, 4 Wheat. 223; *Bradstreet v. Huntington*, 5 Peters, 402; *Clapp v. Bromagham*, 9 Cow. 530; *Prescott v. Nevers*, 4 Mason, 330; *Fishar v. Prosser*, 1 Cowper, 217; *Peaceable v. Read*, 1 East. 573.)

It was proved on the trial, by one witness, that these defendants were, at the time the action was commenced, in the possession of the portions of the demanded premises by them severally occupied adversely to the plaintiff. This the witness stated in general terms, without undertaking to specify acts or declarations of the defendants from which he deduced his conclusion that their possession was adverse; but on being more particularly examined on the point, he said that when he spoke of the parties claiming adversely, he meant they did not claim by deed or lease from plaintiff. This testimony, taken together, falls short of establishing an adverse possession, and furnishes no evidence of an ouster of the plaintiff by defendants; and, were it not that the record fails to negative the fact that there was other proof on the subject, it would be necessary to reverse the judgments for want of evidence to maintain the essential averment of ouster contained in the complaint. But the record shows that the evidence embodied in the statement used on the motion for a new trial, and which is now before this Court on appeal, was not all the evidence produced on the trial, and hence we are bound to presume the finding of the Court below of an ouster of the plaintiff by the defendants was warranted by evidence which is not embodied in the statement. It appears from the record that

Owen v. Morton et als.

the testimony in the case was taken before a referee, and that at least thirty-six pages of the referee's report of the evidence is omitted from the statement; besides which, the cross-examination of two witnesses sworn in the case is all of their testimony to be found in the statement. The rule of law in such cases is that every intendment must be in favor of the verdict or decision of the Court below, and in support of the judgment it will be presumed that the omitted evidence authorized the decision and judgment, unless there be something in the record to overcome such presumption. (*Belt v. Davis*, 1 Cal. 139; *Ringgold v. Haven*, 1 Cal. 115, 116; *Ford v. Holton*, 5 Cal. 321; *Dickinson v. Van Horn*, 9 Cal. 210, 211.) This disposes of the questions on appeal as to all the appellants, except Antonio de Santos.

The counsel for the appellant Antonio de Santos alleges that the judgment against him is erroneous, for the reason that it appears from the record that he was not, at the time the action was commenced, in the possession of the parcel of land for the recovery of which judgment was rendered against him. The complaint was filed and summons issued in the action in April, 1860. The summons was placed in the hands of the Sheriff early in the year 1861, and was served on the said Santos, as appears by the Sheriff's return, "before or on the 15th day of February, 1861." When the action was commenced, Santos was residing on a part of the land described in the complaint, from which he removed, before he filed his answer in the cause, to the portion of the premises of which he was in possession at the time of the trial, and for the recovery of which alone judgment passed against him. To this portion of the demanded premises the said Santos had acquired an interest of one undivided third part by a conveyance of the same from the plaintiff, or from a grantee of the plaintiff, so that, for aught that appears, he was in the possession not otherwise than according to his right. As already stated, if a person enter into lands, having a title and right of entry, his entry and possession is deemed to be in conformity to his title. In this case, though Santos' possession may have been exclu-

Eastman v. Turman et al.

sive, or of the entire parcel of land, it does not follow, from this circumstance alone, that it was adverse to the plaintiff. In *McClung v. Ross*, 5 Wheat. 124, Mr. Chief Justice Marshall said: "That one tenant in common may oust his co-tenant and hold in severalty, is not to be questioned. But a silent possession, accompanied with no act which can amount to an ouster or give notice to his co-tenant that his possession is adverse, ought not, we think, to be construed into an adverse possession."

The intendment in support of the judgments against the other defendants, founded on the presumption that there was in the testimony omitted from the statement evidence of an ouster, cannot be indulged in support of the judgment against Santos, because it appears by stipulation, as well as by the evidence in the cause, that he entered upon the parcel of land for which judgment was obtained against him after the suit was commenced; hence the finding of the Court that he entered and ousted the plaintiff, as alleged in the complaint, was not warranted. In *Owen against Fowler*, 24 Cal. 192, it is held that in order to entitle a plaintiff in ejectment to recover, he must show a right of possession in himself, and a possession in the defendant, at the time the action is brought, and if he fails to establish either of these facts, he cannot recover.

The judgment against the defendant Antonio de Santos must be reversed, and the action against him dismissed, and the judgments against the other defendants, who are appellants in this case, must be affirmed, and it is accordingly so ordered and adjudged.

CYRUS A. EASTMAN v. B. C. TURMAN AND ALEXANDER ELY.

ACTION ON NOTE—PARTIES TO.—Where a promissory note and a mortgage to secure the same are executed and delivered to the same person, and the payee of the note and mortgagee indorses the note and assigns the mortgage to a third person, who brings an action on the note and to foreclose the

Eastman v. Turman et al.

mortgage, it is not a misjoinder of parties defendant to join as defendants the indorser and maker of the note.

SAME — NOTE — MORTGAGE.—In such case, under the provisions of the Practice Act, it is not an improper joinder of two causes of action to sue the indorser of the note on his liability as such, and to ask a decree against the mortgagor foreclosing the mortgage.

NOTICE TO INDORSER.—A notice given to the indorser of a promissory note, made payable at a banking house, which states "that the note, on the day it matured, was presented for payment at the banking house of (naming the banking house where the same was payable,) and payment thereof demanded, and thereupon the same was duly protested for non-payment," is a sufficient notice of demand, refusal, and non-payment, to charge the indorser.

INDORSER OF NOTE — PAYABLE IN INSTALMENTS.—Where such note is payable in instalments due at different times, and the demand on the maker is not made until the last instalment falls due, and the demand is made for the whole amount due on the note, including the prior instalments, the demand is good for the purpose of charging the indorser for the last instalment.

APPEAL from the District Court, Seventh Judicial District, Sonoma County.

The facts are stated in the opinion of the Court.

Pratt & Clarke, and E. R. Carpentier, for Appellant.

James Rice, for Respondent.

Two causes of action are here improperly united, to wit: A suit in equity to foreclose the mortgage in which the respondent Ely has no interest, and a suit at law against him, Ely, as the *indorser* of the note which the mortgage was given to secure. (Practice Act, Sec. 64; *Bigelow v. Gove*, 7 Cal. 133; *Gates v. Kieff*, 7 Cal. 124; 1 Van Santvoord's Pld'g, pp. 184-200, and notes.)

The complaint does not state facts sufficient to constitute a cause of action against the respondent Ely.

The note sued on is a note payable by instalments, each of which instalments is, in itself, an independent note, and the indorser entitled to due notice of demand, refusal, and non-payment of each instalment when the same becomes due, as well as of the interest thereon, when made payable at specified times, as in the present case.

There is no allegation in the complaint that when the

second and last note or instalment became due there was any demand made for the payment of the same, or any notice given to the indorser Ely of any refusal to pay the same, or of any demand, refusal, and non-payment of the interest specified therein, at the several times when the same became due and payable.

On the contrary, it appears on the face of the complaint that at the time the said second note or instalment became due, payment of the whole sum of fifteen hundred dollars (being the amount of *both* of the said notes or instalments) was then demanded; thus treating the two notes or instalments as *one entire sum* due at that date; and it is not alleged in said complaint, that upon such demand for the entire sum of both the said notes or instalments, payment was refused, or that there were no funds at the place where the said notes or instalments were made payable to meet the same. It is simply alleged that payment was demanded of the whole entire amount of both of the said notes or instalments, and that thereupon the same was protested without alleging the material fact of the refusal to pay, which refusal was essential to authorize the protest.

Where a note is payable by instalments, each instalment is regarded by all the authorities as a separate note, upon the becoming due of which, the holder is entitled to sue; and, if he fail to take the proper steps for holding the indorser, the latter is by analogy and reason discharged, and this equally whether it regard the principal note or the interest which is a part of it, when provided in the note itself to be paid at specified times; the indorser's liability being contingent on due notice of the default of the maker as to every part of the contract. (Baily on Bills, 346; 11 M. & W. 374; *Cooley v. Rose*, 3 Mass. 221; *Greenleaf v. Kellogg*, 2 Ibid, 568; *Eastabrook v. Moulton*, 9 Ibid, 228; *Bander v. Bander*, 7 Barbour, 560; *Heywod v. Perrin*, 10 Pickering, 258; *Green v. Palmer*, 15 Cal. 415; 2d Chitty's Pleadings, 121, 125.)

By the Court, SAWYER, J.

The defendant, Turman, executed in favor of defendant Ely a note for fifteen hundred dollars, payable in equal instalments on the first day of December, 1860, and the first day of December, 1861, with interest payable quarterly. The note was secured by a mortgage. Defendant Ely indorsed the note and assigned the mortgage to plaintiff. This action is brought to recover the amount due, and to foreclose the mortgage. The defendant, Ely, demurred to the complaint. The demurrer having been sustained, and the plaintiff declining to amend, judgment was rendered in favor of Ely. The appeal is from the order sustaining the demurrer, and from the judgment entered thereon.

The first ground of demurrer is, that there is a misjoinder of parties defendant, it not appearing that Ely has any interest in the foreclosure of the mortgage adverse to plaintiff. But he is sued as an indorser, and sought to be held personally liable in that character. He is properly made a party, under section fifteen of the Practice Act. The second ground is that two causes of action are improperly joined—a cause of action on the note against Ely, as indorser, and a cause of action in equity to foreclose the mortgage. There is no misjoinder in this respect. On the contrary, section two hundred and forty-six of the Practice Act provides that there shall be but one action for the recovery of the debt and the enforcement of the right secured by the mortgage. As to defendant Turman, at least, it would be necessary to demand all the relief to which he was entitled in this action.

The remaining ground of the demurrer is, that the complaint does not state facts sufficient to constitute a cause of action. The first point under this head is, that the defendant, Ely, does not appear to be liable for the whole amount of the note and interest, for the reason that it does not appear that any demand was made at the time the several instalments of interest, or the first instalment of seven hundred and fifty dollars principal, fell due, or that he had any notice of the dishonor as to these payments. Admitting this to be true, and that he is discharged from liability as to these sums, (and he

probably is, if no demand was made, or notice given, as they actually fell due,) still, if the complaint shows a good cause of action as to the *last* instalment, it is not obnoxious to the demurrer on this ground.

This brings us to the question as to whether the complaint states facts sufficient to constitute a cause of action against the defendant, Ely, for the last instalment of seven hundred and fifty dollars due on the note. This was payable, by the terms of the note, on the first day of December, 1861. The last day of grace, therefore, fell on the 4th.

The plaintiff alleges "that said note is now past due; that as its maturity, to wit: on the fourth day of December, 1861, it was presented for payment at the banking house of Tallant & Wilde, at San Francisco, where the same was payable, and payment thereof demanded, and thereupon the same was duly protested for non-payment, of which defendants had due notice."

It is insisted that this averment does not state a refusal to pay, and that a refusal was essential to authorize a protest; that one of the facts necessary to charge the indorser is therefore wanting. In discussing the form of the notice necessary to be given to the indorser in order to charge him, Mr. Parsons, in his work on Bills, page 471, says: "The word 'protested,' used in a notice, clearly implies that the note or bill has been dishonored in all cases where a protest is necessary, and by the weight of authority this word sufficiently designates that the necessary steps have been taken, even in the case of inland bills and promissory notes, where the law does not require a protest."

Upon the same point, in the case of *Cayuga County Bank v. Warden*, 1 Comstock, 419, the Court say: "Another objection to the notice is, that it does not state that payment of this note was ever demanded, or that it was refused. The notice * * * states that S. Warden's note * * * 'was this evening protested for non-payment.' * * * The case of *Mills v. Bank of United States*, 11 Wheat. 431, shows that it need not be stated in the notice that a demand of payment was made; that it is sufficient to state the fact of non-payment

Eastman v. Turman et al.

of the note, which the notice in this case alleges, as it states that the note was protested for non-payment. * * * I am of opinion that the notice under the circumstances of this case was sufficient." The allegation in this cause is that payment was "demanded, and thereupon the same was duly protested for non-payment." If these words clearly import a refusal, as held in the authorities cited, we do not see why the averment of the complaint is not a sufficient allegation of demand, refusal, and notice of non-payment. The complaint also contains an averment that no part of the sum due on the note, except the first instalment of interest, had been paid. We think the complaint sufficient in this respect. But it is insisted that the averments under consideration show that the demand on the fourth of December, 1861, was for the whole amount due on the note, including the prior instalments and the several instalments of unpaid interest before due, and for this reason it was not a good demand for the purpose of charging the indorser for the last instalment which fell due on that day.

The maker of the note was certainly liable for the whole amount. The demand of the greater sum included the less. The indorser had notice of the demand and dishonor of the note, and he was, therefore, in a condition to take any measures he might deem necessary to protect his interest. He could pay the amount for which he was liable, and place himself in a position to pursue the maker. We cannot see that he is in any manner placed in a worse position by reason of a demand of the whole amount due from the maker. Suppose there had been separate notes for the different instalments, instead of one note, and the demand had not been made till the last fell due—that both were demanded together, and notice given to the indorser that on that day the two notes, describing them, had been presented, demand made, and the notes protested for non-payment, would it be pretended that the indorser would not be charged upon the one that fell due on that day, on the ground that the payment of the other had been demanded at the same time? We think not. We have not been referred to any authority showing that such a demand

Lodge v. Turman et al.

as is alleged would not be effectual to charge the indorser to the extent of the instalment which fell due on that day. We think it good to that extent, at least, and that the complaint shows a good cause of action against Ely for the sum of seven hundred and fifty dollars and any interest that had not become payable prior to the time the last instalment of principal fell due.

The judgment is reversed and cause remanded for further proceedings.

J. D. LODGE v. B. C. TURMAN, ZADOCK JACKSON,
AND WM. M. WAGGLE.

DEED ABSOLUTE ON ITS FACE—WHEN A MORTGAGE.—If a deed of land, absolute on its face, is executed and delivered in consideration of a precedent debt due from the grantor to the grantee, and there is at the time a verbal understanding between the parties that the grantor shall be entitled to a reconveyance upon the payment of the debt, then the conveyance is a mortgage.

SAME—PAROL EVIDENCE.—Parol evidence is admissible to show that a deed, absolute on its face, was intended as a mortgage.

SUIT AT LAW ON A NOTE—DEFENSE, PAYMENT BY DEED OF LAND.—Where an action is brought in a court of law upon a promissory note, and a defense is interposed that the note has been paid by the execution and delivery of a deed of land by the maker to the payee, and the defendant, in proving the allegations of the answer, shows that the conveyance was in fact intended as a mortgage to secure the note, plaintiff is entitled to judgment.

APPEAL from the District Court, Seventh Judicial District, Sonoma County.

The facts are stated in the opinion of the Court.

J. Temple, for Appellant.

This action is brought upon a promissory note against three defendants, each of whom is a principal upon the note.

The only defence set up is payment. The fact of payment is denied in the replication, and this is the *only issue* in the case.

There is *no evidence* in the case which *tends to prove* payment. On the contrary, the evidence of Turman, one of the

Lodge v. Turman et al.

defendants, proves conclusively that the note has *not been paid*, but tends to prove that he had given a mortgage to secure it.

There being no evidence to establish the only defense set up, the verdict and judgment are evidently contrary to the evidence and against law.

The judgment is that the note had been *paid*, and would prevent the plaintiff from foreclosing his mortgage, (if it be a mortgage,) when, by their own testimony, they ought to have that right.

The first and second instructions asked by the plaintiff, both contain correct propositions of law, were directly in point, and should have been given.

That these instructions are law, is clearly established in *Pierce v. Robinson*, 13 Cal. 125, and other decisions of this Court.

That they are in point, is evident from the fact that they relate to the question as to whether a certain transaction, concerning which testimony had been given, amounted to payment, the only issue in the case.

They take nothing from the province of the jury; for they simply say that if the jury find from the evidence that certain facts exists, then the law gives a certain effect to those facts.

James W. Coffroth, and *Francis McConnell*, for Respondent.

The instructions asked for by plaintiff were very properly refused by the Court below: First—because the instructions themselves are not law; Second—because the instructions, *if law*, are neither *relevant* to the case, nor *warranted* by the pleadings.

The question of *payment*, in any view, is one of *fact*, to be determined by the jury. (*Griffith v. Grogan*, 12 Cal. 324; 2 Am. Lead. Cases, 180.)

The instrument in question is claimed, acknowledged, and admitted, by both the plaintiff and the defendants in the pleadings, to be a deed; and the consideration of this deed being an antecedent debt, consisting of the note and other indebtedness, the legal inference is that the debt was dis-

charged upon the execution of the deed. (*Ford v. Irwin*, 18 Cal. 117.)

The instruction, if relevant, is incorrect in this respect: that it takes away from the jury the right to pass upon the intention of the parties as to whether the deed was intended as a mortgage. The question is one of intentions, to be gathered from the whole transaction. (*Ford v. Irwin*, 18 Cal. 117.)

It is not incumbent on the Court to instruct the jury upon mere abstract questions of law *irrelevant* to the case, as serving only to bewilder and mislead them from the true issue to be determined. (*Fowler v. Smith*, 2 Cal. 45; *Benham v. Rowe*, 2 Cal. 387.)

Instructions to the jury are properly refused when not *warranted* by the pleadings. (*Thompson v. Lee*, 8 Cal. 280.)

That the instructions were neither *warranted* by the pleadings, nor *relevant* to the case, is evident from the issues made by the pleadings.

The plaintiff brings an action against three defendants upon a promissory note. Two of the defendants answer, and admit the making of the note, and that they signed the same to accommodate Turman, the other defendant; that Turman, on the 6th of August, 1860, (some two weeks after the note was given,) executed a deed to plaintiff of certain premises, in satisfaction and discharge of the note. Plaintiff replies, and admits the making of the deed on the 25th day of July, 1860, and that the note formed no part of the consideration of the deed, without stating what the consideration of the deed was; but says nothing about the deed being intended as a mortgage. The pleadings are verified. The evidence fully sustains all the material allegations in defendants' answer, and establishes that the deed, though bearing date July 25th, 1860, was not signed and acknowledged until the 6th of August, 1860.

Now, under the pleadings, there is no doubt but the instrument in question is a deed, and the plaintiff having stated in his replication that the note sued upon formed no part of the consideration of the deed, the instructions certainly could not

Lodge v. Turman et al.

be material for plaintiff, but entirely unwarranted by the pleadings, and irrelevant to the case.

The only material point in issue is simply a question of fact as to the payment of the note. The jury find against the plaintiff, and in favor of the defendants, and their finding is conclusive. (*Griffith v. Grogan*, 12 Cal. 324.)

By the Court, CURREY, J.

This is an action of assumpsit, brought by the plaintiff against the defendants on a promissory note by them made and delivered to the plaintiff, bearing date the 25th day of July, 1860, by which they jointly and severally promise to pay to the plaintiff or order, five hundred dollars, three months after the date of the note, with interest thereon at the rate of three per cent per month. Each of the defendants was duly served with process, and two of them, viz.: Jackson and Waggle, appeared and answered, but the defendant Turman, having failed to appear or answer, was duly defaulted. The defendants Jackson and Waggle answered jointly, admitting the making and delivery of the note, a copy of which was contained in the complaint, and then, as a defense, pleaded that the note was paid and satisfied by Turman on the sixth day of August, 1860; and they further answered that they signed the note, without consideration to themselves, as an accommodation to said Turman, who shortly afterwards, in order to relieve them from liability and to pay and discharge the note, conveyed to plaintiff certain real estate in the Town of Petaluma, in Sonoma County, for the consideration of one thousand dollars, and that the plaintiff paid to Turman five hundred dollars as a part of such consideration, and that it was agreed between them that the remaining five hundred dollars should be applied in satisfaction and discharge of the note. The plaintiff replied, controverting the material averments of the answer.

The issue joined was tried by a jury, who rendered a verdict in favor of the defendants, on which judgment was entered

Lodge v. Turman et al.

in favor of the three defendants by name, against the plaintiff. A motion for a new trial was afterwards made and denied, and the appeal in the case is from the order denying the motion for a new trial and from the judgment.

On the trial the defendants gave in evidence the deed of conveyance referred to in the answer of Jackson and Waggle. This deed bears even date with the note, and the consideration expressed therein is one thousand dollars; but Turman testified that it was executed in fact on the sixth day of August, and was in payment of the note in question and another sum of five hundred dollars which he owed plaintiff. He also testified that by agreement with the plaintiff he had the privilege of redeeming the premises described in the deed upon paying to the plaintiff one thousand dollars, the consideration expressed in the deed, within twelve months after its execution. He further testified that he leased of the plaintiff the same premises for the term of one year, at the rate of thirty dollars a month; and in connection with this testimony a lease executed by the plaintiff and said Turman was introduced in evidence, which corresponded in date with the note and deed. Among other things, the lease contained this clause: "And the said lessee promises to pay the rent as follows, to wit: thirty dollars per month, payable at the end of each month; but if five hundred dollars, the amount of a note of Turman to Lodge, should be paid at the end of any month, then thereafter but fifteen dollars per month is to be paid, until the entire sum of money as above is fully paid."

A witness testified that at the time the deed was executed, the defendant Turman promised the plaintiff that he would pay the whole punctually at its maturity. The testimony being closed, the plaintiff requested the Court to instruct the jury, among other things, that if, at the time the deed was executed, there was an understanding between Lodge and Turman that there should be a re-conveyance of the land upon the payment of the note, then the document which purports to be a deed was a mortgage, and not a deed, although absolute on its face.

This instruction the Court refused to give to the jury, and to such refusal the plaintiff duly excepted, and on the motion for a new trial assigned this decision of the Court as error; and on appeal he again assigns this ruling of the Court as erroneous, and as demanding a reversal of the judgment.

From the evidence in the case, it is apparent that the question was directly presented as to the real character of the deed produced in evidence on the part of the defendants, and whether or not the parties intended it as an absolute conveyance, or as a mortgage to secure the payment of the note on which the action was brought. Turman, himself, testified that this note, and another sum of five hundred dollars, which he owed the plaintiff, was the consideration for the conveyance, and that he had the privilege of redeeming the premises by paying plaintiff one thousand dollars—the consideration expressed in the deed. From what was Turman to redeem the premises, if not from the incumbrance of the debts, to secure which he conveyed the same to the plaintiff? The language employed would seem to indicate the real character of the transaction, and that the conveyance was intended as a mortgage rather than as an absolute conveyance; and this intent is still more manifest from the clause in the lease to which reference has been made. Be this as it may, there was evidence before the Court from which to determine whether the deed given in evidence was executed and delivered in satisfaction and payment of the note, or whether the same was intended as a security for its payment. If this deed was intended by the parties as a mortgage, its character as such could not be defeated, because the deed is absolute on its face. The right of a mortgagor in such a case to redeem the property, by due performance of the condition on his part to be performed for the purpose, is an incident, as between the parties to the transaction, inseparably connected with the mortgage.

In *Pierce v. Robinson*, 18 Cal. 125, Mr. Justice Field says: "I consider parol evidence admissible in equity to show that a deed absolute on its face was intended as a mortgage, and

Lodge v. Turman et al.

that the restriction of the evidence to cases of fraud, accident, or mistake, in the creation of the instrument, is unsound in principle and unsupported by authority." And again he says: "As the equity upon which the Courts act arises from the real character of the transaction, it is of no consequence in what manner this character is established, whether by deed or other writing, or by parol. Whether the instrument—it not being apparent on its face—is to be regarded as a mortgage, depends upon the circumstances under which it was made and the relations subsisting between the parties. Evidence of these circumstances and relations is submitted, not for the purpose of contradicting or varying the deed, but to establish an equity superior to its terms."

Judge Willard, in his Treatise on Equity Jurisprudence, 429, says: "It is well settled that parol evidence is admissible in a Court of equity to show that a conveyance absolute in its terms was intended as a security for a debt." And he refers to many cases to sustain this doctrine. The same learned author also says: "As between the parties themselves, or purchasers with notice, or without consideration, the true character of the transaction may be shown, notwithstanding the Statute of Frauds."

If it be objected that the plaintiff's action was in a Court of law, and that therefore parol evidence was not admissible to show that the deed produced was intended as a mortgage, the answer to the objection is that the defense set up by the defendants who answered was that by the conveyance the note was paid and satisfied, and in their attempt to make good their averment they proved enough to determine the true character of the conveyance, and that it was intended as a mortgage. The deed being a mortgage in fact, it could not operate as a payment of the amount of the note and the interest thereon, and hence the defendants' liability to pay the debt remained subsisting at the commencement of the action and at the trial.

The instruction requested should have been given, and the refusal of the Court to so instruct was erroneous.

Camden v. Vail et al.

The judgment is therefore reversed and the cause remanded for a new trial.

CHARLES CAMDEN v. G. C. S. VAIL, AND FRANCIS CROSBY.

MORTGAGE—MARRIED WOMAN.—Where a mortgage is executed by a married woman upon real estate for the purchase money of the same, and such mortgage is void and cannot be enforced by reason of defective execution, the assignee of the mortgage by virtue of the assignment does not acquire any such interest in the mortgaged property as to entitle him to a decree rescinding the contract and setting aside the deed of conveyance, and restoring the parties to their original condition.

MORTGAGE—ASSIGNEE OF.—The assignee of such mortgage does not succeed to all the rights held by the mortgagee by virtue of his having been the owner of the premises, and of his having conveyed them without obtaining the stipulated consideration, but he only acquires such rights as the mortgage carries with it.

Quere? Would the mortgagee, himself, be entitled to such relief?

APPEAL from the District Court, Ninth Judicial District, Shasta County.

The facts of this case will be found reported in the 23d Cal. 633.

Robinson & McConnell, for Appellants.

This case has been ordered for re-hearing upon this one point: "Can the transaction set forth in this complaint be treated as a conditional sale" so as to do equity between the parties in this suit?

To this question I answer, "No!" for the following reasons:

1st. Neither of the original parties to the contract are before the Court in this suit, and it is impossible to bring them in so as to do justice between them. What are the simple facts? J. H. Robinson sold to E. M. C. Vail a certain piece of property for the sum of ten thousand dollars, and received four thousand dollars down, and took a note and mortgage for six thousand dollars. So far the case is plain and easily understood. After this, J. H. Robinson, the vendor,

sells, by indorsement, the note and mortgage to the plaintiff, Camden, and Camden brings suit on the note, and to foreclose the mortgage against G. C. S. Vail and Crosby. The Court holds, properly, that the suit cannot be maintained against the defendants, because they did not make the note or mortgage. What other right has Camden, the plaintiff? He bought a note and mortgage. So far as the defendants, or E. M. C. Vail, the maker, are concerned, the doctrine of *caveat emptor* applies to Camden, the plaintiff. If he has any remedy, it is against his assignor, J. H. Robinson, for selling him a note and mortgage which were worthless; but, as against the defendants, or the property, he can only act on his note and mortgage, and if they fail, his remedy is gone as to the defendants or the property.

Suppose the Court to be inclined to think there had been a fraud in the purchase which should require a Court to set aside the sale. The Court would not do so at the instance of a third party who had no interest in it; nor would the Court set aside the sale as to one party and deprive her of the property without the applicant putting that party in the same position in which she was at the outset. In this case, four thousand dollars of E. M. C. Vail was paid to J. H. Robinson. Before this sale can be set aside or annulled, this must be paid back. Does the plaintiff offer to pay back? No. Could the Court compel him to pay back that amount? No. Who is that money to be paid to? E. M. C. Vail, who is not a party in this suit, and so not within the jurisdiction of the Court. The Court cannot affect her right. Who is the four thousand dollars to be paid by? J. H. Robinson, who received it; and he is not before the Court. Thus, the parties are not before the Court, except to pass upon the note and mortgage as to the defendants.

George Cadwalader, for Respondent.

It so happens that the mortgage is void, and, consequently, incapable of enforcement, and, therefore, (equity refusing to

interfere,) the deed being good, and the mortgage bad, the vendee gets the property without consideration, as fully so as if she had given therefor forged securities or counterfeit bank notes.

Circumstances like these, however, call into play one great head of equity jurisdiction called "Rescission and Cancellation," under which relief is given in various forms.

Thus, Adams, in his work on Equity, page 418, says: "In accordance with such a doctrine, a contract may be set aside, if made for a consideration which was really 'non existent.'" (*Hitchcock v. Giddings*, 4 Price, 55.) Again, page 416: "The decree in such a case will be that the conveyance shall be set aside as an absolute sale, but shall stand as security for the principal and interest of the money advanced." (1 Atkins, 801.)

In Hilliard on Vendors, page 16, it is said: "That a decree was proper ordering a partition among the heirs of C., and directing that B. should account for the rents and profits, be paid for the lasting improvements made by him, and refunded the purchase money paid by him since the death of C., with interest, and that A. should convey to the heirs according to their respective interests." (*Lynn v. Lynn*, 5 Gilman, 602.)

Hilliard on Vendors, page 802: "With regard to the respective rights of the parties after a sale has been rescinded, if the vendee has had the possession, he must account for the profits exceeding the improvements; he has a lien on the land for his purchase money and interest, and the value of the improvements, and is liable for rents, etc." (1 A. K. Marshall, 434.)

Thus it will be seen that the authorities support and commend equitable decrees which protect all outstanding equities.

The deed and the mortgage back are considered simultaneous acts, or parts of the same transaction. (*Lassen v. Vance*, 8 Cal. 271; Hilliard on Vendors, p. 27; *Stow v. Tift*, 15 Johnson, 462; *Holbrook v. Finney*, 4 Mass. 569.)

In *Van Horne v. Crain*, 1 Paige, 454, it was said: "Separate instruments, executed at the same time, and relating to the

same subject matter, may be construed together, and taken as one instrument."

In *Lynde v. Budd*, 2 Paige, 192, Chancellor Walworth observed: "In this case the deed and mortgage, being given at the same time, are to be construed together as forming only one instrument or contract; the infant cannot avoid one part and affirm the other."

It is not an objection to this relief that Mrs. Vail is not a party to the suit, for upon the conveyance to her (which was during coverture) by force of the statute concerning "Husband and Wife," it became common property, and as such came under the sole control of the husband. (See sections 2 and 9 of Act; Wood's Digest, 487-8.)

And the husband alone was the necessary party to the suit concerning this property. (*Pixley v. Huggins*, 15 Cal. 127.)

Camden is subrogated to all the rights of Robinson.

In *Johnson v. Dopkins et al.*, 3 Cal. 391, it is said, that the purchaser of a mortgage is subrogated to the rights of the mortgagee.

And in *Swift v. Kraemer*, 13 Cal. 526, Mr. Justice Baldwin said: "These last mortgagees would be in equity assignees of the debts they paid, and be subrogated to the rights of their assignors, for in equity the substance of the transaction would be an assignment of the old mortgages in consideration of the money advanced." (*Burrell v. Schie*, 9 Cal. 106; *Robinson v. Leavitt*, 7 New H. 73; 4 Johnson's Chancery, 370.)

In *Himmelman v. Schmidt*, 23 Cal. 117, this Court says: "A Court of equity, under such circumstances, even if it came within the provisions of the Act, would treat it, to the extent of the old mortgage included in it, as a substitute for the former mortgage, and, to that extent, a valid incumbrance upon the property." (*Dillon v. Byrne*, 5 Cal. 455.)

1st Hilliard on Mortgages, p. 493: "Thus, it is held in general, that when a mortgagee makes a deed of assignment upon the back of the mortgage deed, or by a separate instrument referring to it, the assignee is put in the place of the mort-

Camden v. Vall et al.

gagee to all intents and purposes, unless a different intention is apparent from the contract."

In *Pierce v. Robinson*, 18 Cal. 116; Mr. Justice Field applied the doctrine of "Equitable Assignments," which seems to be usually applied from the circumstances of a case, rather than from the express agreements of the parties. A notable instance of the kind is the case of *Dana v. San Francisco*, 19 Cal. 486.

In this case, it is evident that when Robinson parted with his mortgage to plaintiff he wholly divested himself of all interest in the property, and that whatever the sort of the security he held against the property became vested in the plaintiff, upon the transfer of the note and mortgage, while the possession of the same by plaintiff put him, *quoad* the property in dispute, in Robinson's shoes. Robinson, by the sale, could no longer receive money from the mortgagee. Neither could the mortgagor make valid payments to him, nor could Robinson sustain any suit in regard to the property. He could not sue on the mortgage, for it no longer was his property. Neither could he sue for a rescission of the contract, after disposing of the notes and mortgage.

By the Court, SAWYER, J.

This case was decided at the April term, 1863—(23 Cal. 633.) It was then held—all the Justices concurring—that the mortgage sought to be foreclosed was inoperative and could not be enforced. Subsequently the same Justices ordered a re-argument, not, as we understand it, on account of any doubt as to the soundness of the previous decision, but with a view, owing to the hardship of the case, of ascertaining if any modification of the judgment could be made by which the plaintiff might have a remedy in this action. We infer this to be the case from the fact that the counsel were directed by the Court to confine their attention upon the re-argument to the single point as to "whether the principles of equity would not warrant this Court in declaring that (the mortgage being invalid) the consideration of the deed of Octo-

ber, 1st, 1860, failed, and in consequence thereof plaintiff is entitled to a rescission of the contract in the form of a conditional decree restoring the parties to their original condition." And the arguments of counsel have been mainly directed to that question.

Upon a review of the case, we are satisfied with the former decision upon the point that the mortgage in question is inoperative and void; and the only question left for our consideration is the one discussed on the re-argument with reference to the judgment to be entered in the case. Possibly a Court of equity, in a proceeding in the nature of that suggested, or some other, would have been competent to afford a remedy to Robinson, or a party succeeding to his rights in the premises. But, however that may be, this is not the proper proceeding. The present action is the ordinary one for the foreclosure of a mortgage. It proceeds entirely upon the theory that there is a debt due secured by a valid mortgage; that the plaintiff is entitled to have the mortgaged premises sold under a decree of foreclosure to satisfy the debt, and to a judgment against the maker of the notes for any balance that may remain unsatisfied. Such is the cause of action alleged, and such the judgment prayed for. But a complaint would have to be framed upon an entirely different theory to reach the case disclosed by this record. Neither of the parties to the original transaction is before the Court. The plaintiff is here simply as the assignee of the notes and mortgage in question. His mortgage proves to be void; and being void, he has acquired no interest whatever in the land. He acquired such rights only as the notes and mortgage, as such, carry with them by the ordinary assignments of such instruments. He has not, either in law or equity, succeeded to all the rights held by Robinson by virtue of his having been the owner of the premises in question, and of his having conveyed them without obtaining the stipulated consideration.

Admitting that Robinson, either on the ground of fraud, or want of consideration, or otherwise, might have obtained a conditional decree of the Court for a payment of the balance

Leet v. Wilson et al.

of the price, or in default thereof, for a rescission of the contract of sale and a reconveyance of the premises upon such terms as the Court might adjudge to be just, still such right of action was not expressly assigned to plaintiff, and it did not pass by the mere indorsement of the notes and assignment of the mortgage in question.

Upon the case disclosed by the record, we cannot perceive that the plaintiff has any remedy at all against these defendants. His remedy—if he has any—is against Robinson. He asked in his prayer the only relief that was competent for the Court to grant on the case stated in his complaint. He could not amend without substituting an entirely new and different cause of action, and one which, it is quite evident, he is not in a position to maintain.

In any proceedings to set aside the conveyance, it would, of course, be necessary that all persons interested should be made parties to the suit, as a decree granting such relief could only be made upon the condition of a repayment of such portion of the purchase money as has already been paid.

This is apparently a case of great hardship, and we regret exceedingly that no mode could be suggested by which a remedy might be afforded in this action. Under the view we have taken, a new trial would evidently be useless.

The judgment is therefore reversed and the Court below directed to dismiss the complaint.

BENJAMIN F. LEET *v.* CHARLES L. WILSON AND G. S. FISKE.

NOTICE TO TESTIFY.—Where notice was given of a party's intention to testify in his own behalf, and the notice specified with sufficient particularity some points pertinent to the issues upon which he would give evidence, and also stated generally that he would testify to other facts relative to the issues, and on the trial a general objection was interposed to his giving any testimony under the notice—which objection was overruled, and the record does not set out the testimony; *held*, that it will not be presumed that the party gave testimony on any matters except those particularly specified in the notice, and that the objection was properly overruled.

Leet v. Wilson et al.

OBJECTION TO WITNESS.—Under such notice a party has a right to testify on such matters as are specified in the notice, and a general objection to his giving testimony as a witness is not well taken.

ACTION FOR WORK AND LABOR.—In an action to recover the value of services, and work and labor performed under a contract, the plaintiff has the right to prove the value of the services of an assistant employed by him, and who performed the same work plaintiff contracted to do, unless it appears by the nature or terms of the employment that the services of a particular person were contracted for, and that no other person could, under the contract, fill the place of the employé.

OBJECTION TO EVIDENCE.—A general objection that evidence is inadmissible should be disregarded, as it amounts to no more than that the evidence is illegal. The grounds of an objection should be specified and fully pointed out.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

The complaint averred that defendants were indebted to plaintiff in the sum of seven thousand six hundred and twelve dollars and sixty-five cents, for work, labor, care, and services done, performed, and rendered by plaintiff, in and about the business of defendants, from the 1st day of October, 1859, until the commencement of the suit, at the special instance and request of defendants.

The answer denied the allegations of the complaint.

The suit was commenced April 30th, 1861.

The principal items of labor and services which plaintiff proved on the trial, were for laying the railroad track of the California Central Railroad.

On the trial, plaintiff offered Montague as a witness to prove that he was employed by plaintiff as an assistant engineer, from January 1st, 1860, to May 16th, 1860, at one hundred dollars per month, and his expenses.

The referee allowed this demand, not as so much money paid to Montague, but as so much labor rendered by plaintiff, through his agent, Montague.

Plaintiff recovered judgment in the Court below, and defendants appealed.

The other facts are stated in the opinion of the Court.

George Cadwalader, for Appellants.

The notice was defective. (*Bradley v. Kent*, 22 Cal. 169.)

Leet v. Wilson et al.

John G. Hyer, for Respondent.

By the Court, RHODES, J.

On the trial of this cause before the referee, the plaintiff was examined as a witness in his own behalf. The defendant objected to his testifying on the ground that the notice was "vague and uncertain," that it did not "inform the defendants what facts or charges, claims, or indebtedness, the said witness is called to support," and was not in conformity to the statute of 1861. The objection was not taken to his testifying to any particular point, but was directed generally to his being permitted to give any testimony under the notice.

The record does not purport to set out any of his testimony, but states that the "referee overruled the said objections, and permitted the plaintiff to give material testimony in his own behalf." The complaint is simply the common count for work and labor, but on the demand of the defendants the plaintiff furnished a bill of particulars, setting forth the work performed by him on the railroad of the defendants, in laying the track, building and repairing the bridges, culverts, and cattle guards; in acting as the engineer, and repairing the grade; also the value of such labor. Portions of the services mentioned in the notice, in respect to which the plaintiff's testimony was to be taken, are evidently the same as those set forth in his bill of particulars, although set forth in a different form.

The notice is not as precise in all respects as it might be, but it describes the services as having been performed for the defendants in the construction of the railroad mentioned in the bill of particulars. It is not necessary to state in the notice that the party offering himself as a witness will give all the testimony that may be required to entitle him to recover upon the whole case, or upon any given point in the case, or that he will state all the facts in relation to any certain point. He may offer to prove by his testimony either the time, the place, the character, or the value of the performance of any work, and rely upon other testimony to prove

the other facts necessary to be proven in order to charge the opposite party.

The plaintiff offered his own testimony to prove the laying of the first six miles of the track, the manner of doing the work, the time employed therein, and the value of his services in performing the work; also his personal services in locating the line of the railroad, and the character, extent, and value of the services; also other facts connected with items stated in his bill of particulars. It was proper for him to give his testimony in relation to the facts above mentioned, and as the statement neither sets forth the testimony of the plaintiff nor the points about which he testified, it will not be presumed that he testified as to any facts not properly stated in the notice.

The objection to the testimony of Montague was not well taken. It was competent evidence for the plaintiff, under his item for services as engineer, for under that charge he was entitled to prove and recover for services, whether performed by himself, or an assistant, or both. Unless it appears by the nature or terms of the employment that the services of a particular person were contracted for, and no other person could under the agreement fill the place of the employé, he may, under the allegation of services performed by him, prove that they were performed by another person under him.

The referee has not allowed the plaintiff for his services and those of his assistant at the same time, but has allowed him for the services of only one person during the time that either he or his assistant was employed as an engineer.

The plaintiff's bill of particulars contains the following item: "I was compelled, in prosecuting said work, to employ from time to time a blacksmith; his time cannot be given, as his services were rendered as demanded; he was paid by me \$75.37." This item, though not expressed with technical accuracy, is for the value of the services of the blacksmith while employed under the plaintiff, during the progress of his work for the defendants, and is not an item for money paid by the plaintiff for the use of the defendants, for the blacksmith is not alleged to have been in the employment of the

defendants, nor is it stated that the defendants were indebted to him, but he is directly alleged to have been employed by the plaintiff.

The evidence offered in support of the item is not set out in the statement, and the only reference thereto is as follows, "On the trial of the cause the plaintiff offered and proved by a witness that he paid and disbursed for defendants the sum of \$75.37 to a blacksmith." The defendants objected to this evidence, on the grounds "that the complaint of the plaintiff set forth no such charge, and that the evidence was inadmissible;" but the referee overruled the objection, and allowed the sum to the plaintiff, and in his report says:

"In addition to this, Leet claims a blacksmith's bill for seventy-five dollars and thirty-seven cents, paid for defendants. No doubt he paid for some blacksmithing, but from the loose manner of keeping the accounts, and the unsatisfactory character of the proof, I am in doubt about the amount. With some hesitancy I allow the charge, and add it to the amount of extra work."

Although the language of the report and the statement in respect to this item is very loose, there can be no doubt that the testimony of the witness was offered to prove the services of the blacksmith, and their value, as mentioned in the item of the bill under consideration, and not to prove that the plaintiff had paid money for the use of the defendants. The objection, therefore, to the evidence, on the ground "that the complaint of plaintiff set forth no such charge," was not well taken.

The further objection of the defendants, "that the evidence was inadmissible," was properly disregarded by the referee and the Court below. It amounted to no more than the assertion that the evidence was illegal. If admitted without objection, it would tend to prove the value of the services of the blacksmith; but if the defendants wished to exclude such evidence, and force the plaintiff to prove the value of the services by calling witnesses who could testify to the real value of the services from their knowledge of their nature and

Cunningham v. Hawkins.

extent, the grounds of the objection should have been specified and fully pointed out. (*Dreux v. Domec*, 18 Cal. 89; *Martin v. Travers*, 12 Cal. 243, and cases therein cited.)

Judgment affirmed.

P. CUNNINGHAM v. T. H. HAWKINS.

LIMITATION OF LIEN OF MORTGAGE.—The right to enforce the lien of a mortgage given to secure a debt is barred by the Statute of Limitations at the end of four years from the time the right of action accrues on the debt.

POSSESSION OF MORTGAGEE DOES NOT EXTEND LIEN.—The entry of the mortgagee into the possession of the mortgaged premises cannot, as between him and the mortgagor, extend the time allowed by the statute for the enforcement of the mortgage.

LIMITATION OF ACTION TO REDEEM MORTGAGE.—The right of the mortgagor to maintain an action to redeem the property from the lien of the mortgage is barred by the Statute of Limitations at the end of four years from the time the right of action accrues on the debt.

STATUTE OF LIMITATIONS—MORTGAGOR—MORTGAGEE.—The right of the mortgagee to maintain an action on the debt, and enforce the lien of a mortgage given to secure it, and the right of the mortgagor to maintain an action for the redemption of the property from the lien of the mortgage, are reciprocal, and when one is barred by the Statute of Limitations, the other is also.

ACTION TO REDEEM—REVIVAL OF WHEN BARRED.—When the right to maintain an action for the redemption of the mortgaged property from the lien of the mortgage is barred by the Statute of Limitations, it cannot be revived by an offer of the mortgagor to pay the debt.

APPEAL from the District Court, Seventeenth Judicial District, Sierra County.

The facts are stated in the opinion of the Court.

Williams & Johnson, for Appellant.

If Hawkins took possession as mortgagee under Bartlett, he could never, by lapse of time, acquire such title as would defeat the plaintiff's right to recover in this action. By adverse possession he might; but there can be no adverse possession whilst he holds as mortgagee.

If, from mutual confidence of the parties, no written defeasance is given, any attempt on the part of the grantee or mort-

gagee to defeat a redemption by the mortgagor, will be a fraud. (*Brown v. Dewey*, 1 Sandf. 56; Coke on Lit. 265.)

Hawkins is yet our mortgagee, and if there is any want of mutuality of interest between the parties that will not affect our side of the case, we may not now be liable *in personam*; but that circumstance could not defeat our title. (1 Washb. on Real Property, 479-482; and cases cited.)

If the note and mortgage are discharged by the statute, from the day of discharge, unless notice of a contrary intention was given, the mortgagee would hold in trust for Bartlett, the mortgagor. (2 Bouv. 190, and cases there cited.)

We maintain that a mortgage, simply as such, could not defeat an action of this kind by even fifty years possession. In some of the States of the Union, where the mortgagee is held to have an interest in the realty mortgaged, a different rule undoubtedly would prevail. But in England, in New York, in this State, and some others, mortgages simply give a right of action, as well against the property mortgaged as the person, and are a security for the debt only.

The modern decisions in England and New York are uniform on the point that a mortgagee in possession is simply a trustee for the mortgagor; and having no right in himself, being a trustee only, any attempt by him to acquire a right, as against the mortgagor, should be held a fraud. (*Edwards v. Farmers' Fire Insurance and Loan Co.*, 21 Wend. 488-9.)

If this had been an action in ejectment, there can be no question but that the judgment of nonsuit would be error; for we would be saved by the ninth section of the Statute of Limitations, and it would devolve, as before seen, upon the defendant to prove adverse possession. We contend that the case at bar is governed by the same rule. (*Tiffany & Bullard's Trusts and Trustees*, page 718, and cases cited.)

We admit that the Statute of Limitations runs against a note on demand from its date in a case of this kind, and that the mortgage expires with the note. But it never was our duty in making out our case to show that we were yet liable

Cunningham v. Hawkins.

in any sum on the note and mortgage; that is defendant's part of the case, we agreeing, if anything is found due, to pay it.

That Hawkins entered as trustee for Bartlett, we cite 2 Johns. Ch. R. 33, and cases there cited. Also, *Slee v. Manhattan Co.* 1st Paige, 53.

Whether we have a right to claim that the mortgage is a lien on the claim can have nothing to do with the question: Did the Court err in granting the nonsuit? Had we brought ejectment, and not offered equity, it is not contended that, under the proofs, the nonsuit would have been proper.

Lord v. Morris, 18 Cal. 486, clearly establishes the doctrine: That after four years, any interest the mortgagee had by virtue of his mortgage is extinguished. If the mortgagee refuses to receive equity, that is no reason why it should be refused to the mortgagor.

Vanchief & Haymond, for Respondents.

The statutes of this State and the statutes of New York apply equally to equitable as well as to legal causes of action.

In *Lord v. Morris*, 18 Cal. 486, it is held that the Statute of Limitations of this State applies equally to actions at law and to suits in equity; that it is directed to the subject matter, and not to the form of action or the form in which it is prosecuted, and covers all cases where equitable relief may be sought.

In *McCarthy v. White*, 21 Cal. 496, and in *Grattan v. Wiggins*, 23 Cal. 16, the doctrine of *Lord v. Morris* on this point is affirmed, and these authorities are conclusive as to the applicability of the statute.

Our position is, that plaintiff's cause of action accrued on the 13th day of May, 1856, the day of the conveyance from Bartlett to Raskt & Co.

This suit is brought to enforce what? Clearly, the plaintiff's right to redeem; and that right was full, perfect, and complete on the day the mortgage debt became due, viz.: May 13th, 1856, and not, as contended for by appellants, on the

Cunningham v. Hawkins.

1st day of September, 1861, the day on which the plaintiff tendered to defendants the redemption money.

Plaintiff could have maintained his action to redeem without alleging in his bill or proving on the trial a tender of the redemption money. This is decided in the case of *Daubenspeck et al. v. Platt*, 22 Cal. 330.

In the case of *Grattan v. Wiggins et al.*, it is said: That the right to foreclose and the right to redeem are reciprocal and commensurable, and if one cannot be enforced, that is regarded as sufficient to preclude a claim for the other; thus, if the right to foreclose is barred by the lapse of time, the right to redeem is equally barred. We therefore hold that the right to redeem asserted by the plaintiff in this cause was barred by the Statute of Limitations.

In the case at bar, the debt secured by the mortgage was due upon demand, and was given on the day the conveyance from Bartlett to Raskt & Co. was made—May 13, 1856. The statute ran against it from the time it was given. (*Howland et al. v. Edmunds et al.*, 24 N. Y. 307; *Weinman v. N. Y. Ins. Co.* 13 Wendell, 267.)

By the Court, CURREY, J.

The complaint in this case is in equity, to redeem certain property in Sierra County from the lien of a mortgage executed on the 13th day of May, 1856, by one James H. Bartlett, to the firm of Raskt & Co., of which the defendant was a member, to secure the payment of a debt then due said firm from said Bartlett, and also for an account of the issues and profits of the premises received by the defendant during the time he had the possession of the premises, which was from the date of the mortgage.

The instrument denominated a mortgage purports to be a conveyance from Bartlett to Raskt & Co. of one fourth of certain mining ground described therein. Nothing appears upon the face of this instrument to indicate its character as a mortgage, except that the consideration expressed is a certain sum

Cunningham v. Hawkins.

of money, "with interest from date till paid." But the plaintiff alleges in his complaint that it was intended and understood by the parties thereto as a mortgage to secure the payment of the sum mentioned in it as the consideration, with interest, and that the mortgagees entered into the possession of the property under the mortgage to hold the same in trust for the mortgagor.

It is alleged by the complaint that at the time of commencing the suit, and for some time before then, the defendant claimed to be the owner and holder of the mortgage and the debt thereby secured, and during all that time had possession of the premises by virtue of the mortgage; and that on the 1st day of August, 1861, Bartlett conveyed all his right, title, and interest in said property to the plaintiff, who afterward, in the same month, exhibited his deed of conveyance to the defendant, and offered, for the purpose of redeeming the property from the lien of the mortgage, to pay the amount due thereon — but that defendant refused to accept payment, and that the same offer had since then been often repeated, and had been met by a like refusal by the defendant. That at the commencement of the action the defendant was in possession of and holding the premises adversely to the plaintiff, and was taking gold therefrom. The complaint concludes with a prayer for an accounting and redemption of the premises and for general relief.

The defendant, by his answer, alleges that he had been in the possession of the premises ever since the date of said instrument, as the owner thereof, and that for more than five years he had been working and improving said mining ground, and had expended in such work and improvements, during that time, the sum of seven thousand dollars, and that he had never as yet received anything whatever of value from said premises. The material allegations of the complaint, except the possession and adverse holding of the premises by the defendant, are denied by the answer. And, as an affirmative defense, the defendant pleads that neither the plaintiff nor his grantor was seized or possessed of the premises within five years next

Cunningham & Hawkins

before the commencement of the action, and also that the plaintiff's alleged cause and causes of action did not accrue within four years next before the commencement of the suit; and he therefore averred that all the causes of action alleged in the complaint were barred by the statute limiting and defining the time of commencing civil actions.

There was evidence produced on the trial before the Court tending to prove the principal averments of the complaint.

When the plaintiff had closed his case, the defendant moved the Court to nonsuit the plaintiff and to order the action dismissed, on the ground that the complaint and proofs showed that plaintiff's right of action was barred by the nineteenth section of the statute before mentioned. The Court sustained the motion, dismissed the complaint, and gave judgment in defendant's favor for his costs. The plaintiff, by his appeal, seeks a reversal of this judgment.

The questions to be determined in this case arise upon the Statute of Limitations; and in their consideration we shall assume, without comment, that the instrument described in the complaint and denominated a mortgage, was intended as such by the parties thereto at the time of its execution. The counsel for the respective parties have so treated it in argument, and to have done otherwise would have been a departure from the record in the case.

The debt, to secure which the mortgage was executed and delivered, was due at the date of the mortgage, and a cause of action for its recovery, and for the foreclosure of the mortgage, accrued at that time to the mortgagees, and a corresponding right to pay the debt and redeem the property from the lien created upon it accrued at the same time to the mortgagor; and each of the parties to said instrument had the period of four years from its date in which to commence an action for the enforcement of the accrued right. The entry of the mortgagees into the possession of the premises could not, as between them and the mortgagor, invest them with any other or greater right than they would have had without such entry. The mortgage upon the land was a mere security for the debt due,

and the interest of the mortgagees was a mere chattel interest. (*Johnson v. Sherman*, 15 Cal. 293; *Calkins v. Calkins*, 3 Barb. 312.)

When this action was commenced, the mortgagees' cause of action was barred by the lapse of nearly seven years after the debt became due. The fact that the debt was secured by mortgage could not affect the right of the debtor to avail himself of the Statute of Limitations as effectually as in a case where the debt might not be thus secured. (*Lord v. Morris*, 18 Cal. 486; *McCarthy v. White*, 21 Cal. 495.) Nor is it claimed on behalf of appellant that the statute is not a bar in the one case equally as in the other; but it is suggested that the debtor could waive the protection of the statute, and that in the case under consideration the plaintiff, by a tender of payment to the defendant of the amount due upon the mortgage, gained the right to compel the defendant to account for the issues and profits derived by him from the property, and to deliver possession of the property to the plaintiff when the mortgage debt should be satisfied.

Upon first impressions it would seem but just to accord to a debtor, or one having assumed the debt of another, the privilege of discharging his obligation, notwithstanding the immunity afforded him by the Statute of Limitations; and the instances of the refusal of a creditor to accept payment of a debt barred by the statute must be exceedingly rare, and perhaps experience scarcely furnishes an instance where a debtor offers to pay a demand against which the statute has run that the creditor has refused to receive the payment in absence of a motive of greater potency than the value of the amount tendered on the one hand and refused on the other.

It does not necessarily follow, that because a debt has remained unpaid until the Statute of Limitations has run its course, an action could not be maintained for its recovery. Whether it could or not, depends upon the election of the debtor, who may insist upon the immunity afforded him, by pleading it, or by proving it under a proper plea, where necessary. But the debtor has the right to avail himself of this

defense, and the mortgage creditor must have, on the principle that remedies, as between mortgagor and mortgagee, are mutual, the reciprocal right of resisting a redemption when under circumstances he may deem it to his advantage to do so.

Mr. Hilliard, in his work on the Law of Mortgages, says: "In general, the respective rights of mortgagee and mortgagor, with regard to the foreclosure on the one hand, and a redemption on the other, are treated as mutual; that is, the existence of the former is held to involve that of the latter, and *vice versa*; and the fact that the one cannot legally be enforced under the circumstances, is regarded as sufficient to preclude the claim for the other." (2 Hilliard on Mort. 1.) In *Caufman v. Sayre*, 2 B. Mon. 206, the Court say: "The right to foreclose and the right to redeem are reciprocal and commensurable." And in *Koch v. Briggs*, 14 Cal. 262, the Court hold the same doctrine.

As already appears, the mortgagor's right to redeem the premises from the lien of the mortgage existed immediately after that instrument was executed and delivered, and his right to an action to enforce a discharge of the incumbrance was complete at that time, and so continued for four years thereafter, after which it became barred by the nineteenth section of the Statute of Limitations. This section is much like the fourth section of the New York Statute of Limitations of suits in equity, which is as follows: "Bills for relief, in case of the existence of a trust not cognizable by the Courts of common law, and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue, and not after."

In speaking of this statute, Mr. Justice Mason, in *Calkins v. Calkins*, 3 Barb. 310, said: "This is a very sweeping statute, and embraces, to say the least, all suits in equity where the cause of action has accrued since the passage of the statute. In short, it extends over the whole field of equitable jurisdiction." And in reference to this statute, it is said by Cowen & Hill, in their Notes, (1 Cow. & Hill's Notes to Phillipps' Ev. 541, ed. 1850,) that the time of the complainant

can be enlarged by no considerations, except those specifically enumerated; "that neither promises, acknowledgments, nor the most solemn acts, can keep the subject matter of the bill alive."

From the case presented by the record, the defendant could not be regarded as in possession of the premises mortgaged adversely to the mortgagor, Bartlett, nor of his grantee, the plaintiff, before the time when the plaintiff exhibited his deed to the defendant and proposed paying the mortgage debt, because, as the complaint states, and as the mortgagor testified, the defendant entered into and held the possession in subordination to the title of the mortgagor. (*Zeller's Lessee v. Eckert*, 4 How. 296.) What may be the real truth of the case in this respect, or what may be the real nature of the tenure by which defendant has held the possession, we do not undertake to determine, except so far as may be necessary to decide the case upon the record before us.

We think the judgment of the Court below was correct, and should be affirmed.

Judgment affirmed.

JOHN DONAHUE v. THOMAS McNULTY, JAMES BRADY, JOHN FURLONG, MOSES FURLONG, JOHN DOOLY, PATRICK CODY, LAWRENCE NOLAN, JOHN SHARP, JOHN KIRK, MAT. SAFFON, MARTIN SAFFON, AND H. T. NICHOLS.

SHERIFF'S DEED — PAROL EVIDENCE NOT ADMISSIBLE.—Parol testimony of the officer who makes a sale of property under an execution, and executes a deed to the purchaser therefor, is not admissible for the purpose of adding to, contradicting, or altering the terms of the deed.

SAME — HOW MEANING OF ASCERTAINED.—Where the language of a deed executed by an officer for property sold under execution is plain and unambiguous, the Court should limit its inquiry to what the words of the deed express, without regard to any intention independent of the words.

RECITALS IN SHERIFF'S DEED.—The officer who makes a sale of land by virtue of an execution, and executes to the purchaser a deed therefor, must, in his deed, make recitals of the recovery of the judgment, the names of the judgment creditor or creditors, and of the judgment debtor or debtors, and

Dónahue v. McNulty et al.

of the issuing of an execution on the judgment, and of the levy and sale thereunder. The recital of such facts is essential to show the officer's authority and the transmission of the debtor's title in the property to the purchaser.

WHO ESTOPPED BY RECITALS IN SHERIFF'S DEED.—The officer executing a deed for property sold under execution, and those who claim under the deed, are estopped from denying the truth of the matters recited therein, but the same are not evidence as against strangers, or those claiming adversely to the deed.

AGAINST WHOM OFFICER'S DEED IS EVIDENCE.—A deed of a constable, made of land sold under execution, is not evidence of the purchaser's title as against any person except those whom the deed shows upon its face to have been the judgment debtors, and named as such in the execution issued on the judgment, and whose interest in the property was sold by the officer.

PAROL EVIDENCE AS TO RECITALS IN OFFICER'S DEED.—Parol evidence is inadmissible to show that a constable's sale was made by virtue of any other judgment or execution than that recited in the deed; and it is also inadmissible to show that the constable sold the interest of a person in the land described in the deed, whose interest the deed itself does not recite upon its face to have been sold.

AGAINST WHOM OFFICER'S DEED NOT EVIDENCE.—Where a Judgment was rendered against several persons, and an execution issued upon it against all the judgment debtors, and the constable levied upon and sold the land of one of the judgment debtors, but in making a deed to the purchaser, did not insert the name of the one whose land had been sold as a judgment debtor, or recite that his land had been sold; *held*, that the deed was not evidence of title in the purchaser as against the owner of the land.

APPEAL from the District Court, Seventeenth Judicial District, Sierra County.

The facts are stated in the opinion of the Court.

Creed Haymond, and Johnson & Williams, for Appellants.

The objection taken to the admission of the deed from Dixon, the constable, to Nolan, presents a question as simple as this:

Can a deed, purporting to convey the property of A., only be construed by law (or varied by parol testimony) to be a conveyance of the property of A. and B.? And, in this connection, we call the attention of the Court to the case of *Bartlett v. Judd*, 23 Barb. 286, and to *Mason v. White*, 11 Barb. 184.

Vancilf & Bowers, for Respondents.

There is no question but the deed describes the property correctly. In reciting the execution, the deed leaves out the

Donahue v. McNulty et al.

name of John Donahue, though it gives the true name of the company, which was composed of these names, viz: Richardson and Buffalo Co. It will be seen that in the executions from J. P., as well as previous proceedings, that the defendants are described as composing the Richardson and Buffalo Co., and further, that the name of John Donahue is contained in each of the executions; and it is still important to notice that in the granting part of the conveyance the officer describes the property as all the estate, right, title, and interest of the said persons against whom the said writ of execution has been issued as aforesaid.

A Sheriff or constable is not bound to recite the execution in his deed of conveyance, nor will a mistake in its recital vitiate. Had he the authority to sell, and did he sell? are the only material questions. (*Jackson v. Pratt*, 10 Johns. 386; *Jackson v. Jones*, 9 Cowen, 191.)

By the Court, CURREY, J.

This is an action of ejectment to recover possession of the one undivided seventeenth part of certain mining ground, situate in the County of Sierra, of which the plaintiff alleges he was the owner and in the possession in June, 1863, and of which he was then ousted by the defendants. The defendants, by their answer, deny that they wrongfully ousted the plaintiff, and further answering, aver that on the 16th of October, 1861, three judgments were obtained in a Justice's Court in said county against the plaintiff and others as defendants, described as the Buffalo and Richardson Mining Company, and that under executions issued on such judgments, the right, title, and interest of the plaintiff was sold, and afterwards conveyed by a constable to Lawrence Nolan, one of the defendants in this action; and they further aver that each of the defendants owned, at the time this action was commenced, and was entitled to the possession of an undivided portion and interest in the premises, which portions, in the aggregate, comprehended the entire property.

As to the title and interest of the plaintiff to the undivided seventeenth part of the premises at the time the sale under

the executions transpired, there seems to have been no issue made by the answer of defendants, or by the evidence adduced at the trial.

The decision of the case, it will appear, rests entirely upon the effect and competency, as evidence in the case, of the judgments obtained in the Justice's Court, and the executions issued thereon, and the alleged sale of the plaintiffs' right, title, and interest in the premises, and the deed executed by the constable and produced in evidence.

In each of the cases in the Justice's Court, John Donahue was one of the defendants, and was served with summons, and Lawrence Nolan, who became the purchaser at the sale, and is the grantee named in the deed, was also a defendant, and was served with summons. The defendants served made default, and there was no appearance in any of the cases on the part of the defendants who were not served with process. In two of the suits, judgments were entered against all the defendants who were named in the summons, and in the other, judgment was entered against all the defendants named in the summons, and, also against three other persons not mentioned therein. The recitals in the deed are that a writ of execution issued out of the Justice's Court of a Justice of the Peace therein mentioned, directed and delivered to James F. Dixon, constable, commanding him that of the goods and chattels of P. Donahue, M. Donahue, L. Nolan, B. Kenrief, P. Cody, H. F. Nichols, P. Daley, J. Wiseman, R. Anderson, J. Doe, H. Hoe, and R. Roe, composing the Richardson and Buffalo Company, he should cause to be made the moneys in said writ specified; and if sufficient goods of said persons could not be found, that then he should cause the same to be made of the lands of which the last named persons were seized; and then it is further recited in the deed: "And, whereas, because sufficient goods and chattels of the last named persons in the said writ could not be found, whereof the said constable could cause to be made the money specified in said writ, he, the said constable, did, in obedience to the said command, levy on, take, and seize all the estate, right, title, and interest of the

last named persons in and to the lands," etc., described, and "did, on the 9th day of November, A. D. 1861, sell all the right, title, and interest of the last named persons in and to the said premises," etc., "at which sale the right, title, and interest of the last named persons in and to said premises, were struck off and sold to L. Nolan for the sum of five hundred and sixty-two dollars." And after these recitals follows the granting portion of the deed, whereby the constable, "By virtue of the said writ, and in pursuance of the statute in such cases made and provided, for and in consideration of the sum of money hereinbefore mentioned," grants, bargains, sells, and conveys, "unto the said Nolan, his heirs and assigns, all the estate, right, title, and interest of the said persons against whom the said writ of execution has been issued as aforesaid, of, in, and to all the following described property;" and then follows a description of the property, with the usual *habendum* clause. Several of the defendants against whom judgment passed in all of the suits in the Justice's Court, and who were named in the executions issued on such judgments, were not named as judgment debtors in the execution recited in the deed, and two of those who were therein named were not defendants or parties in any of the judgments and executions given in evidence. It does not appear from the deed who was the judgment creditor in the execution recited, nor what was the amount due by the judgment on which such execution was issued.

In connection with the introduction in evidence of the judgments, executions, and deed, the defendants examined the constable, who testified that he received from the Justice of the Peace the three executions so offered in evidence, and that he duly levied such executions on the property and mining claim described in plaintiff's complaint, including the whole of plaintiff's right, title, and interest in the same, before he sold said claims, or any part thereof, and that he sold said claims and plaintiff's interest therein and conveyed the same to the defendant, L. Nolan, by the deed in question, "and that such sale and conveyance was under and by authority of said executions."

The plaintiff's counsel interposed objections to the judgments, executions, and deed offered and given in evidence. The objection to the deed was that it was irrelevant and inadmissible in evidence, because it was not connected with any of the judgments or executions offered in evidence; that it did not refer to any of them; and, also, because it did not purport to convey the property of the plaintiff, John Donahue; and, further, that it did not purport to be the deed of any officer authorized by law to make such deed, and that the same was void. The Court overruled this objection, and the counsel for plaintiff excepted.

When the testimony was closed, the plaintiff's counsel requested the Court to charge the jury that the deed in question was not even *prima facie* evidence against plaintiff's claim of title and right of possession, unless they believed from the evidence before them that plaintiff's interest was actually sold and conveyed by the deed in evidence.

The Court refused so to charge, and the plaintiff excepted.

The jury rendered a verdict for defendants against the plaintiff, on which judgment was entered.

A motion was made for a new trial, and denied, and the appeal is from the order denying a new trial, and from the judgment.

It is not necessary in order to dispose of this case to determine as to the validity of the judgments obtained in the Justice's Court. In respect to these judgments, and the executions issued thereon, the only question necessary to be considered is, whether the deed offered and given in evidence bears any dependent relation thereto.

The deed, as we have seen, professes to have been executed by the constable, as a conveyance of the right, title, and interests of certain persons therein named in and to the premises in controversy, which were, before the date thereof, sold by the constable upon a writ of execution issued out of a Justice's Court, commanding the constable that, of the property of certain persons therein mentioned, composing the Richardson and Buffalo Company, he should cause to be made the moneys in said writ specified. The appellant was not one of

the persons named in the writ recited in the deed; nor is there anything apparent on the face of the deed to warrant the intendment that the writ of execution therein mentioned was issued on any one of the judgments produced in evidence. To show that the truth was otherwise than as recited in the deed, the constable who made the sale and conveyance was examined as a witness, and testified in respect to the matter as already appears.

The testimony of the constable was not competent to establish any facts having the effect to contradict, alter, or add to the terms of this deed. In the consideration of a deed, the terms of which are plain and unambiguous, the Court should limit its inquiry as to what the words of the deed express, without regard to any intention independent of the words. (2 Cow. & Hill's Notes, 571, Third Edition, and cases there cited.)

Where a deed of gift imported an absolute estate in fee in the donee, and was capable of being satisfied as such, parol evidence was held inadmissible to show that the donor intended to give a life estate only, with a limitation to the defendant. (*Pooser v. Tyler*, 1 McCord Ch. 18.) Nor can it be shown by parol that by mistake one tract was inserted in a deed instead of another, unless it be in a suit to reform a deed and correct the mistake, (*Bell v. Morse*, 6 N. Hamp. 205,) or that part of the premises described were intended to have been excepted (*Jackson v. Crory*, 12 John. 427; *Hovey v. Newton*, 7 Pick. 29; *Jackson v. Roberts*, 11 Wend. 426; *Locke v. Whiting*, 10 Pick. 279); or that a deed professing to convey all was intended to convey a part only. (*Barkley v. Barkley*, 3 McCord, 269; *Paine v. McIntier*, 1 Mass. 69; *Child v. Wells*, 13 Pick. 121; *Gittings v. Hall*, 1 Harr. & John. 14; *Beeson v. Hutchinson*, 4 Watts, 442.) So, parol evidence was held inadmissible to show that an execution, on which a levy and a sale had been made, had been withdrawn, and the levy abandoned by the plaintiff, in contradiction to the Sheriff's deed, (per Spencer, Ch. J., in *Jackson v. Vanderheyden*, 17 John. 168,) or to contradict the recital or show that the land was sold

under a different judgment and execution than those recited in the deed, though such evidence may be admitted to show a fraud in the sale. (*Jackson v. Sternberg*, 20 John. 50.)

The rule laid down in the last two cases cited, in regard to the conclusiveness of a recital in a deed, should be limited in its operation to the party making the recital and those who claim some right and interest under the deed which contains it. The officer who makes a sale and executes a conveyance of land under and by virtue of a judgment and execution, must necessarily make some reference in his deed to the authority under which he acted and to the character of such authority. This is essential for the purpose of showing a transmission of the debtor's title in the property to the purchaser and grantee thereof. This is done by a recital of certain facts, constitutive of the officer's authority to sell and convey. And when this is done, he and those who claim under the deed are estopped from denying the truth of the facts recited. But such a deed is not evidence of the matters recited as against strangers, and least of all, as against those who claim adversely to it. (*Jackson v. Roberts*, 11 Wend. 436; *Penrose v. Griffith*, 4 Binney, 231; *Carver v. Jackson*, 4 Peters, 88.)

There is nothing in the deed in question which is evidence of title in the defendants or any of them of the right, title, and interest of the appellant in the demanded premises, at the time it is alleged, on the part of defendants, the property of the appellant was sold; but, on the contrary, the deed shows upon its face that the execution under which the property is claimed to have been sold and conveyed was not issued against the appellant as a defendant therein, and it also shows upon its face that the interest of the appellant in the demanded premises was not attempted to be sold or conveyed.

The objection to the deed was well taken, and should have been sustained; and the instruction which the plaintiff requested the Court to give to the jury was proper, inasmuch as the deed and testimony of the constable was received in evidence.

Peterie v. Bugbey et al.

Upon the facts of the case as they appear in the record, the appellant was entitled to a verdict and judgment, as demanded in his complaint.

The judgment is therefore reversed and the cause remanded for a new trial.

G. C. PETERIE v. B. N. BUGBEY AND ROBERT BECK.

CONFLICTING EVIDENCE.—If the testimony is conflicting, the Supreme Court will not attempt to weigh the evidence and decide between conflicting statements.

WITNESS—ASSIGNOR OF THING IN ACTION.—B. commenced an action against S. on a promissory note indorsed by A. to B., and procured an attachment, by virtue of which the Sheriff levied on goods and chattels as the property of S. P., who claimed that the property levied on belonged to him, brought suit against B. and the Sheriff to recover possession of the same. On the trial, B. offered A. as a witness on behalf of himself and the Sheriff. *Held*, that A. was a competent witness, and that he was not the assignor of a thing in action, within the meaning of the four hundred and twenty-second section of the Practice Act, as amended in 1861. *Held*, further, that A. had not such a "present, certain, and vested interest" in the result of the suit as disqualified him under the three hundred and ninety-first section of the Practice Act.

SAME.—The statute to which the four hundred and twenty-second section of the Practice Act applies only exists where the thing in action or contract assigned is the subject matter, or a part thereof, of the suit pending, and in which the assignor is offered as a witness.

EXECUTION ON JUDGMENT FOR POSSESSION OF PERSONAL PROPERTY.—Where A. commences a suit against B. to recover possession of personal property, and, before the suit is commenced, B. has sold the property to C., if A. recovers judgment, the property cannot be taken from C. under an execution issued on the judgment for its delivery.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

This action was tried on the 6th day of March, 1863. Notice had not been given by defendants of an intention to examine Ackley, the witness hereinafter referred to, as a witness on their behalf.

S. Stackhouse was indebted to Robert Beck, one of the defendants, and Beck commenced an action against him in the District Court of Sacramento County, on the 14th day of October, 1862, on demand, and procured the issuance of

Peterie v. Bugbey et al.

an attachment, and placed the same in the hands of defendant, Bugbey, who, as Sheriff, levied upon a quantity of personal property, as belonging to Stackhouse, the defendant in the writ.

Peterie, the plaintiff, claimed the property levied on, and brought this action to recover possession of the same. Peterie claimed to have purchased the property from Stackhouse before the levy of the Sheriff.

The defense was, that the purchase of Peterie was fraudulent as against the creditors of Stackhouse.

On the trial, defendants offered as a witness on their behalf W. Ackley. Witness stated in his *voir dire* that he was a partner of Beck when the debt against Stackhouse accrued, and that Stackhouse gave Beck and Ackley his note therefor, and that he, Ackley, before the commencement of the attachment suit, sold his interest in the note to Beck, and indorsed the same. Witness also stated that Beck recovered judgment in the attachment suit, and the Sheriff sold the property levied on, and Beck became the purchaser. Beck sold a portion of this property to witness before the commencement of the possessory action by Peterie.

The plaintiff objected to Ackley testifying, because he had bought of Beck a portion of the property sued for, and it was the interest of the witness that the property should be applied on Beck's debt, as, if Peterie recovered judgment for a return of the property, the writ would run against the property in Ackley's possession; and because Ackley was the assignor to Beck of the note on which the suit was brought against Stackhouse.

The Court sustained the objection, on the ground that Ackley was the assignor of the note, and defendant excepted.

Plaintiff recovered judgment, and defendants appealed from the judgment, and from an order denying a new trial.

John G. Hyer, for Appellants.

An indorser of a negotiable promissory note is *not* an assignor, under the statute requiring notice. In *Hicks v.*

Wirth, 10 Howard, 555, at general term of New York Common Pleas, the question, and all the cases then reported, were very fully and ably considered, and it was held that an indorser of a negotiable promissory note was not an assignor of a thing in action, within the meaning of section 399 of the code; that the indorsement of a note, strictly speaking, is the order or appointment, by the payee to the maker, of a person to whom, according to the maker's contract, he has agreed to pay the amount as promised; and although it virtually carries with it a right of action against the maker, yet such right is rather for a breach of the original contract, viz.: a promise to pay to the order of the payee—than from any actual assignment of a claim against the maker. This case was approved, in the opinion of Mr. Justice Welles, in *Calkins v. Packer*, 21 Barb. 275, decided at general term. In the case of *Tuloss v. Rapelyee*, 3 Abb. 93, in the same Court, at general term, and the same Judge delivering the opinion, the same doctrine was approved, as applied to negotiable paper. In *Anderson v. Busteed*, 5 Duer, 485, it was held by the Superior Court (Duer, Bosworth, and Slosson, Justices) that an indorser of negotiable paper is not an assignor within the meaning of the code, and that his examination as a witness does not render the party against whom he is examined a competent witness under section 399 of the code. And in the case of *Watson v. Bailey*, 2 Duer, 509, the Superior Court doubt whether section 399 (of the New York Code, in relation to examination of assignors, parties, etc.) applies to cases of negotiable paper at all, though the question did not directly arise in that case. (*Hicks v. Wirth*, 10 Howard, 555. Approved: *Calkins v. Packer*, 21 Barb. 275; *Anderson v. Busteed*, 5 Duer, 485; *Watson v. Bailey*, 2 Duer, 509; *Tuloss v. Rapelyee*, 3 Abb. P. R. 93.) These cases are all decided in New York, under a statute which was, when the decisions were made or rendered, identical in its terms with that of our own State as it stood prior to the amendment of 1863.

Robinson & McConnell, for Respondent.

Peterie v. Bugbey et al.

We contend that under the facts, Warren Ackley was directly interested in establishing in Beck the title and ownership of the property in question. The *ownership* was the very point at issue in this suit. If Peterie was the owner, then Ackley had no title, for he purchased with a full knowledge of Peterie's rights; but if Beck's title was good, then Ackley's would be, for he purchased of Beck. Hence it follows that Ackley would gain or lose by the direct legal operation and effect of the judgment, and the record of the judgment would be legal evidence for or against him in any action where the title of the property might come in question.

The authorities are far from uniform upon the point as to whether an indorser of a promissory note is an *assignor* under the statute requiring notice. The weight of authority is in favor of the affirmative of the proposition. (*Clement v. Adams*, 12 How. 163; *Bump v. Van Andele*, 11 Barb. 634; *Potter v. Bushnell*, 10 How. 94; *Collins v. Knapp*, 18 Barb. 532; *Jagoe v. Alley*, 16 Barb. 580.)

By the Court, SANDERSON, C. J.

This is an appeal from an order denying a motion for a new trial. Two points are made by appellants: First—That the verdict is against the weight of evidence. Second—That the Court erred in holding that one Ackley, offered as a witness by the defendants, was incompetent on the ground of interest.

First—Upon the first ground the judgment cannot be disturbed. As to the *bona fides* of the sale of the property in controversy by Stackhouse to the plaintiff, the testimony is conflicting; and under the rule which has long been established in this State, we are not at liberty to disturb the verdict of the jury. Where the testimony is conflicting, the result mainly depends upon the credibility of the witnesses. Of that the jury and the Court below have an opportunity to judge, but this Court has not. Should we attempt to weigh the evidence as it is presented to us and decide between conflicting statements, the chances for the intervention of error would be increased rather than diminished.

Second—The witness, Ackley, was not an assignor of a “thing in action or contract” within the meaning of the four hundred and twenty-second section of the Practice Act, as amended in 1861. There is no “thing in action or contract” involved in this case of which Ackley is the assignor, nor of which the defendants or either of them are the assignees. The note which was in part assigned by Ackley to Beck constitutes no part of this suit. It was part of the consideration upon which the suit of Beck against Stackhouse was founded, and had Beck offered Ackley as a witness in that case the question could have been there presented, and there only, which is attempted to be presented here. The *status* to which the four hundred and twenty-second section applies, only exists where the “thing in action or contract” assigned is the subject matter or part thereof of the suit pending, and in which the assignor is offered as a witness.

Nor has Ackley such a “present, certain, and vested interest” in the result of the suit as disqualifies him under the three hundred and ninety-first section of the Practice Act. The test of the interest which renders a person incompetent as a witness is “that he will gain or lose by the direct legal operation of the judgment; or that the record of the judgment will be legal evidence for or against him in some other action.” Under this test it is clear that Ackley has no interest in the result of this suit. The title of Beck to that portion of the property in question which was sold by him to Ackley had vested in Ackley before this suit was brought. Suppose the judgment to be in favor of the plaintiff, it could not directly operate against Ackley, for not being a party to the suit, the execution, either for a delivery of the property, or for its value in money, could not run against him. The property in his possession could not be taken under the execution, nor could its value be made by a levy and sale of his property. Nor can there be any other action to which Ackley could be a party and in which the record of the judgment in this case could be used as evidence for or against him. Counsel for respondent seem to have confounded the relative posi-

Williams v. Benton.

tions of Beck and Ackley. Reverse their relative positions, and the result would be a *status* to which the theory of the plaintiff would apply. Make Ackley the party, and Beck the witness, and the pretended disabilities of Ackley become realities in Beck. We think the Court below erred in excluding Ackley from the witness stand, and for that reason the judgment must be reversed and a new trial awarded.

Ordered accordingly.

H. S. WILLIAMS v. A. S. BENTON.

REFERENCE.—In an equity case, where the trial of an issue of fact is involved, requiring the examination of a long account on either side, the Court may order a reference, with directions to the referee to report upon the account, or any issue of fact involved in the account.

REFEREE — POWER TO APPOINT.—The Court has no power, without the consent of the parties, to order a reference for the trial of any other issue of fact than that involved in the examination of an account in an equity case.

SAME.—The Court has no power, where either of the parties object, to order a reference with directions to the referee to report a judgment.

SAME.—In an action to dissolve a partnership and obtain a settlement of the partnership accounts, the Court has power to order a reference for the trial of all the issues of fact relating to the condition of the partnership accounts, but it has no power, if objection is made, to order a reference of the trial of any other issue or issues in the case, nor to direct the referee to report a judgment.

APPEAL from the District Court, Eleventh Judicial District, Placer County.

The referee reported a judgment in favor of plaintiff. The Court ordered a judgment in accordance with the report, and defendant appealed. The other facts are stated in the opinion of the Court.

Chas. A. Tuttle, for Appellant.

J. E. Hale, for Respondent.

By the Court, SANDERSON, C. J.

This is an action brought to dissolve a copartnership, and

Williams v. Benton.

to obtain a settlement of the partnership account. The plaintiff claims to be an equal partner. This is denied by the defendant, who avers that the interest of the plaintiff in the concern is only one third. Whether the plaintiff's interest is one half or one third is the principal issue involved in this case. When the case was called for trial the plaintiff moved for the appointment of a referee to try all the issues, and report a finding and judgment thereon. This motion was resisted by the defendant, but was allowed by the Court, and the case was accordingly referred. The order of reference was excepted to by defendant, who now assigns the same as error.

It is not denied by the appellant that the Court had the power to direct a reference, so far as the issue as to the balance of the partnership account is concerned; but it is claimed that the Court had no power to refer the other issues involved in the case, except upon the agreement or consent of the parties.

The power of the Court to compel a reference is derived from the one hundred and eighty-third section of the Practice Act, and can be exercised only as therein provided. The first subdivision of that section is the one relied on by the respondent as authorizing the order in question, and is in the following language, viz.: "when the trial of an issue of fact requires the examination of a long account on either side — in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein" — a reference may be ordered. The word "issue" is used twice, and each time in the singular number, and no other issue is mentioned than such as requires the examination of a long account, and no power is given the Court to direct the referee to report a judgment. If there be but one issue in the action, and that issue involves the examination of a long account, the whole case may be sent to a referee; but, even in such a case, he cannot be invested with power to report a judgment. If, however, there are other issues in the case, not involving the examination of a long account, the Court has no compulsory power to send them to a referee for trial.

The character of the issue which may be referred is particu-

larly described, and, by necessary implication, all issues not answering to that description are excluded from the operation of the section. The language is not that the Court may refer all the issues involved in the action, nor that the referee may be directed to try all the issues, but merely that he may try the whole issue—that is to say, the issue already spoken of, and the reference of which has been already authorized.

That it was not the intention to authorize the Court to refer all the issues involved in the action, against the consent of the parties, merely because one of them might involve the examination of a long account, is made more manifest by contrasting the terms of the one hundred and eighty-third section with those of the one hundred and eighty-second.

The latter section provides for the reference of cases upon the agreement or consent of the parties. And the language used is, that the reference may be made “to try any or all of the issues in the action or proceeding, whether of law or fact, and to report a judgment thereon.” The language of the one hundred and eighty-third section, on the contrary, is studiously confined to a single issue of the character therein described, and the power of the referee is limited to a decision of that particular issue, or the decision of a specific question involved therein, without any power to report a judgment.

Taking the two sections together, it is clear that it was not the intention of the Legislature to confer compulsory power upon the Court over the question of reference beyond such issues as involve the examination of a long account. Under the Constitution, this section cannot be construed to include issues of that character even in cases in which the parties have a constitutional right to a trial by jury. The present, however, is not one of those cases, and the Court had the power to order a reference of all the issues (if there was more than one) relating to the condition of the partnership accounts; but it had no power to refer the other issues involved in the case, nor to direct the referee to report a judgment.

The conclusion to which we have come upon the order of

Curran v. Shattuck.

reference disposes of the appeal, and makes the consideration of the other assignments of error unnecessary.

The judgment is reversed and a new trial ordered.

BERNARD CURRAN v. FRANCIS K. SHATTUCK.

ROADS—CONDEMNATION OF LANDS FOR.—A statute for the condemnation of the land owned by individuals for road purposes, which fails to provide a method of ascertaining the compensation to be paid to the owner, and the way and means of paying the same before the road is opened, is unconstitutional.

SAME—STATUTORY CONSTRUCTION.—The provisions of a statute which provides for taking the lands of private persons for road purposes must be strictly followed, and the Act must be strictly construed.

CONDEMNING LANDS—NOTICE TO OWNER.—The proceedings for the condemnation of land for road purposes fall within the class denominated "special cases" in the Constitution, and in such proceedings the person whose land is to be taken against his will must have notice or the proceedings will be void.

SAME.—Notice to the owner when the proceedings are commenced is not notice to his vendee who purchases pending the proceedings.

SAME—COMPENSATION—WHO PAID TO.—When the compensation to be paid to the owner of the land has been ascertained, the amount thereof must be paid to the one who is the owner at the time, or his authorized agent.

OPENING ROAD—INJUNCTION.—Where the statute under which proceedings for the condemnation of land for road purposes is taken is unconstitutional, or its provisions are not strictly pursued, or notice is not given to the owner of the land, or the compensation is not tendered to him, a perpetual injunction against opening the road will be granted.

EFFECT OF INJUNCTION.—A perpetual injunction against opening a road under proceedings which have been taken does not prevent laying out a road at any future time over the same land whenever the proper steps are taken to acquire the right of way and the right has been secured.

LIT PENDENS.—The common law doctrine of *lit pendens* does not apply to the proceedings before a Board of Supervisors for condemnation of land for road purposes.

APPEAL from the District Court, Third Judicial District, Alameda County.

The facts are stated in the opinion of the Court.

Wm. Crane, for Appellant.

The most material question is, whether the respondent was properly notified of the day designated for the assessment of damages. It will be remembered that Higgins remained in

possession, occupying the lands for farming purposes, and was there by permission of the respondent.

The statute provides (Laws of 1862, p. 81, Sec. 13): "At the designated meeting, the applicant for said location or alteration, or one or more of them, shall file affidavits with the Clerk of the Board that he has notified all owners, occupants, or agents of land over which said proposed road is to pass, of the aforesaid designated time for assessing damages, with a copy of said notice, which shall give the parties affected at least five days notice to appear; *provided*, further, that should the land over which said proposed road is to pass be vacant, or the owners thereof unknown, or reside out of the county, then the affidavit shall state that the said notice was posted in some conspicuous place at least five days previous to the designated time for assessing such damages."

The plain meaning of this clause is that the notice shall be served upon either the owner, or upon the occupant, or upon the agent of the land. The grammatical construction of the language is not that the owners *and* occupants *and* agents shall receive notice.

The proviso, taken in conjunction with the preceding part of the clause, only enjoins that if the land be vacant, and there be no occupant or agent of the owner in the county, or the owner resides out of the county, then the notice shall be given by posting.

It cannot mean that if there be an occupant and agent, you shall serve both, and shall also post notices if the owner reside out of the county.

By construing the whole Act together, it will be seen that the Legislature did not intend that so vain a thing should be done. Section seven, Laws of 1862, p. 79, provides for the giving of notice upon the inception of the proceedings. It requires that notice shall be served on all parties occupying and owning land, or their agents, and if the owners do not live in the county, or are unknown, then notice shall be served on the parties occupying the land, or if it is vacant, then shall be posted. It was probably not intended to require greater

Curran v. Shattuck.

strictness in notifying parties of the day designated for fixing the damages, than of the application to open the road.

If in the case at bar the respondent had owned the land when these proceedings were commenced, and Higgins had then been in possession under the same terms as afterwards, a notice of the application to open the road served upon Higgins would clearly have been sufficient under section seven; and I submit that a reasonable construction of section thirteen authorizes also a service of the second notice upon Higgins, the occupant, and agent of the owner also.

W. H. Glascock, for Respondent.

After the 29th of January, 1862, Higgins was the tenant of Curran, who was the owner of the premises, and resided out of the county. The District Attorney claims that the notice to Higgins was sufficient, and refers to Stat. 1862, p. 80, § 13, in which are the following words: "*Provided, further, that should land over which said proposed road is to pass be vacant, or the owners thereof unknown, or reside out of the county, then the affidavit shall state that said notice was posted in some conspicuous place at least five days previous to the designated time for assessing the damages.*" It is conceded that there was no such notice posted nor affidavit made.

The best rule to arrive at the meaning and intention of the law is to abide by the words which the law-maker has used. (9 Bacon Abr. 238.) If a proviso in a statute be directly contrary to the purview of the statute, the proviso is good and not the purview, because it speaks the later intention of the legislators. (Ib. 243.)

The owner, Bernard Curran, did not reside in the county, and did not have actual notice, and the provisions of the statute to constitute *constructive* notice were not complied with. It is a fundamental principle of law that a party must have notice and an opportunity to be heard before his property can be taken; and if the statute provides that certain acts done shall be deemed to impart notice then the statute must be strictly followed.

Curran v. Shattuck.

Again: if it should be held that giving notice to Higgins was notice to Curran, yet there is no pretence that there was an assessment of damages in favor of Curran, or that there was even any *tender* of damages in any amount to Curran. Thus we have an attempt to take the land of Curran without notice to him, or the assessment of any damages to him, or the tender of any sum whatever as damages to him. If Higgins should be made by statute a party to *receive notice* for Curran, he is not made by statute a party to whom a tender can be made for Curran.

By the Court, RHODES, J.

This action was brought to enjoin the defendant from proceeding as an overseer of roads to open a highway over the land of plaintiff.

A petition was filed before the Board of Supervisors on the 15th of September, 1861, pursuant to previous notice, for the location of the road, and on that day the Board appointed viewers, and they having failed to act, other viewers were appointed on the 5th of November, 1861, and directed to proceed to view the road on the 15th, and they, having been sworn on the 20th, adjourned to the 23d, and on that day proceeded to view the road, and subsequently they reported in favor of the road as petitioned for, and on the 7th of April, 1862, the Board confirmed the report, except as to the damages, and on the 5th of May proceeded to assess the damages, and ordered that the damages to the lands of Higgins, the plaintiff's grantor, be assessed at three hundred dollars. That sum was tendered to him, but he refused to accept it. The Board, on the 15th of September, made an order establishing the road at the width of sixty feet, and a copy of the order was delivered to the defendant, who was about to open the road according to the said order.

From the commencement of the proceedings to the 29th of January, 1862, Higgins was the owner in fee of a tract of land over which it was proposed to lay out the road; and on that day he conveyed a portion of his premises to the plaintiff, and

Curran v. Shattuck.

the deed was recorded on the 31st of January; but Higgins remained in possession of the premises as a tenant during all the proceedings of the Board. The plaintiff was a non-resident of the County of Alameda during the pendency of the proceedings, and had no actual notice thereof until after the order of the 15th of September, 1862. Damages were not assessed for his benefit, nor were they tendered to him, nor to any one as his agent. Upon the hearing, the Court decreed a perpetual injunction, restraining the defendant from laying out the road over plaintiff's land. The defendant appeals from the decree, and from the order overruling his motion for a new trial.

The proceedings were commenced under the general road law of 1861; but on the 24th of March, 1862, the road law for the County of Alameda took effect; and the question is raised by counsel whether the proceedings before the Board, after that date, were had or should have been conducted under the general or the special Act; but the decision of this case does not turn upon that question, for if the public have not acquired the right of way by means of the proceedings of the Board of Commissioners under either Act, then the injunction must be sustained. The object of the proceedings of the Board of Commissioners is to ascertain if the proposed road will be beneficial to the public, and if so, to determine upon the route, and then to acquire the right of way over the lands necessary for the road. When parties have not granted the right of way, the proceedings of the Board of Supervisors amount in effect to a condemnation of the land for public uses. It is provided in the Constitution of this State, that private property shall not be taken for public use without just compensation. No right in the land vests in the public until such compensation is made or tendered to the owner. If the authority to ascertain the compensation, or to assess the damages, as is usually denominated in the Road Acts, and, upon paying or tendering the same, to divest the owner of some interest in his land, is conferred upon a Board like that of the Supervisors, possessing but a limited and inferior juris-

diction, it is the inflexible rule that the Board must strictly pursue the statute or the proceedings will be void.

It is held in *Bensley v. Mountain Lake Water Company*, 13 Cal. 306, that "all statutory modes of divesting titles are strictly construed, and to be strictly followed: He who relies for a title upon an extraordinary mode of acquisition given him, not by the will of the owner, expressed or implied, but against his will and by the mandate of the law, must show for his warrant a strict compliance with those statutory rules from which his title accrues." The power conferred must be executed precisely as it is given, and any departure will vitiate the whole proceeding. (Sedgwick on Stat. and Const. Law, 319; Dwarria, 611; 1 East. 64.)

The Board or officer must find the power to ascertain the compensation within the statute. A resort cannot be had for that purpose to implication. (*Sharp v. Spire*, 4 Hill, 76; *Sharp v. Johnson*, Ibid, 92.) If the statute has failed to provide, directly, the means or mode, it simply results that the compensation cannot be ascertained, and, therefore, the land cannot be taken for public use without the consent of the owner. The Board cannot insert into the statute provisions conferring further powers, however necessary they may be to carry into effect the supposed intention of the Legislature.

If the proceedings of the Board in this case were had under the general road law of 1861, and if every act required by that law to be performed by the petitioners, Board of Supervisors, viewers, and other officers, has been done according to the statute, still those proceedings were not effectual to vest in the public the right of way over the plaintiff's lands, for the obvious reason that the Act fails to provide for the assessment of damages—the ascertaining of the compensation—for the right of way, in any manner, at any time or place, or by any person or officer. But if it can be held that the Act confers this principal power upon the viewers or the Board of Supervisors, then, without regard to the question as to which Act the Board acted under, the further point is presented that the plaintiff did not have notice of the proceedings to assess the

damages. The Court below finds that he did not have notice of any of the proceedings. The counsel for the appellant contends that, under the statute of 1861, notice to the owner of the assessment of damages was not necessary, but in our opinion it is beyond controversy that notice, actual or constructive, was absolutely necessary, unless waived by his appearance, or something that is deemed in law its equivalent, whether the statute makes provisions for it or not. The proceedings, though not amounting to a civil action, fall within the class denominated "special cases" in the Constitution, and "special proceedings" in the code of New York. (*Visscher v. Hudson River Railroad Company*, 15 Barb. 37; *Ex parte Ransom*, 3 Code R. 148; *New York Central Railroad Company v. Marvin*, 11 N. Y. 276.) And in such proceeding the person whose rights are to be affected against his will must have notice. (*Cruger v. Hudson River Railroad Company*, 12 N. Y. 190.)

He also insists that, regarding the proceedings subsequent to March 24, 1861, as having been had under the special Act, the owner of the land was duly notified of all the subsequent proceedings, because Higgins was still the owner of the land, (the sale being a mere sham); that if the plaintiff was the owner after January, 1862, Higgins was the occupant, and was the agent of the plaintiff, and that, through notice to him, the plaintiff received constructive notice, as provided in the special road Act for Alameda County.

It is unnecessary to determine whether the Board retained jurisdiction of the proceedings after the passage of the special Act under that Act or under the general Act of 1861, but it is a sufficient answer to say, that the seizin of the plaintiff was directly an issue in this case, and the Court below found the fact in favor of the plaintiff; and it might be suggested that when the claimants show before the Board a *prima facie* case of ownership, although the real and beneficial interest is in another, yet neither the Board nor the viewers are competent to pass upon the question of title, but must act at their peril in notifying parties and tendering damages.

The plaintiff denies that he had notice of the proceedings,

and this denial will include constructive as well as actual notice, and the Court finds that he had no notice of the proceedings until the defendant was about to proceed to open the road, pursuant to the order of the Board of the 15th of September. On examination of the record, it does not appear that any attempt was made to notify the plaintiff in any manner; indeed, his name is not mentioned in the proceeding, although the record of his deed imparted notice of his ownership. The special Act, section thirteen, provides that if the owner of the land is a non-resident of the county, the affidavit of service shall state that the notice was posted in a conspicuous place five days before the time for the assessment of damages. The plaintiff was a non-resident, and there is no evidence that a notice was posted. Notice to Higgins was not, in any sense, a notice to the plaintiff. A statute authorizing constructive service must be strictly pursued. (*People v. Huber*, 20 Cal. 81; *Hallett v. Righter*, 13 How. Pr. R. 43; *Sedgwick* on Stat. and Const. Law, 319.)

The appellant urges that Higgins, while the owner of the land, was notified of all the proceedings, and that his vendee is deemed to have purchased with notice; and that if such is not the rule, it would be in the power of an owner to constantly baffle the Board, and prevent the location of a road over his land. If the owner has the power, (and it may be that he does possess it as the law now stands,) it simply makes apparent another insufficiency of the road laws to meet the just demands of the public; but the statute not having provided against that contingency, the Courts are powerless to afford an adequate remedy. The statute has not declared that a notice to the owner shall impart a notice to his vendee. The common law doctrine of *lis pendens* does not apply to the proceedings before a Board of Supervisors, and the statute has not extended it to them.

We agree with the counsel for the respondent, that without regard to the regularity of the proceedings before the Board, up to and including the assessment of the damages, the right of way could not be acquired unless the damages, as compen-

Vance v. Fore et al.

sation for the land, have been tendered to the owner or his authorized agent. (*McCauley v. Weller*, 12 Cal. 500, and cases there cited; *Bensley v. Mountain Lake Water Company*, 13 Cal. 306.) The tender was not made to the plaintiff, nor to any one for him.

It cannot with propriety be urged that the injunction in this case will prevent the laying out of a road at any future time over the lands of the plaintiff; for, notwithstanding the proceedings that have been had before the Board, whenever the proper steps are taken to acquire the right of way, and that right has been secured, the road may be opened, and the present injunction will not be operative against the exercise of the rights thus acquired.

Nor can the appellant invoke the rule that the proceedings of the Board cannot be attacked collaterally, for it must be made clearly to appear that the Board had jurisdiction of the matter in controversy, and of the person of the party, where private rights are involved, otherwise its orders are void. The Board of Supervisors is not, in any sense, a Court; but, though exercising certain *quasi* judicial functions, it possesses only an inferior and limited jurisdiction, and the facts conferring jurisdiction in any given matter must affirmatively appear.

It is unnecessary to pass upon the other points, because, if the plaintiff was not notified of the time or place of the assessment of damages, or if the amount, after being assessed, was not tendered to him, the injunction must stand.

Judgment affirmed.

SHAFTER, J., expressed no opinion.

ROBERT H. VANCE v. E. ELIZA FORE, WM. A. SUBLETT, FRANK WILLIAMS, WM. BUTCHER, J. W. HILL, D. V. THOMPSON, R. O. MARSHALL, AND JOHN FORE.

DEED — DESCRIPTION IN.—Where one deed refers to another for a description of the granted premises, the deed referred to becomes a part of the

Vance v. Fore et al.

other; and the description contained in it is regarded as of the same effect as if copied into the deed itself.

DEED—REFERENCE IN TO MAP.—Where a map or plan of a tract of land, with lines drawn upon it marking its boundaries, and with the natural objects upon its surface laid down, is referred to in a deed as containing a description of the premises therein conveyed, this map or plan is to be regarded as giving the true description of the land conveyed, as much as if it was expressly recited and marked down in the deed itself.

DEED—CONFLICTING DESCRIPTIONS.—If a deed contains conflicting descriptions, that description is to be adopted which is the least likely to be affected with mistakes.

SAME.—Where a deed referred to another deed previously made for a description of the premises conveyed, and also to a map previously made for a description of the same premises, and the description in the deed referred to did not fix any monument at the initial point which could be determined with accuracy, and the end of the line running from the initial point terminated at "the base of the mountain," and then turning down at right angles was to follow down the base of the mountain, and the character of the country was such that witnesses might differ as to the location of these lines, and the map referred to represented all the natural and artificial objects found upon the land—such as streams, buildings, and roads—and there was a conflict between the verbal description as found in the deed and the boundaries as laid down on the map; *held*, that the description presented by the map must be adopted as the one most stable, and least likely to be affected with mistakes.

SAME.—Where a deed contains two descriptions of the land conveyed, and both are of equal authority, that one which is most favorable to the grantee must be adopted.

APPEAL from the District Court, Seventh Judicial District, Solano County.

Pena and Baca were the co-grantees of the Mexican Government of a tract of land confirmed and patented to them by the United States, which grant included the demanded premises.

Baca's deed to McDaniel, referred to in the opinion of the Court was for a portion of the grant, and was dated August 21st, 1850.

Pena's deed to Currey and Clarke, dated January 27th, 1853, also mentioned in the opinion of the Court, besides referring to the McDaniel deed for a description of the property conveyed, contained an additional reference to a map made by Swan, a surveyor. This map, Swan made after the purchase by McDaniel, at the request of McDaniel and one Mizner. The description contained in the McDaniel deed, literally followed, did not include the demanded premises;

the map made by Swan, however, did include the demanded premises. The tract of land in controversy was a parallelogram, having for its base an arroyo lying south of the land described in the McDaniel deed, but was included in the Swan map. On the 7th day of November, 1853, Pena executed to Vance, the plaintiff, a deed, which, both parties admitted, included in its description the demanded premises. Vance claimed under this deed, and it was insisted by him that the deed to Currey and Clarke did not convey any land except the quantity within the literal calls of the McDaniel deed, while the defendants claimed that the deed to Currey and Clarke conveyed all the land laid down on the Swan map to which it referred. As both parties claimed under the same grantors, there was no question about title. Vance purchased with full knowledge of the prior deeds, so that the only issue before the Court was the construction of the description contained in the Currey and Clarke deed. The defendants, a part of them, claimed under Currey and Clarke, and a part of them set up an outstanding title in Currey and Clarke, or their grantees.

The Court below gave judgment for the defendants, and plaintiff appealed from the judgment, as well as from an order denying a new trial.

The other facts are stated in the opinion of the Court.

W. W. Stow, for Appellant.

All the surveyors agree that there was and is no difficulty in locating by the description in the McDaniel deed the lands thereby conveyed and therein described; and hence, if the deed to Clarke and Currey contained no other words of description, there could be no dispute, and no hesitation in determining that Vance did, by the conveyance from plaintiff, acquire *title* to the lands for which he brought ejectment, and which are claimed under the deed to Clarke and Currey.

But because of the following language in the deed to Clarke and Currey: "the same being the land as laid down on a map or plat thereof made by Thos. M. Swan, Esq.,"—it is claimed

that Clarke and Currey acquired title to one thousand nine hundred more acres than McDaniel's deed conveyed. This argument and pretension rests for its sole foundation upon the proposition that all other *words* of descriptions in the Clarke and Currey deed must be rejected, or must be controlled by reference to the Swan plat or map.

In *Ferris v. Coover*, 10 Cal. 628, Mr. Chief Justice Field says: "The principle to be extracted from these cases is this: that the *lines actually intended by the parties*, if they can be *ascertained*, are to control. The rules adopted in the construction of *boundaries* are those which will best enable the Courts to ascertain the intention of the parties. Thus, preference is given to monuments, because they are least liable to mistake, and the degree of importance given to natural or artificial monuments, courses, and distances, is just in proportion to the liability of parties to err in reference to them. But they do not occupy an inflexible position in regard to each other. To hold otherwise would be to give greater importance to the rule itself than to the reason of the rule. It may sometimes happen in case of a clear mistake an inferior means of location will control a higher. In *Davis v. Rainsford*, 17 Mass., it was held that if, on taking the whole description together, it would be more reasonable to suppose a mistake was made in the monuments referred to than in the measurements of the distance, where the two disagree, the measurement should govern instead of the monuments; and, in that case, a diagram or plat of the land was allowed to control the designation of the monuments. 'To this admeasurement,' says the Court, 'we are bound to adhere, in order to effectuate the intention of the contending parties.' "

"In *Noorwood v. Byrd*, 1 Richardson, S. C. 135, it was held that when on *the face of a deed* the mention to convey a particular tract of land is *clear*, but the description of metes and bounds is, upon a survey for the purpose of locating the tract, ascertained to be erroneous, the description by metes and bounds will be rejected as surplusage, and the land located so as to cover the land clearly *intended to be conveyed*."

In *Falwood v. Graham*, 1 Richardson, 497, the Court say: "The defendant's counsel is wrong in supposing that there is any difference in the rules of location as laid down and enforced in the older or more recent cases. They all maintain that in locating lands we are to resort, first, to natural boundaries; second, to artificial marks; third, to adjacent boundaries; fourth, to courses and distances; *but it has never been held that each of these occupied an inflexible position.*"

In this connection we refer to authorities (not cited in *Ferris v. Coover*); *Seaman v. Hogeboom*, 3 Barbour, S. C. 215; 21 Ib. 398; *Jackson v. Ransom*, 18 John. 107.

"The *construction* ought to be made upon the entire deed, not on any particular part of it." (*Jackson v. Blodget*, 16 John. 172.)

We therefore deduce the rule applicable to this case to be, that the intention of the parties is to be ascertained and given; that if, to ascertain *it*, one part of the description must be rejected or disregarded, it is proper for the Court to treat such portion as surplusage.

That when there are two attempted descriptions, which are certain in themselves, and which agree with each other, and a third which is at total variance with the other two, the third *must* be rejected, especially as in the case where on its face it assumes to agree with the other two, but, in point of fact, it does not.

John Reynolds, also for Appellant.

It is very clear that Swan was called to survey the lands included in the McDaniel deed, and for no other object. To every person and party that object only could have been known, and no presumption that the survey should or could include any other lands than those in that deed can be made against Pena, or the plaintiff, or any other person. And knowing that to be the object and extent of the survey, well and properly made Pena, after giving the same description in the Currey and Clarke deed as contained in the McDaniel deed, refer to the Swan map. And knowing that it could not con-

tain more than the lands described in the McDaniel deed, that map cannot control those boundaries which are certain, and which, from all the testimony, do not include the lands in question.

The lands in the Currey and Clarke deed are described as follows:

“Beginning at a point one mile and a half due north of the point where the county road, so called, crosses the water course or branch ‘*Arroyo de Agua*,’ about a mile and a half east of said Manuel Baca’s dwelling house, in the County of Solano; thence running due west to the base of the mountains; thence in a southerly direction, following the base of the mountains, to a point about three English miles due south of the first mentioned course or line; thence due east three English miles; thence due north three English miles; then west to the place of beginning.”

If the description had stopped here, I think there could have been no doubt but that this description must have been confined to the land contained in the McDaniel deed, and could not have included the lands in question. All the surveyors, as witnesses, say, unequivocally, that the McDaniel deed does not include the lands in this suit.

The description in the Currey and Clarke deed then proceeds: “The same being the land as laid down on a plat or map thereof made by Thomas M. Swan, Esq.” I have already shown the object of making this map, and its effect upon the parties to this deed and the plaintiff in this action. But suppose we admit, for the sake of the argument, that it was intended to include all the lands embraced within its most exterior lines, then it could not control the description in this deed, nor extend the boundaries of this deed, so as to include the lands in question.

The description in the Clarke and Currey deed then proceeds: “And being the land the boundaries and courses whereof are described in a certain deed from said Baca to one William McDaniel, bearing date the 1st day of August, 1850.”

This, as I have already said, shows clearly that it was the

intention of the parties to convey only the lands included in the McDaniel deed. After giving a full description of the lands, being the same as contained in the McDaniel deed, and referring to the map, with the knowledge that the object of that map was only to include the lands contained in that deed, they then, to make their intention more certain, and that the Currey and Clarke deed should only contain the lands in the McDaniel deed, refer again in a pointed and particular manner to the McDaniel deed, to show that the lands then to be conveyed were to be confined to the lands in the McDaniel deed, and to those only.

Whitman & Wells, for Respondents.

While it is true that no rule for the location of land described in a deed can be laid down which is not subject to an infinite variety of exceptions arising out of matters of evidence, still, it is equally true that there are certain general rules, well considered and established, which must be the guide of Courts in considering the proper construction of deeds, and by which the evidence must be measured. We propose to state some of these rules which are so well established that they cannot be disputed, and by these rules and the evidence given in the case as measured by them, to insist that the judgment of the Court below was properly rendered.

1st. Every part is to be taken most strongly against the grantor, and every uncertainty is to be taken in favor of the grantee. (*Hathaway v. Power*, 6 Hill, 453—this is a very full case, and we invite the attention of the Court to it, although we imagine that the dispute between counsel for appellant and ourselves is not so much as to what the rules are, as to what is their proper application to the case at bar—*Middleton v. Pritchard*, 3 Seam. 510; *Cocheco Co. v. Whittier*, 10 N. Hamp. 305; *Jackson v. Shedson*, 3 J. R. 375; *Jackson v. Gardner*, 8 J. R. 308; *Jackson v. Blodgett*, 16 J. R. 172.)

2d. A plan of a tract of land which is referred to in a deed for the purpose of description, is to be treated as if it were annexed to and made part of the deed, and may be

referred to for the purpose of aiding in the identification of the land, showing its form, location, etc. (*Lincoln v. Cullum*, 4 Ala. 576.) Under this rule it has been decided that when lines are laid down on a map or plan, and are referred to in a deed, the courses, distances, and other particulars appearing on such plan are to be as much regarded as the true description of the land conveyed as they would be if expressly recited in the deed. (*Davis v. Rainsford*, 17 Mass. 210.) And also, if a lot of land be granted, specifying its number in a certain patent, and referring to a map on which it is laid down, the whole lot will pass, although described in the deed to contain a less number of acres than it actually does. (*Jackson v. Defendorf*, 1 Cal. 493.)

3d. A deed will always be construed, if possible, so as to render it operative, and to carry out the true intention and meaning of the contracting parties, whenever it is possible to ascertain the same. So it was decided in *Keitte v. Reynolds*, 3 Green. 393, side paging: that, "When a parcel of land is conveyed, as being the whole of a certain farm, which is afterwards described in the deed by courses and distances which do not include the whole farm, so much of the description will be rejected as that the whole may pass." (See, also, *Lodge's Lessee v. Lee*, 6 Cranch. 273.) So in *Jackson v. Loomis*, 18 J. R. 81: "The governing consideration in all cases upon the construction of deeds is to give effect to the intention of the parties, if the words they employ will admit of it; * * * here is a flat contradiction in the description, and then we ought to take that which is most stable and certain;" and in *Jameson v. Balmer*, 1 Shep. 425: "Though there may be a want of accuracy, or, indeed, a repugnance in some part of the language of a deed of land, the intention of the parties is to be gathered from the whole language used;" and in *Stone v. Clark*, 1 Met. 378: "When a deed conveying land is of doubtful construction as to the boundaries, the construction given by the parties themselves, as shown by their acts and admissions, is deemed to be the true one, unless the contrary be clearly shown;" and in *Proctor v. Pool*, 4 Dev. 370: "If the

description in a deed be so vague and contradictory that it cannot be ascertained what thing is meant, the deed is void—but different descriptions will be reconciled, if possible, or if irreconcilable, yet, if one of them point out the thing intended, a false or mistaken reference to another particular shall not avoid it;” and in the case of *Norwood v. Byrd*, 1 Richardson, S. C. 135, cited by opposing counsel, the Court say: “To effect the plain intention to convey the Norwood grant, the boundaries may be rejected as surplusage.” (See, also, *Jackson v. Loomis*, cited *supra*, and the same case, 19 J. R. 488; *Jackson v. Blodgett*, 16 J. R. 172; *Jackson v. Gardner*, 7 J. R. 217.)

By the Court, SHAFER, J.

This is an action of ejectment. The question presented by the record for review involves the construction of a deed given by Pena to Currey and Clarke, January 27th, 1853, and recorded February 19th of the same year. The description of the land intended to be conveyed is as follows:

“All and singular any of the lands and lots of land embraced within the boundaries of that parcel or tract of land described in a certain deed executed by Manuel Baca to William McDaniel, bearing date on or about the 21st day of August, in the year 1850; the said land being in the County of Solano aforesaid, and the boundaries being described on a certain map thereof made by Thomas M. Swan, to which said deed to said McDaniel reference is hereby made for a full and ample description of said land.”

The description in the deed of Baca to McDaniel begins at a point near the centre of the north line of the tract to be conveyed, and proceeds as follows: “Thence due west to the base of the mountains; thence in a southerly direction three English miles, that is to say, following the base of the mountains in a southerly direction three English miles; thence due east three English miles; thence due north three English miles; thence west to the place of beginning, so as to include three English miles square, or nine square miles of land.”

The Swan map is made part of the statement on appeal, and under the adjudged cases both that map and the description given in the deed of Baca to McDaniel, are to be considered part of the deed to be construed. "When one deed refers to another for a description of the granted premises, it is regarded as of the same effect as if the latter was copied into the deed itself." (*Allen v. Bates*, 6 Pick. 460; *Foss v. Crisp*, 20 Pick. 121.) "When lines are laid down upon a plan, and are referred to accordingly in a deed, they are to be regarded as giving the true description of the parcel as much as if expressly recited in the deed itself," (*Davis v. Rainsford*, 17 Mass. 210; *Kennebec Purchase v. Tiffany*, 1 Me. 219; *Thomas v. Patten*, 13 Me. 329; *Lunt v. Holland*, 14 Mass. 149; *Miller v. Cullum*, 4 Ala. 576.)

The deed to McDaniel calls: First—For nine square miles; Second—Lying in the form of a square; Third—Included within certain boundaries named. The boundaries as given are courses and distances, aided somewhat as to the westerly side of the tract by reference to physical objects. The initial point is not marked by any monument. The end of the line, described as running due west from the place of beginning, is not indicated otherwise than by saying that it terminates "at the base of the mountain." The reference here is not to a visible object, but to a point, the exact location of which can never be determined with absolute precision. Witnesses of equal intelligence, after giving to the subject an equal amount of attention, might, and probably would, differ more or less in their conclusions concerning it. The western line is described as running in a southerly direction three English miles, following the base of the mountain; but the exact line of the base is not fixed by any reference to visible objects, nor is there any object named as marking the southern terminus of the western line. The residue of the description is clearly given by courses and distances, and to every practical intent we consider that the entire description is of like character. A plat was produced in evidence at the trial, based upon this description by courses and distances, and appears as a fact in the case that

the included area contains nine square miles, the quantity called for by the deed; but it also appears that this result was reached only by a sacrifice of the square form constituting the second call. As between these conflicting requirements in the deed to McDaniel, the description going upon courses and distances must prevail. But the case shows that there is a discrepancy or conflict between the verbal description by courses and distances and the description furnished by the map, and the law governing that conflict is the principal question presented for our consideration.

It appears that the map includes an area larger by nineteen hundred acres than the area embraced in the verbal description by courses and distances, which excess of quantity lies in the form of a parallelogram constituting the southern portion of the map.

The map contains something more than a mere delineation of exterior boundaries. The course and location of the hills on the west side of the tract are given. The general area of the map is subdivided into lots, the positions of which are respectively indicated by interior lines and by numbers, and the quantity of land embraced in the lots respectively is stated in figures on the face of each lot. The site of the Town or Village of Vacaville is produced upon the plan, and the plan is traversed by roads and streams running in various directions. Not only are these natural and artificial objects represented upon the map, but they fill it to its exterior limits. The map further shows the position of the tract relatively to an outside object, viz: the dwelling house of Baca, and exhibits a "county road," running from the house to and across the tract in a northeasterly direction; and the question precisely stated is, whether a map so constructed, it being referred to and made part of the deed to be construed, is to be regarded as a more authoritative manifestation of the understanding of the parties than the verbal description by courses and distances.

The rule governing the construction of deeds containing conflicting descriptions is that the description the least likely to be affected with mistakes is to be adopted. (*Davis v. Rains-*

ford, 17 Mass. 210.) By way of further exposition, it has been held that that description should be followed which is the most stable and certain, (*Jackson v. Loomis*, 18 John. 81,) and the only reason why monuments are followed as against courses and distances is, that of the two, monumental lines are more stable and certain, and are less liable to be mistaken. We consider that the map constituting a part of the deed now in question, replete as it is to its very outlines with delineations of natural objects found upon the land, such as hills and streams, and of constructions thereon, such as roads, houses, villages, etc., is more "stable and certain," and "less likely to be affected with mistakes," than the other description by courses and distances contained in the deed. In effect, the map makes the deed a conveyance by monuments. Baca's house to the west of the tract is a monument, and so is the chain of hills forming its western boundary, and so is every object, whether natural or artificial, delineated upon the map. These objects might have been set forth in language; and if they had been, and with that fullness of detail which the map exhibits, that such verbal description would have overruled the description by courses and distances can hardly admit of question. For all the purposes of argument here, the map may be regarded as a daguerreotype of the land which the grantor intended to convey. In *Thomas v. Patten*, 13 Maine, 333, it was held that all the objects represented upon a plan are to have the same effect as they would if brought into the deed by verbal description.

But there is another view under which the point in controversy may be disposed of. Assuming that we are mistaken in holding that the description furnished by the map is more reliable and therefore more authoritative than the verbal description by courses and distances, the most that can be claimed for the appellant is that the two descriptions are of equal authority. Considering the case under that aspect, the settled rule of law would require us to adopt the description most favorable to the grantee.

Judgment affirmed.

Allender v. Fritts et al.

**EDWARD T. ALLENDER *v.* THOMAS G. FRITTS AND
SAMUEL G. SHELDON.**

APPEAL.—An appeal does not lie from an order refusing to dissolve an attachment.

APPEAL.—ORDER.—On an appeal from a final judgment the Court cannot review an order refusing to dissolve an attachment.

APPEAL from the District Court, Seventh Judicial District, Marin County.

On the 4th day of August, 1863, plaintiff commenced an action in the District Court of Marin County against defendants to recover judgment for work and labor alleged to have been done for defendants, and for brick sold them.

On the same day, plaintiff procured an attachment to be issued in the action, which was placed in the Sheriff's hands, who, on the same day, levied on personal property of defendants. The summons was served on the same day. On the 13th day of August, defendants served notice on plaintiff that they would, on the 18th of August, move the County Judge to dissolve the attachment.

The County Judge denied the motion.

Defendants answered, denying the allegations of the complaint.

November 4th, 1863, plaintiff recovered judgment. Defendants appealed from the order refusing to dissolve the attachment, and from the judgment.

G. F. & William H. Sharp, for Appellants.

John Reynolds, for Respondent.

By the Court, SAWYER, J.

This is an appeal from an order refusing to dissolve an attachment, and from the judgment entered in the cause.

The only error relied on is the refusal to dissolve the attachment. It is insisted by respondent that the question cannot be considered, for the reason that under the provisions of the Practice Act the order is not appealable; and that it

cannot be reviewed on an appeal from the judgment, for the reason that the Court, on an appeal from a judgment, can only "review an intermediate order involving the merits and necessarily affecting the judgment." (Practice Act, Sec. 344.) This objection seems to us to be well founded. Section 347 prescribes the cases and section 336 the time in which an appeal may be taken. This is not an appealable order within the meaning of those sections, and an appeal, therefore, cannot be taken from it directly as an order; and it is not an order "involving the merits, and necessarily affecting the judgment," within the meaning of section 344. The attachment is merely a proceeding ancillary to the action, by which a party is enabled to acquire a lien for the security of his demand by a levy made before instead of after the entry of a judgment. This ancillary proceeding may be taken at the time of the commencement of the action, or at any time afterwards. Neither the action nor the judgment, under our law, in any manner depends upon the attachment, although the attachment depends upon the action. The judgment in the case is precisely the same, whether the attachment is dissolved or not. In those States where the attachment is used as a process acquiring jurisdiction, the consequence of dissolving or refusing to dissolve an attachment might be different. But here, the judgment is not, in any respect, affected by the attachment. We could neither reverse nor modify the final judgment in any particular in consequence of any error in the attachment proceedings. The provision—"Upon an appeal from a judgment the Court may review any order involving the merits and necessarily affecting the judgment," implies that it shall not review intermediate orders not affecting the judgment. We think the question cannot be reviewed in this form of proceeding. It is a case for which the Practice Act has made no provision.

The case of *Taaffe v. Rosenthal*, 7 Cal. 518, appears to have been decided on the authority of *Griswold v. Sharpe*, 2 Cal. 17. But the latter case arose under the Practice Act of 1851, which provided for an appeal "from an order * * * which

Dorsey v. Barry.

affects a substantial right in an action or special proceeding." Probably this provision would embrace an order of the kind under consideration. The attention of the Court, in the case of *Taafe v. Rosenthal*, does not appear to have been called to the amendment of the Practice Act in this particular. Besides, the objection does not appear to have been raised or discussed in *Griswold v. Sharpe*.

No error appearing which affects the judgment, it must be affirmed, and it is so ordered.

G. T. DORSEY v. JOHN BARRY.

ELECTIONS—CONTESTING.—The statutory proceeding contesting an election is a special case, provided for by section nine of Article VI of the Constitution; wholly distinct in form and substantially different from the common law remedy.

JUDGMENT IN CONTESTED ELECTION.—Upon the entry of a judgment in a contested election case under the statute, the power of the Court over the cause ceases, and it cannot grant a new trial or re-examine the issues of law or fact.

SAME—APPEAL FROM.—An appeal lies from such judgment to the Supreme Court, which may, upon a reversal of the judgment, if it be found necessary or proper, order a new trial in the Court below.

APPEAL from the County Court, Tuolumne County.

The facts are stated in the opinion of the Court.

Edwin A. Rodgers, and *George Cadwalader*, for Appellant.

The Court below exhausted its authority when it entered its judgment confirming the election of Barry. (Wood's Dig. 785, Sec. 69.)

This final judgment was rendered on the 6th of November, 1863, and ended the controversy, as well as the special term.

H. P. Barber, for Respondent.

The County Court is a Court of record. (Wood's Dig. 157, Sec. 694.)

In Courts of record the power to grant new trials may, so far as the United States are concerned, be considered as a com-

Dorsey v. Barry.

mon law right, independent of statute, dating back even prior to the case of *Wood v. Gunston*, in 1655. Sty. 462; *Rex v. Corp. of Bewdley*, 1 P. Wons. 207; 2 Gr. & Wat. on New Trials, 38.)

No *special* power is given to either the District or County Courts by our statute to grant new trials, except in providing the *means* necessary to attain that end. The general power, as to Courts of record, appears to be conceded by implication. (Wood's Dig. 192, Arts. 927, 928.)

The County Court, in these contested election cases, acts as a *Court*. The Judges of the Supreme Court of New York, on the contrary, in proceedings to open streets, act more as *quasi Commissioners* than as a Court. (2 Hill, 15, cited in the opinion.)

The Act in question refers to the County Court *as a Court*, and its only effect is not in any manner to limit the general powers of that Court, but simply to provide that contested election cases shall be tried there.

As regards the time of *appeal* from the judgment of the County Court, referred to in the opinion, it must be remembered that the old Act (Compiled Laws, 785, Sec. 69) provided for an appeal to the *District Court*, where the whole matter was retried.

We respectfully suggest that the County Court has the right, where it exercises its functions *as a Court*, to grant new trials *in all cases*; that the object of the contested election Act was not to limit the power of the Court, but to provide a tribunal *where* such cases should be tried.

County Judges have the power to hear and determine motions for new trials *out of Court and at Chambers*. (Laws of 1861, Chap. 339, p. 199.)

Cases of alleged fraudulent insolvency are also "special proceedings" tried in the County Court, and the statute providing for such trial makes no provision for a new trial. (Wood's Dig. 499, Arts. 26, 67.) Yet, we imagine your honors would hesitate long, before deciding that the County Court *could not* grant a new trial in such cases.

Dorsey v. Barry.

By the Court, RHODES, J.

Dorsey and Barry, and two other persons, were candidates at the general election of 1863 for the office of constable for Township No. 1, in Tuolumne County. The Board of Supervisors canvassed the election, and declared Barry and John Edwards duly elected as constables for said township. On the 23d day of October, 1863, Dorsey filed in the County Court of Tuolumne County his petition contesting the election of Barry, and praying that he (Dorsey) might be declared elected in the place of Barry. A citation was issued to Barry to appear before the Court on the 2d day of November; and on that day, at a special term held for the hearing of said contested election case, the parties appeared before said Court, and the defendant filed his demurrer and answer, and the Court proceeded to hear said cause, and on the 6th day of November rendered judgment confirming the election of Barry. On the 10th of November, Dorsey filed his notice of intention to move for a new trial, and on the 14th of November, the motion was heard and a new trial granted, and the hearing was ordered for the 30th day of November to which day the cause was continued. It appears from the statement that "on the 11th day of December, 1863, the Judge of said Court opened said special term," and proceeded with the trial of said cause, and on the 13th of December the Court rendered judgment annulling the election of Barry as declared by the Board of Supervisors, and declaring Dorsey duly elected as constable.

Barry gave notice on the following day of a motion for a new trial, and the motion being denied, he gave notice on the 23d of December of an appeal from the judgment and the order overruling the motion for a new trial.

After the entry of the judgment in favor of Barry, on the 6th of November, he objected, at each stage of the proceedings, to the further action of the Court in the premises. The proceedings were instituted and conducted under the provisions of the Act of 1850, and the amendments thereof (Wood's Digest 380-2.) The cause is not one of which the Court

Dorsey v. Barry.

had jurisdiction by virtue of its organization, but it falls within the class of "special cases" provided for by section nine of Article VI of the Constitution, the jurisdiction of which may be conferred upon that Court by the Legislature. In *Saunders v. Haynes*, 13 Cal. 150, it is said that "the statute of 1850 creates a special proceeding wholly distinct in form and substantially different from the common law remedy." The Act itself provides a complete mode of procedure, leaving but little, if anything, dependent upon implication or the common law powers of the Court.

The written statement of contest, the filing of it in the Clerk's office, the fixing of the time of hearing, the process and its service, the attendance of witnesses, the continuances, the hearing by the Court, the fees of officers and witnesses, the liabilities of the parties therefor, the judgment for costs and the manner of collecting the same, the dismissal for insufficiency of the proceedings or for want of prosecution, the judgment and the appeal therefrom, are all specially provided for in the Act. One of the usual rules of all Courts sitting in the trial of actions does not prevail here. A judgment by default or *nil dicit* cannot be rendered. The Court must proceed to hear the proofs and allegations of the parties, and without regard to the allegations of the contestant or the default of the defendant, if the contestant does not offer his proofs the proceedings must be dismissed. (*Searcy v. Grow*, 15 Cal. 117.) No provision is made for taking depositions nor for any of those proceedings which, in an action between parties, would result in delays and continuances. In special proceedings, the Court vested with jurisdiction by the statute possesses only such powers as the Act creating the special case has conferred, and in the exercise of those powers it is limited by the terms of the Act. (*Whitney v. Board of Delegates*, 14 Cal. 503.)

It is held also, in *Saunders v. Haynes*, that "the statute evidently intended to afford a new and summary remedy in cases of contested elections," and it is a cardinal rule, that in sum-

Darsey v. Barry.

mary proceedings, the law must be strictly pursued. (Sedgwick on Stat. and Const. Law, 319.)

In section sixty-two of the Act, provision is made for the continuance of the special term, not exceeding twenty days, upon good cause shown before the commencement of the trial; and it further provides that after the commencement of the trial it may be continued from day to day until such trial is ended. The continuance in those two cases being provided for, all further power of continuance is excluded.

It is not directly asserted by counsel that the Court had authority to continue the cause otherwise than is provided for in that section, and it does not appear that the Court has assumed to exercise such authority. The judgment was rendered on the 6th of November, and it does not appear from the record that on that day the Court continued the special term to a future day; and in the absence of proper evidence to the contrary, it will be presumed that the special term ended upon the entry of the judgment; and, therefore, there was no special term of the Court at the time of the filing or hearing of the motion for a new trial, unless one had been created by the Court. Upon the entry of the judgment the power of the Court over the cause ceased, for the reason that the statute has not conferred upon it any further jurisdiction. In *People v. Supervisors of Greene*, 12 Barb. 217, it was held that the power of the Board of Supervisors ended upon declaring the result of the election, and that they could not hold a further session to correct an error in the canvass, because they were not authorized to do so by the statute. It will be observed that the statute does not authorize the Court to appoint a new term after the expiration of the term appointed upon the filing of the petition. In special proceedings, the Court looks to the statutes alone for authority; and the question whether, in a given case, the Court can exercise any power or adopt any of the forms of procedure common to Courts of law, must be determined by the provisions of the statute conferring jurisdiction. Thus, it is held that there can be no jury in special proceedings unless it is provided for in the statute. (*Koppi-*

Dorsey v. Barry.

kus v. State Capitol Commissioners, 16 Cal. 248; *Beckman v. Saratoga and Schenectady Railroad Company*, 3 Paige, 75; *Livingston v. Mayor of New York*, 8 Wend. 85.)

In proceedings to acquire the right of way, where it is provided that certain orders or judgments shall be final, and no appeal is provided, it is held that no appeal lies. (*Ex parte Ransom*, 3 Code R. 148; *New York Central Railroad Company v. Marvin*, 11 N. Y. 276.)

The new trial granted on the 14th of November was void, and of no effect for any purpose, unless the special term, in existence when the judgment of November 6th was rendered, still continued; and in our opinion, even in the event that the Court was still holding the special term, the order granting the petitioner's motion for a new trial was without authority, and void. The statute has not made provision for the re-examination of the issues of law or of fact in that Court, but has expressly provided for the taking of an appeal. It is said *In the Matter of Beekman Street*, 20 J. R. 269, and affirmed *In the Matter of Mount Morris Square*, 2 Hill, 14; 15 Barb. 37, and many other cases, that the Supreme Court, in revising, confirming, or setting aside reports of Commissioners of Streets appointed by them, derive their powers from the statute under which they act, not as a Court, but as Commissioners. *In the Matter of Canal Street*, 11 Wend. 154, *In the Matter of Mount Morris Square*, 2 Hill, 14, and in *Visscher v. Hudson River Railroad Company*, 15 Barb. 37, the Court held that they could not reconsider their decisions confirming the report of Commissioners appointed by them, because the statute did not vest in them the jurisdiction to review their decisions. And in *People v. Supervisors of Greene*, the Court said that if they should, by mandamus, order the Supervisors to re-examine the election returns, the action of the Board would be void, for the Board was not vested with that power by the statute, though the error in the decision of the Board was apparent.

We are aware that it was held by the late Supreme Court that in special proceedings to contest elections the County

Dorsey v. Barry.

Court could grant a new trial. The decision in that case (*Dickinson v. Van Horn*, 9 Cal. 207) seems to have been founded upon the provisions of section sixty-three of the Act of 1850, to regulate elections, and upon the idea that the appellate power of the Supreme Court could not be properly exercised unless it could order a new trial in the County Court, and that if the Supreme Court could so order, the County Court must necessarily have that power without an order from the Supreme Court. In our opinion, section sixty-three has no reference to the power to grant a new trial, nor, indeed, to any proceeding that might be had after judgment, as in a civil action. The only portion of the section that can, under any construction, be held to bear upon the question of the authority to order a new trial is as follows: "Such Court shall be governed in the trial and determination of the contested election by the rules of law and evidence governing the determination of questions of law and fact so far as the same may be applicable." This clause evidently means simply that questions of law and questions of fact arising in the progress of the trial of the contested election shall be determined by the Court according to law; and that evidence shall be admitted and its effect determined by the rules of law governing the production and effect of evidence on the trial of an action at law.

It does not necessarily follow that if the appellate Court can order a new trial in the inferior Court, that the inferior Court can, of its own motion, grant a new trial. It will be remembered that in the early history of the common law Courts of England, the Court of Chancery directed a new trial at law in those Courts, and it enforced its decree under the penalty of a perpetual injunction if the adverse party should refuse. (1 Gra. & Wat. New Trials, p. 4.)

The power to grant new trials, and the mode of its exercise, are dependent mainly, if not entirely, upon the statute, in both civil and criminal actions. The grounds upon which it may be obtained, and the manner of applying for and procuring it, are therein prescribed.

Dorsey v. Barry.

If the appellate power of a Court does necessarily include or imply the power to order a new trial, the Legislature might with propriety leave the exercise of that power to the appellate Court, and in cases like the one before us, which was intended to be a summary proceeding, the Legislature may well be supposed to have intended that the judgment of the County Court should be final, unless appealed from, and that the order for a new trial should proceed from the appellate Court upon a reversal of the judgment, if it should then be found necessary or proper. This would appear both reasonable and probable, upon examination of section 73. It is therein provided, that if an appeal be not taken from a judgment annulling an election within ten days, the commission or certificate, if issued, shall become void. If the contestant should desire to appeal from such a judgment, and it should be held necessary for him first to move for a new trial, prepare his statement, procure its settlement by the Court, and have the motion heard and determined by the usual course of proceeding in civil actions, it would be found that before his appeal could be taken from the order denying the new trial his certificate or commission had become void, and that he had been ousted from the office, through no default or neglect on his part, while proceedings were pending to try his right to the office.

Since the decision in *Dickinson v. Van Horn*, 9 Cal. 207, the late Supreme Court have more accurately ascertained and defined the character of the proceedings under the statute relating to contested elections, and, as already remarked in the cases before cited, they held them to be special proceedings, and in one case denominated them "summary proceedings." We regard them in every sense as special proceedings, and subject to the well settled rule, that in adjudicating upon them, the tribunal exercising jurisdiction must resort to the statute alone to ascertain its powers and mode of procedure.

Upon examination of the several provisions of the statute, and construing the proceedings under them by the well established rules applicable to special proceedings, our conclusions

Casgrave v. Howland.

are, that the judgment entered on the 6th day of November, not having been appealed from, was final; that the special term, not having been continued from day to day after that time, expired on that day; that thereafter the County Court had no jurisdiction of the proceedings, and that the order granting the petitioner's motion for a new trial was *coram non judice* and void.

The judgment appealed from is reversed, and it is ordered that all the proceedings subsequent to the entry of the judgment, on the 6th day of November, 1863, be set aside.

J. W. CASGRAVE v. J. H. HOWLAND.

NEW TRIAL—STATEMENT.—Where a statement is made and settled on motion for a new trial, and an appeal is taken both from the judgment and from the order denying a new trial, the statement can be used in reviewing the order appealed from, but cannot be used in determining the appeal from the judgment.

NEW TRIAL—CONTESTED ELECTION.—In a special case to contest an election under the statute, the County Court has no power to grant a new trial, and an appeal to the Supreme Court must be taken from the judgment, and a statement on appeal be made and settled to enable the Supreme Court to review the proceedings below outside the judgment roll.

APPEAL from the County Court, Napa County.

Howland and Casgrave were candidates for the office of County Recorder of Napa County at the general election in the fall of 1863. Howland was declared elected, and received his certificate and qualified.

Casgrave contested the election. The Court below rendered judgment in favor of Howland.

Casgrave moved for a new trial and appealed.

The other facts are stated in the opinion of the Court.

P. W. S. Rayle, for Appellant.

O. Hartson, for Respondent.

By the Court, SANDERSON, C. J.

Miller v. Van Tassel.

This is a proceeding under the provisions of Article VI of the Act to regulate elections, to contest the right of the defendant, Howland, to the office of Recorder of Napa County. The appeal is taken from the judgment and an order overruling a motion for a new trial. The transcript contains a statement on the motion for a new trial, and it may be used as such in determining the appeal from the order, but cannot be so used in determining the appeal from the judgment, in the absence of any stipulation to that effect. No such stipulation is to be found in the transcript.

In *Dorsey v. Barry*, 24 Cal. 449, we held that the proceedings authorized by Article VI of the Act to regulate elections are special and summary, and that no remedy can be had under the provisions of that Article, except such as is therein expressly or by necessary implication provided. We also held that a new trial was not authorized by the provisions of the Article in question, and that the remedy of a party who is dissatisfied with the judgment of the County Court is by appeal only.

Under the decision in that case, we cannot consider the appeal from the order denying the motion for a new trial. As already stated, there is no statement on the appeal from the judgment, and it therefore stands upon the judgment roll alone. No error is assigned upon the judgment roll, and we have been unable to find any.

Judgment affirmed.

SAMUEL MILLER v. NELSON VAN TASSEL.

ACTIONS — PLEADINGS IN.—The forms alone of the several actions have been abolished by statute, but the substantial allegations of the complaint in a given case must be the same under our practice as are required at common law.

VENDOR OF CHATTELS — ACTION AGAINST.—Under the forms of pleading at common law, the vendee of chattels sold with a warranty of title could, on a breach of the warranty, recover damages in assumpsit, or he might sue in an action on the case for deceit, if there had been deceit, as well as warranty of title; but, in the first case, he must aver specially that the defendant warranted his title to the property, and that a breach of the warranty had

Miller v. Van Tassel.

occurred, and in the latter, that the defendant falsely or fraudulently represented himself to be the owner of the property, and that he knew his representations were false.

SAME—COMPLAINT ON.—Under our practice, whichever ground of recovery the pleader adopts, his complaint must contain the same allegations of fact as were required at common law.

OBJECTION TO EVIDENCE.—The ruling of a Court, during a trial, in excluding testimony, will be sustained if its introduction was improper, although counsel do not state the correct grounds of objection, provided the correct grounds, if stated, could not have been obviated.

CHATTELS—WARRANTY OF TITLE.—The vendor of chattels in his possession warrants the same by implication. The warranty is a presumption of law arising from the possession of the vendor and the sale.

SAME.—This presumption may be rebutted by proof on the part of the defendant that he refused to give a warranty of title, and that the plaintiff agreed to take the property at his own risk.

BILL OF SALE OF CHATTELS—WARRANTY.—Where the vendor of chattels in his possession gives a written bill of sale to the vendee containing no covenant of warranty, there is an implied warranty, the same as though the sale was by parol.

SAME.—Where the vendor of chattels in his possession gives a written bill of sale to the vendee, containing no covenant of warranty, the warranty arising by implication may be rebutted by parol evidence, the same as it could be if the sale was a verbal one.

WARRANTY OF CHATTELS—EVIDENCE OF.—The record of a Court in an action to recover possession of personal property, containing the summons, proof of service, and a voluntary surrender of property, and dismissal of the action, is not admissible in evidence to show that the plaintiff in the possessory action owned the property, in an action between the defendant in the possessory action and his vendor of the same property.

APPEAL from the District Court, Fifteenth Judicial District, Tehama County.

The record of the Circuit Court of the United States, spoken of in the opinion of the Court, contained a certified copy of a summons in an action brought by the United States against Miller to recover possession of the jack, proof of service on Miller, his voluntary surrender of the property, and a dismissal of the action by the Attorney for the United States.

The plaintiff recovered judgment in the Court below, and the defendant appealed.

The following is a copy of the bill of sale of the jack:

“This is to certify that I have sold to William Miller my brown Maltese Jack, for \$1,000.

“N. VAN TASSEL.”

Miller v. Van Tassel.

The other facts are stated in the opinion of the Court.

W. S. Long, for Appellant.

Defendant offered to prove that Miller expressly waived a warranty of title, and agreed to take the jack at his own risk; which testimony was rejected by the Court. For our right to have introduced such testimony, I cannot do better than to call the attention of the Court to Mr. Parson's very able work on Contracts, Vol. I, pages 456, 457, Chap. V, and the notes referred to.

There is no clause of warranty in the instrument of writing, and in fact nothing more or less than a simple statement that he had sold the jack. If there had been a warranty in the writing, then the Court would properly have excluded the evidence. But as there was none, we think we had as much right to show the terms of the sale as if the sale had been made verbally.

W. H. Rhodes, for Respondent.

The evidence sought to be introduced was inadmissible for any purpose, because it would vary, contradict, and add to the written bill of sale, and parol proof cannot be introduced for any such purpose. The rule is too well settled to admit of doubt that the sale and delivery of personal property by one in possession thereof, carries with it a warranty of the right to sell, and of the title.

Mr. Parsons, in his treatise on Cont. Vol. I, page 456, thus states the rule: "And in this country it seems to be now well settled by adjudications in many of our States, that the seller of a chattel, if in possession, warrants by implication that it is his own, and is answerable to the purchaser if it be taken from him by one who has a better title than the seller, whether the seller knew the defect of his title or not, and whether he did or did not make a distinct affirmation of his title." In support of this view, the learned author cites almost innumer-

able authorities. (*Vide*, also Hill on Sales, 292, § 36, and authorities to same effect.)

There having been, therefore, a warranty of title, as evidenced by the bill of sale, the question arises, can the vendor now prove by *parol* that there was no warranty of title?

This proof would add a clause to the written contract, and contradict its written terms by a disaffirmance of the legal effect of the instrument, which testimony is inadmissible.

"Where there is a bill of sale, or a written agreement respecting a sale, no action can be maintained upon a mere *parol* warranty," that is, of the quality or quantity of the article sold, and this upon the principle contended for, that the written instrument contains all the contract. Thus in the case of *Mumford v. McPherson*, 1 John. 414, Mr. Justice Thompson delivered the opinion of the Court: "The warranty alleged to have been made is, that the ship was *completely copper fastened*. Upon the trial, the bill of sale was produced, which contained no such warranty. The plaintiff then offered to prove by *parol* that one of the defendants, after the bill of sale was executed, and before the same was delivered, did, to a question put by one of the plaintiffs, express himself to the effect of the warranty contained in the declaration." This evidence was ruled out, and Mr. Chief Justice Kent, in reply to one of the counsel *arguendo*, said: "You do not show any express authority that where you have reduced a contract to writing, and the previous *conversations are thereby merged in the written instrument*, you can bring an action on such previous *conversations*," and we add in this case, or *defend one*.

There are two cases in the English Chancery Reports offering the same doctrine distinctly, the first being *Gannis v. Erhart*, 1 H. Black. R. 289.

The sale was at auction, and there were certain printed conditions, one representing "that the property was free from encumbrances." *Parol* proof was offered that the auctioneer, on offering the property, stated the encumbrances, but not to the vendor personally. The proof was rejected, as it contradicted the written conditions of sale. The second case is *Pow-*

ell v. Edmunds, 12 East. 6. The synopsis of the case is as follows: "Printed conditions of sale of timber growing in a certain enclosure, not stating anything of quantity. Parol evidence that the auctioneer at the time of sale warranted a certain quantity *is not admissible as varying the written contract.*" To the same effect is the case of *Van Nostrand v. Beed*, 1 Wend. 432.

By the Court, RHODES, J.

This action was brought by the vendee of an American jack to recover back from the vendor the purchase money, on the ground that the vendor had no title at the time of the sale. The first count of the complaint amounts merely to the common count for money had and received by the defendant to the use of the plaintiff. The second count states, in substance, that the defendant represented to plaintiff that he, the defendant, was the owner of and entitled to sell the property; that thereupon the defendant executed to the plaintiff a bill of sale of the property, a copy of which is inserted; that the plaintiff paid the defendant the price, and received possession of the property; that the United States is the owner, and reclaimed and took possession of the jack; that the sale was void, and that the plaintiff rescinded the sale and demanded from the defendant the price, with interest, and that defendant refused to pay the same.

The case was treated by the parties in the Court below as an action upon the warranty of title, and the counsel of both parties have submitted the case to this Court on that theory. But evidently no recovery can be had for a breach of the warranty under the first count, because it contains no allegation of a warranty. (*Edick v. Crim*, 10 Barb. 445.)

Under the forms of pleading at common law, the vendee of chattels sold with a warranty of title, could, on a breach of the warranty, recover in assumpsit, or he might sue in an action on the case for deceit, if there had been also deceit on the sale, as well as a warranty of title; but in either case,

the plaintiff was obliged to plead specially. (Chitty on Pleading, 383.)

The *forms* alone of the several actions have been abolished by the statute; substantial allegations of the complaint, in a given case, must be the same under our Practice Act as are required at common law. The second count fails to state that the defendant warranted his title to the property, or that the property or the value thereof had been recovered from him by law by a person having a better title, or that any breach of the supposed warranty had occurred. Nor can it be considered as a count in *case* for deceit, for it is not alleged that the defendant falsely or fraudulently represented himself to be the owner of the property, nor that he knew that his representations were false.

The defendant, in his answer, denies that the property was the property of the United States, that the sale was void, or that the plaintiff had the right to rescind the contract; and he sets up that the plaintiff bought the property at his own risk; in other words, he denies what is not alleged in the complaint—that is to say, that he warranted the title.

This explanation of the state of the pleadings is necessary in order to clearly understand the force and effect of the ruling of the Court in excluding the testimony, which is the error mainly relied upon by the appellant. He offered to prove that at the time of sale the defendant refused to give a warranty of title, that the plaintiff said he did not wish the defendant to warrant the title, and that he would take the property at his own risk. This testimony was objected to by the plaintiff, on the ground that the defendant could not contradict his own bill of sale by parol, and the Court sustained the objection. The ruling of the Court will be sustained in excluding the testimony, if its introduction was improper, without regard to the grounds of objection stated by counsel, if the true objections could not have been obviated on being stated. The true ground of the exclusion of the testimony was because it did not tend to disprove any of the allegations of the complaint, nor to prove any allegation of the answer

Miller v. Van Tassel.

that amounted to a defense to the cause of action. In other words, the testimony was irrelevant to the issues in the case.

It is a rule well established in the American Courts, that the vendor of chattels in his possession warrants the title by implication. (1 Parsons on Contrs. 456, and notes.) This implied warranty amounts to nothing more than a presumption of law of the existence of a fact, arising from the proof of certain other facts, to wit: the possession of the vendor, and his sale of the chattel; but this is not a conclusive presumption. If the whole evidence of the sale had rested in parol, there would be no question that in an action brought to recover damages for a breach of the warranty of title, evidence of the character of that offered by the defendant would have been competent and material in support of the answer denying the warranty. The plaintiff urges that there being a bill of sale of the property, the warranty of title arising by implication attaches itself to the writing, and thereby becomes a part of the written instrument, and thus is subject to the rule of law forbidding an instrument of writing to be contradicted by parol testimony. There is much force in the point, but in our opinion it is untenable. No case is cited by the respondent directly to the point, and it is doubtful if any well adjudged case can be found sustaining that doctrine. The language of the Court in *Munford v. McPherson*, 1 John. 414, is broad enough to exclude parol proof of a warranty of any description, when there was a contract in writing which was silent in regard to a warranty, because, if allowed, it would add a new term to the written instrument of sale; but in that case, the question of adding to the written contract a *further* warranty of quality was under consideration. *Van Ostrand v. Reed*, 1 Wend. 424, *Powell v. Edmunds*, 12 East. 6, and a large number of English and American cases, decide that a warranty of quality or quantity cannot be added by parol to the written contract of sale; but they do not hold, as counsel argues, that an implied warranty of title, arising out of a sale of chattels, cannot be varied or contradicted by verbal evidence.

The fallacy of the learned counsel's argument consists in

considering the warranty as arising out of the terms of the contract; in holding that a contract of sale means a sale and a warranty by the same process and in the same manner that the words "grant, bargain, and sell," in a conveyance of land import a warranty as against the grantor; or as the term *demise*, in a lease of real estate, implies a covenant for quiet enjoyment; or as a clean bill of lading (as was held in *Creery v. Holly*, 14 Wend. 30) means, according to commercial usage, that the goods were stowed *under* the deck.

A warranty of title of a chattel, not directly expressed either verbally or in writing, is an implied agreement of the vendor, presumed by law from the concurring facts of the sale of the chattel by the vendor, and his possession at the time of the sale, without regard to the terms of sale, or the fact that the sale is or is not evidenced by writing. Chancellor Kent adds the further fact that the sale was for a fair price, (2 Kent, 478,) but the current of the late American cases does not regard that as an essential fact. Familiar illustration of such contracts arising by implication may be found in the cases of sale of chattels, either verbal or in writing, where no price or terms of payment are expressed. In such cases the law presumes, from the fact of sale, that the purchaser promised to pay the reasonable value of the chattels; also, to pay on demand, and to pay in money. A tenant holding over after the expiration of a lease in writing, is presumed to hold as a tenant from year to year, and upon the terms expressed in the lease. But, in all these cases the implied contracts may be varied or contradicted by parol evidence, showing an agreement differing from that presumed by law. This doctrine is further enforced by the fact that if the warranty is presumed from the contract, as distinguished from the facts of the sale and possession by the vendor, none could be presumed when the contract was in writing, unless the writing also stated that the vendor was in possession at the time of sale, for it would certainly not be allowable to presume the existence of a fact which might as well not be true as be true, and thereupon to presume an agreement that could not arise by implication unless

Miller v. Van Tassel

that fact was true. The implied agreement of warranty does not form a portion of the contract in writing, and may be varied or contradicted by parol. "It is a general rule that oral and extrinsic evidence is admissible to rebut a presumption of law or equity." (2 Starkie on Ev., 568.)

An instrument simply expressing that the vendor has sold to the vendee a certain chattel at a specified price, the receipt of which is acknowledged, and which is usually denominated a bill of sale, does not amount, in legal contemplation, to a contract, defined by Parsons (Vol. I, p. 6) as "an agreement between two or more parties for the doing or not doing of some specified thing," but amounts rather to a bill of parcels, according to commercial usage. But even if it is said to be a contract in any sense, yet the rules of law might not preclude the defendant in this case from introducing the evidence offered by him, for, in a case where a writing is not required by law, "oral proof of a distinct parol contract, relative to terms not noticed in the written memorandum, and showing that the memorandum was confined to one part only of the transaction, may be received." (Chitty on Cont., 109.) The bill of sale is silent in respect to the warranty.

This question, so far as it affects the bill of sale in this case, has been discussed at this time because, upon a new trial, it will again arise in the Court below if the pleadings shall present the issue of the warranty of title, and the defendant shall offer evidence of the conversation of the parties respecting the warranty.

The record from the United States Circuit Court, offered in evidence by the plaintiff, and admitted by the Court, was not admissible, because there was no judgment rendered in the case, and the record, if it amounted to anything at all, simply showed that the United States *claimed* the property, not that they had *recovered* it by law from the plaintiffs in this action.

The judgment is reversed and the cause remanded for a new trial.

Robinson v. Russell et al.

HENRY E. ROBINSON v. JOHN RUSSELL, SAMUEL DRURY, AND B. N. BUGBEY.

MORTGAGEE—HIS POSSESSION.—The entry of the mortgagee of real estate into the possession of the mortgaged premises by consent of the mortgagor, does not invest him with any other or greater rights than he would have had without such entry.

ACTION OF MORTGAGEE FOR DAMAGES.—An action can be maintained by the mortgagee of real estate to recover damages for wrongful and fraudulent injuries done to the mortgaged property, by which the security of the mortgage has been impaired.

INJUNCTION TO RESTRAIN WASTE BY MORTGAGEE.—An injunction will be granted at the suit of the mortgagee of real property to restrain the commission of waste upon the mortgaged premises; but before it is granted, it must be made to appear that the commission of the threatened waste will materially impair the value of the mortgaged property, so as to render it inadequate security for the mortgaged debt, and that the defendants are insolvent, or unable to respond in damages for the threatened injury.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

A. P. Smith was the owner of a tract of land containing about fifty acres, near the City of Sacramento. A large portion of the land was planted to fruit trees, and devoted to raising fruit for sale. A portion of it was also used as a nursery for rearing fruit trees, which were dug up at the proper season of the year and sold. In 1859, Smith borrowed of Robinson, the plaintiff, ten thousand dollars, for which he gave the latter his note, payable in two years, and to secure the note executed a mortgage on the land.

On the 15th and 28th days of August, 1862, John Russell and Samuel Drury, two of the defendants, commenced actions against Smith on money demands due from him; procured attachments, which were placed in the hands of defendant Bugbey, as Sheriff, who, by virtue of the attachments, levied on the pendant fruit and nursery trees, and placed a keeper in possession or charge of the same. Smith was living on the land and in possession at the time.

On the 28th of August, and after the attachments had been levied, Smith entered into a written contract with the attachment creditors, authorizing the defendant, Bugbey, to sell, at

private sale, the fruit attached by him, and hold the proceeds subject to the order of the Court.

On the 10th of September, Robinson, whose mortgage had not been paid, commenced an action for the foreclosure of the same. On the 12th of September, A. P. Smith took Robinson's attorney on to the land, and told him he delivered up to Robinson possession of the same. The Sheriff's keeper refused to recognize Robinson's right to the possession. The Sheriff continued to sell the fruit, and after the proper season arrived commenced digging up the nursery trees, planted in rows, for market, upon which he had levied.

On the 17th day of January, 1863, Robinson, who had not yet obtained judgment in his foreclosure suit, commenced this action.

The other facts are stated in the opinion of the Court.

J. G. Hyer, for Appellant.

As by our law an officer is not authorized by attachment process to seize upon and take into his possession *real property*, the first question to settle is, what species of property is *fruit* growing on the trees, and trees growing in plantations?

For if they are personal property, then the defendants are justifiable; if, on the other hand, they are real property, (and they are either the one or the other,) the defendants are not excused by virtue of any authority claimed under the attachment process.

That the fruit unplucked was a part of the realty, and that it, as such, became, by transfer of possession by Smith to Robinson, property of the latter, I quote:

"That *fruit* is a parcel of the land, that it descends to the heir and not to the executor, (which is the ultimate rule to determine to what class any particular species of property belongs,) and that it cannot be taken in execution, is fully shown in the case of *The Bank of Lansingsburgh v. Creary*, 1 Bar. 544; *Green v. Armstrong*, 1 Denio, 550; 2 East., in notes, and the authorities there cited."

Robinson v. Russell et al.

Pendant fruit is part of the realty. (Bouvier's Inst. 2, 157-159; 4 Kent's C. 73; 10 Cal. 258; Coke on Littleton, 56.)

Trees growing in a plantation or nursery also belong to the realty; are a parcel of the land, with the exception when, as between the tenant and the landlord, the law considers them as *emblems*. And when the law attaches to them the character of *emblems*, it has done so as in the case of fixtures—liberalized its rules for the benefit of trade, and impresses this character upon these subjects only in controversies between the landlord and the tenant; but with regard to all others, they, both the nursery or plantation trees and the fixtures, are real property.

These views are fully sustained by the English Court of Common Pleas, in the case of *Lee v. Ridsen*, 7 Taunton, 191, where the Chief Justice, in discussing the more general question of fixtures, says: "That the trees in a nursery ground are part of the freehold until severed." And in the case of *Miller v. Baker*, 1 Metcalf, 38, the Court, after quoting the above recited portion of the opinion of the Judge of the Common Pleas, say: "That there is no doubt that this is true as between the heir and executor, and would be, also, when the entire property in the land, and in the trees growing therein, united in the same person." And in the case at bar, the union did and does exist. Smith was the owner of the land and the trees in the nursery or plantation, and Robinson was equally in possession, by the same title as Smith, of the land and the nursery.

This being an action on the equity side of the Court, if they find that the fruit was real estate, the money derived from its wrongful severance and sale will also be regarded as such.

H. H. Hartley, for Respondent Russell.

The bill is totally devoid of equity, and should absolutely be dismissed, inasmuch as it contains none of the elements which a bill of that character should possess—it does not aver irreparable injury to the fee, permanent destruction of the inheritance, or the insolvency of the defendants.

Robinson v. Russell et al.

Nursery trees, planted out by Smith in rows for the purpose of being removed and taken up by him and sold at any time, particularly where they were planted on the premises after the date of the mortgage, were clearly and beyond doubt personal chattels, and did not form a portion of the realty. (*Penton v. Robart*, 2 East. 88; *Taylor, Land. & Ten.* 81; 1 Washburn, 102.)

Growing trees or grass may be severed in law from the land, and become personal property without an actual severance, as where the owner of the fee, by instrument in writing, sells or deeds them to a third person; in those cases the chattels become distinct from the soil, for, in contemplation of law, they are abstracted from the earth.

Mr. Washburn, in his recent treatise on Real Property, page 592, Vol. II, goes further than the previous cases, and lays down the rule that a man may grant trees growing on his land without deed; also corn in the ground; fruit upon the trees standing on his land, though they had not been severed; and that they may be conveyed by parol, an instrument in writing not being necessary, the law regarding them so much of the character of chattels as not to require the formality of a deed to pass them. (2 Barb. 624; 1 Barb. 547.)

P. L. Edwards, for Respondent Drury.

"An injunction will not be granted to prevent a mere trespass, unless the complainant has been in the previous undisturbed enjoyment of the property under claim of right, or where, from the want of responsibility in the defendant, or otherwise, the complainant could not obtain a relief at law." (5 Bacon's Abr. 198; *Hart v. Mayor, etc.*, 3 Paige, 213.)

Both the fruit and nursery trees, vines, etc., were simple personalty.

In regard to the fruits: We regard them as neither fixtures nor emblements, but as mere chattels. The terms of the deed impress neither of the former characters, and the true character must result from the facts. (2 Hilliard on Mort. 310.)

As between landlord and tenant the rule is well established

that nurseries are personalty. (*Amos & Ferrard on Fixtures*, 65; *Miller v. Baker*, 1 Met. 25; 1 Washburn on Real Property, page 3, Secs. 5, 6, 7 and 8.) "Where land is let for nurturing trees and plants until they are fit to be transplanted, without any specific limitation of time, the interest of the owner of the trees in them continues until that purpose is accomplished." (*King v. Wilcomb*, Barb. Sup. Ct. 263.)

In any view of the case we had a right to attach and sell the residuary interest of the mortgagor both in the personalty and realty. The mortgagee has no right of interference with the fruits, nursery, or realty, until foreclosure and sale; in fact, as before stated, until the lapse of six months from the time when he himself shall have become the purchaser, although from the time of such sale and purchase he would be entitled to the rents and profits. Thus the creditors had a right to take all the residuary right, title, and interest of the mortgagor, whether in the realty or personalty, and they did attach prior even to the pretended entry. (1 Washburn on Real Property, 545, Sec. 6.)

Probably the most satisfactory definition of a fixture is that given by the Supreme Court of Ohio:

"The true criterion of a fixture is the application of these united requisites:

"1. Actual annexation to the realty, or something appurtenant thereto.

"2. Application to the use of purpose to which that part of the realty with which it is annexed is appropriated.

"3. The intention of the party making the annexation to make a permanent accession to the freehold." (*Laff v. Hewatt*, 1 Ohio State Reports, 511.)

Basing the argument on this definition, we further state, that to constitute a fixture there must be a complete annexation to the soil, otherwise the thing remains a mere chattel. (*Amos & Ferrard on Fixtures*, 3, 6; 2 Smith's Leading Cases, 204; 2 Hilliard on Mortgages, 311, Sec. 17; *Ib.* 373, Sec. 59; *Gale v. Ward*, 14 Mass. 357.)

Gardeners, nurserymen, etc., entitled to sell, may remove.

(Amos & Ferrard on Fixtures, 65-6; *Miller v. Baker*, 1 Met. 27.)

By the Court, RHODES, J.

The object of this action was to procure an injunction, restraining the defendants from removing from "Smith's Gardens" certain growing trees and vines, and a steam engine and pump erected to irrigate the land, and restraining the defendant Bugbey from paying over to the other defendants certain money in his hands, which it was agreed represented certain fruit sold by him from the gardens. The Court below found all the material issues of fact for the defendants, and rendered judgment in their favor.

The Court found, among other things, that the defendants had not removed, and did not intend removing from the premises anything besides the growing fruit and the nursery trees and vines which had been attached by the Sheriff at the suit of the other defendants. There was some conflict in the evidence in relation to the matters included in that finding, but we think there was sufficient evidence to authorize the Court to arrive at the conclusion stated.

The first and most obvious point presented in the case, and one that is decisive of this appeal, is that the whole case, as made by the allegations and proofs, does not present such a cause as entitles the plaintiff to relief in equity, or to the process of injunction to restrain the defendants from the commission of the injuries complained of. The plaintiff claims that he is a "mortgagee in possession" of the premises, and insists that by reason of that relation he possesses some further right or interest in the land than he had as a simple mortgagee, but he does not allege or prove that the mortgagor had conveyed to him any interest in the premises other than the lien which he acquired by the mortgage. He alleges and proves merely that the mortgagor let him into possession. It was recently held by this Court that the entry of the mortgagee into the possession of the premises could not invest him with any other or greater right than he would have had without

Robtson v. Russell et al.

such entry. (*Cunningham v. Hawkins*, 24 Cal. 403.) The term "mortgagee in possession" is unknown to the law regulating the rights of parties to a mortgage in this State. It signifies no more than would the term "creditor in possession." The plaintiff is to be treated simply as a mortgagee of the premises, and will be restricted to the rights and remedies pertaining to that relation.

There can be no doubt but that an action can be maintained by the mortgagee for injuries of the character set forth in the complaint in this case, when it appears that by the acts complained of the mortgage security is impaired. This is clearly shown in *Yates v. Joyce*, 11 Johns. 136, *Lane v. Hitchcock*, 14 Johns. 213, and *Gardner v. Heartt*, 3 Denio, 232, cited by the appellant's counsel, and more fully in *Van Pelt v. McGraw*, 4 N. Y. 110. But all those were actions on the case for the wrongful and fraudulent injury committed upon the premises, whereby the mortgagee's security was impaired. There can be as little doubt that the mortgagee may, by injunction, stay the commission of waste upon the mortgaged premises, when he makes a proper case in equity and shows that the commission of the threatened acts will materially impair the value of the property subject to the lien so as to render it an inadequate security for the mortgage debt.

In the case before us, the acts of the defendants, committed or intended to be committed, as found by the Court, consisted in the removal of the pendant fruit and the growing nursery stock. Injuries resulting from such acts are not irreparable. Full and adequate damages could be recovered in an action for the trespass, if the acts bring the case within the rule laid down in *Van Pelt v. McGraw*. The doing of these acts does not materially impair the value of the inheritance—the substance of the realty. It is not stated that the defendants are insolvent or unable to respond in damages for the alleged or threatened injury. The plaintiff, therefore, is not entitled to relief in equity. (2 Story's Eq. Juris., Sec. 925; *Burnett v. Whitesides*, 13 Cal. 156; *Hanson v. Gardner*, 7 Ves. 305, note.)

Judgment affirmed.

Wood et al. v. Truckee Turnpike Co.

D. J. WOOD, AND S. D. WOOD v. THE TRUCKEE TURNPIKE COMPANY.

SHERIFF'S SALE OF CORPORATE FRANCHISES.—The franchises of a corporation organized for the construction of a plank or turnpike road, do not pass by a Sheriff's deed, where the Sheriff, by virtue of an execution issued on a judgment against the corporation, levies upon all the right, title, interest, claim, and property of the corporation in their road, advertises and sells the same, in the manner in which real estate is advertised and sold and executes to the purchaser a deed therefor.

FRANCHISES OF CORPORATION—SALE OF.—The franchises of a corporation are privileges granted and held in personal trust, and cannot be transferred by forced sale, or by voluntary assignment, except by permission of the Government, and when that permission is granted, the mode of transfer pointed out must be followed.

EJECTMENT.—Ejectment does not lie to try the right to a road or right of way.

SAME.—A road or right of way is an incorporeal hereditament, and ejectment is maintainable only for corporeal hereditaments.

CORPORATION—RIGHT TO HOLD LAND.—Corporations organized for the construction of plank or turnpike roads cannot acquire or hold lands, or the possessory right thereto, or any interest therein, beyond the easement or right of way over the same.

TITLE TO LAND WHERE ROAD PASSES.—The road of a turnpike company is not the private property of the company, but belongs to the public, and all the interest the company has in it is the right and power to collect tolls on the line of the road as a compensation for building it.

RIGHTS OF TRAVELLERS ON TOLL ROAD.—Every traveller has the same right to use the road of a turnpike company upon paying the toll established by law that he has to use any other public highway.

SHERIFF'S SALE OF ROAD.—The levy upon and sale of a road, by virtue of an execution, gives to the purchaser no right or title to the same, for, being the property of the public, the defendant in the execution has no interest therein which can be conveyed by the officer.

APPEAL from the Seventeenth Judicial District, Sierra County.

The Truckee Turnpike Company was a corporation organized for the construction of a turnpike road.

The company constructed a turnpike road, leading from the southern line of Sierra County, running thence in a northeasterly direction through said county, by way of Plum Valley, Fred's Ranch, Cornish Ranch, and Jackson's Ranch, to the northeastern boundary line of the county.

The road was built upon public lands.

Wood et al. v. Truckee Turnpike Co.

The execution upon which the road was sold was in the usual form, and the Sheriff levied and sold in the manner required by statute for levying upon and selling real estate. At the end of six months the Sheriff executed to the purchaser a deed.

The other facts are stated in the opinion of the Court.

Charles E. Filkins, for Appellant.

The main and about the only material proposition in this case is, can property or rights like this be sold under execution, as this was sold? The statute of this State, the law and decisions of other States, and the policy of the Government, are against such a conclusion.

To commence with our own statute (Wood's Dig. p. 117, from section 20 to section 28 inclusive): The manner and form in which such rights and interests may be sold under execution is clearly defined; for it will not be disputed that the power that created the franchise had the right to provide and say the manner in which it could be held or disposed of.

The officer having an execution against "any turnpike or other corporation authorized to receive toll," shall give notice for thirty days, (and in this case twenty days notice was given,) and at the sale the person who will satisfy the execution, etc., and agree to take such franchise for the shortest period of time and receive the tolls, "shall be considered the highest bidder," and the officer making such sale shall transfer to the purchaser all privileges and immunities belonging to the corporation, and shall, immediately after the sale, deliver to the purchaser possession of all the toll houses, etc., and the purchasers may demand and receive tolls, etc., in the same manner as the corporation could before such sale, and may recover penalties imposed by law for any injury to the franchise; and by section twenty-six the corporation is bound to repair and keep the road in order, and are liable to all penalties and forfeiture as before the sale.

This statute was passed to govern cases exactly like this,

and it will trouble the ingenuity of respondent's counsel to imagine a case that this statute would control if not this one.

Again: under the twenty-seventh section of the same statute the corporation have one year to redeem after the sale, and in this case the Sheriff executed his deed and this action is brought in less than seven months after the sale; and I might, with confidence, rest this case solely upon the statute, confident that the Court can come to no other conclusion than that the plaintiff acquired no rights under this sale.

Counsel for respondent upon the argument contended that they only sold the land over which the road was constructed, and not the franchise. I contend that the only interest or right that the defendant had in the land was the franchise itself—an easement or right of way over the land; and all the authorities define it as such.

A turnpike company own the *road*, but not the ground over which it passes; and their ownership of the *road* does not vest in them any right but such as is essential to the enjoyment of their rights and franchise. (*Kelly v. Donahoe*, 2 Metcalf, Ky. 482.)

The public have an interest in the road as much as the company, and their interest has been lost sight of entirely in this sale. After a most thorough examination of the reports of almost all of the States, I am unable to find but one case where a turnpike road has ever been sold absolutely, and that is the case of *Armant v. New Alexandria Turnpike Co.*, 13 S. & R. 210. It was that case which, I believe, was the cause of the State of Pennsylvania passing an Act whereby creditors could enforce their judgments against such franchises.

The defendant was incorporated by virtue of an Act of the Legislature for a special purpose in which the public are much interested. The only right defendant had was, under the corporate law, to enter upon the land of the Government, construct a road, and when complete, to collect certain tolls, and, for such right they were compelled to keep the road in repair, and were responsible for all damages caused by their negligence; and under our statutes, as cited, after a sale of their

road, with the purchaser in possession, the company are under the same responsibilities, and the only right or control the purchaser gets is to collect the tolls. It would be an absurdity to contend that after the company had been sold out absolutely, they should be subject to all their original responsibilities, yet, the position of the counsel for appellants in connection with the statute would place the defendant in that position.

And again: in the case of *McKeon v. Odom*, 3 Bland, Maryland Chancery, 422, Chancellor Bland, in his opinion, says: "The road itself cannot be taken and closed by virtue of *dis-tringas*, or sequestration, because that, as one of the highways of the Republic, it could not nor ought not to be obstructed by any process whatever *against those whose only interest* in it is the toll they are allowed to exact in consideration of keeping it in repair." And it seems to be the whole policy of all the law and decisions to protect Government and corporations in property of this kind from being sold so as to transfer the absolute ownership and control by forced sale to third parties, who might be wholly irresponsible, or close up the road entirely, and thus deprive the public of the use and enjoyment of one of the great thoroughfares leading across the Sierras; and there can be no doubt in the mind of the Court that the right of a corporation of constructing a road and collecting toll is a franchise, and is not at common law nor by our statute the proper subject upon which to levy and sell under execution, as in ordinary cases, and this doctrine and principal is fully discussed in *Seymour v. Mifford Turnpike Co.*, 10th Ohio, 476, in which case a sale was had under a statutory law very similar to our statute.

Again: the Sheriff had no power or authority at common law to sell the fee in land, and his only authority in this State comes from the statute, and where the statute points out a way, in which way or what he must sell, (as the rents and profits first,) and he does not sell in accordance with the statute, his *deed*, is void, and the purchaser takes nothing by his purchase; and I say that the deed from the Sheriff to the plaintiffs, and under which plaintiffs seek to recover in this action,

Wood et al. v. Truckee Turnpike Co.

is absolutely void, and not voidable. (*Lessee of Grantly et al. v. Ewing et al.*, 3 Howard U. S. 707; 13 S. & R. 210.)

"The easement enjoyed by the public in a turnpike road is vested in the public as much as that of a common highway." (*State v. Main*, 27 Connecticut, 64.)

Geo. Cadwalader, also for Appellant.

An action of ejectment will not lie against one claiming an easement in a parcel of land, to try his right to enjoy the same. (*Jackson v. May*, 16 Johns. 184; *Doe v. Alderson*, 1 M. & W. 210; *Crocker v. Fothergill*, 2 Barn. & Ald. 652.)

Apart from the statute, these authorities show with great clearness that a turnpike corporation takes nothing but an "easement," or a "right of way," while the Act itself, which vests the defendant with whatever faculties it possesses, merely gives it the easement or right of way over public or private property—while they also prove that for a right of way or an easement the action of ejectment does not lie, and we are warranted in declaring that it would be impossible for a Sheriff to put a party in possession of a road thirty miles long, or to eject the adverse party therefrom—the same being a highway to which everybody has the right of access and transit, subject to a single condition, and that he paid the tolls fixed by the Board of Supervisors. The Legislature, giving to the defendant the mere easement, or the right of way, and reserving to the public the use thereof upon the payment of toll, can hardly be said to recognize such an estate or possession of the land itself as would enable judgment creditors of a turnpike corporation to sell and take exclusive possession of the road, and to exclude the public therefrom by closing the highway or obstructing it, for a doctrine of this kind would be at war with every principle applied to highways, turnpikes, or roads, and carried out to its logical conclusion, would enable A., a creditor, to sell ten miles of the road, B., another creditor, to sell five miles, and in this way defeat the rights of the public, adjacent property holders, and place a most effectual embargo on the trade of large sections of country.

In *Kelly v. Donahue*, 2 Metcalf, Ky. 482, it was remarked: "A turnpike company own the road, but not the ground over which it passes, and their ownership of the road does not vest in them nor take from the owner of the land any right but such as is essential to the enjoyment of their own rights and franchises."

But the plaintiffs were not divested of the fee of the land by laying out the highway, nor did the public thus acquire any greater interest therein than a right of way. (*Perley v. Chandler*, 6 Mass. 454; *Jackson v. Hathaway*, 15 Johns. 447.)

Ordinarily — and we may say always — a person obstructing or claiming possession of a public highway is not proceeded against by the action of ejectment, but he is subject to arrest, and proceeded against criminally. (See Sec. 13 of Act "concerning roads and highways;" Wood's Digest, page 652; and also Secs. 32 and 33 of Act "concerning plank or turnpike roads,") under which the defendant organized as a corporation. And it would be the sheerest folly to suppose that the defendant's road, public in its character, with the tolls thereof regulated by the Supervisors, could be entered and fenced or obstructed by persons against whom the law would only furnish a remedy by ejectment.

Vanclef & Bowers, for Respondent.

The position most relied on seems to be that the *interest* which a turnpike company has in the land upon which it has dug and constructed its road, is but a mere easement, and therefore a part of the franchise. But it is not strictly or purely an easement within any definition we have ever seen. An easement proper is one species of incorporeal hereditaments, and consists of a right in the owner of one parcel of land by reason of such ownership to use the land of another for a special purpose without profit.

"The essential qualities of an easement," says Mr. Washburn, "are these: First — They are incorporeal; Second — they are imposed on corporeal property, and not upon the owner thereof; Third — They confer no right to a participation in the profits

Wood et al. v. Truckee Turnpike Co.

arising from such property; Fourth—There must be two distinct tenements—the dominant, to which the right belongs, and the servient, upon which the obligation rests.” (Washburn on Easements, pp. 3, 8; *Wolf v. Frost*, 4 Sanf. Ch. 89.)

There are one or two other classes of rights which resemble easements, and partake of their nature, but which are not purely such.

“The above definition,” observes Mr. Washburn, “does not embrace the class of rights which one may have in another’s land, like a right of way or of common, without its being exercised in connection with the occupancy of other lands, and therefore called a right *in gross*. * * * But, after all, it partakes so much of the character of an easement, that, like the rights which the inhabitants in certain localities may acquire by custom, or the public by dedication, to pass over the land of an individual, for instance, it would be difficult to treat of easements and servitudes without embracing these rights, as well as that of taking profits in another’s land, which one may enjoy in connection with the occupancy of the estate to which such right is united.”

In *Post v. Pearsall*, 22 Wend. 432, Chancellor Walworth says: “Ordinary easements are either personal, and confined to an individual for life merely, or are claimed in reference to an estate or interest of the claimant in other lands, as the dominant tenant, for a profit *a pendre* in the land of another, when not granted in favor of some dominant tenement, cannot properly be said to be an easement, but an *interest or estate in the land itself*.”

If the right which turnpike corporations have to the land on which their roads are constructed is to be classed with those rights which resemble easements, it belongs to the latter species above named by Chancellor Walworth. The company is in actual occupancy of the land, and takes a *profit* from the use of it, of precisely the same nature of the profits taken by a railroad company.

“This,” says Chancellor Walworth, “constitutes an interest or estate in the land itself, which is of course subject to

Wood et al. v. Truckee Turnpike Co.

seizure and sale on execution, as held by the Court in *The State v. Rives*, 5 Iredell, 304."

In the case last cited, the charter of the railroad company provided for the condemnation of lands for the use of the road in the usual manner, and added that, after the company should acquire the right of way over lands in any of the modes prescribed by its charter, that it should have the same power and authority over such lands during the existence of its charter, and for the purposes of its road, "as though it owned the fee simple therein." This, the Court said, constituted the company "the tenant of the land for the term of its charter, subject to the earlier determination of the charter from any cause."

And the Court further remarked that some estate in the land was necessary for the preservation of the road — which is equally true of turnpike companies.

It is said, however, by appellants' counsel, that the charter of this company was peculiar, in giving a greater estate in the land than is usual in such cases, and greater than that given to turnpike companies in this State; but we see no substantial difference.

Our statute (Wood's Dig., 654) which provides for the condemnation of lands, declares that a confirmation of the report of the Commissioners shall have the effect of a judgment on which execution may issue for the possession of the land. This, it seems to us, is fully equivalent to the provisions of the charter in the case above cited. It gives the turnpike companies full power and authority over the land for all the purposes of its road during the life of its charter, and, in addition to this, shows beyond controversy that turnpike companies have such an interest or estate in the land as may be seized and delivered by the Sheriff; for, if the company may receive the possession at the hands of the Sheriff, it ought not to be denied that the Sheriff may deliver the possession to a purchaser on execution. It will be seen, by reference to the authorities cited by appellants, that all of them, except one or two early Pennsylvania cases, apply to pure easements, to public rights

Wood et al. v. Truckee Turnpike Co.

of way, and to those rights *in gross* which give no general possession nor profit.

Again: it is urged by the counsel for appellant that the right to take *toll* is a part of the franchise, and that the company has lost this right by the sale, etc.

Whether the right to take toll be a part of the franchise or not, it is but a conditional right, and cannot be exercised until the company has a road in travelling order, nor after the company has lost its road by sale or otherwise. In other words, the right is limited to taking toll upon its own road, and does not extend to one which has passed from it, either by its voluntary act or by a judicial sale.

In this State, the remedy by sale of the franchise is not exclusive, for the same section (20th) which provides for a sale of the franchise also provides for a sale of all the corporate property, both real and personal, on execution. A particular mode is required for the sale of the franchise, but the other property is to be sold as in other cases. When the judgment creditor elects to sell the franchise, he must bid the full amount of his judgment, and satisfy it, so that he cannot afterward look to the personal liability of stockholders. If his judgment is twenty thousand dollars, and the franchise is only worth five thousand dollars, he cannot sell the franchise for its value and then resort to the stockholders for the balance, but must allow the sale to satisfy the judgment.

George R. Moore, also for Respondent.

The interest of the defendant in this road is the same as that of any party upon the public lands of which he has the peaceable and exclusive possession, and on which he has made valuable improvements. This interest, under the statutes of this State, and under numerous authorities, can be seized and sold under execution in the same manner as other property.

The plaintiffs obtained a judgment against the defendant for a little less than ten thousand dollars, for work done and materials furnished in the construction of this very road, and it would be extremely hard and unjust if the defendant, after

the road had been built by the labor and money of the plaintiffs, could hold and enjoy the fruits and benefits of their toil without being compelled to pay for its construction.

The defendant has the exclusive possession, management, and control of this road, and this constitutes a perfect title as against the whole world, except the Government and its grantees.

Section two hundred and seventeen of the Practice Act provides that "all goods, chattels, money, and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property seized and held under attachment in the action, shall be liable to execution. Shares and interests in any corporation or company, and debts and credits, and all other property, both real and personal, or any interest in either real or personal property," etc., shall be liable to seizure and sale under execution. No more comprehensive and explicit language than this could be used. Under it, every species and character of property, not exempt by law, and any interest therein of every kind and nature, may be levied upon and sold. Now, is the possession, rights, and claim of the defendant in this turnpike road *an interest in real or personal property*? If so, it can be sold under execution and conveyed by the Sheriff; if not, the company has no interest whatever in the road, and no right or power to defend this action.

"Property," says Mr. Chief Justice Spencer, in *Jackson v. Housel*, 17 John. 283, "is the exclusive right of possessing, enjoying, and disposing of a thing; it is the right and interest which a man has in lands and chattels to the exclusion of others, and the term is sufficiently comprehensive to include every species of real and personal estate."

In connection with his many other fallacies, appellant's counsel argues that the interest of defendant in this road is a mere easement over the land over which the road runs. The company undoubtedly has an easement or right of way—but it has much more. It had this before it commenced to build its road; but when it took actual possession, and performed

labor all along the line of the road in excavating, filling up, bridging, building toll houses, gates, etc., it acquired a good title to the soil as against the whole world, except the Government. The policy of the Government from the first organization of the State has been and is to give to the occupant of public lands such a title to and interest in the soil as to enable him to maintain possession by ejectment and other modes, and thus encourage him to develop the resources of the country.

The reason urged why ejectment will not lie is, that the Sheriff cannot put the party in possession. But this view, under our statute and under the authorities, will be found to be a mistake.

The objection was fully answered by Lord Mansfield in the case of *Goodtitle v. Alker*, 1 Burr, 133-145. He says that where the easement does not pass, the Sheriff delivers the possession subject to the easement.

You might as well say that ejectment would not lie for lands in the present possession of a tenant, because the Sheriff cannot deliver the actual possession; and yet it has been held in numerous cases that such action would lie, and was the proper remedy.

Although the interest of a person owning a church pew is only *usufructuary*, yet ejectment will lie for its recovery. (*Baptist Church v. Wetherell*, 3 Paige, 296; *Ithaca Church v. Bigelow*, 16 Wend. 32.)

It is a well settled rule of the common law that ejectments will lie wherever the right of entry exists, and the interest is tangible. It will lie for anything attached to the freehold whereof the Sheriff can deliver possession.

If it will lie for things attached to the lands, it most certainly ought to lie for the land itself.

It will lie for a coal mine. (*Comyn v. Kynets*, Cor. Jac. 150; *Comyn v. Wheatly*, Noy, 121.) Also for a fishery. (*King v. Old Arlesford*, 1 T. R. 358.) Also for a mining claim. (*Pennsylvania Mining Company v. Owens*, 15 Cal. 136; *Lowe v. Alexander*, 15 Cal. 302.) Also for the right to herbage or

grass. (*Wheeler v. Toulson*, Hard: 330; Adams on Ejectment, 24.)

By the Court, SHAFTER, J.

This is an action of ejectment. It is averred in the complaint that the defendant is "a body politic and corporate, duly organized under and by virtue of the laws of the State of California;" that "on the 27th day of May, 1862, the said plaintiffs were seized and possessed of and lawfully entitled to the possession of all that certain turnpike road and the land upon which the same has been constructed, built, and excavated," lying between certain *termini* named; "said road being about fifty feet in width, bounded on each side by the public lands of the United States, and wholly within said County of Sierra; also, all the bridges, toll gates, and toll houses upon said road and the line thereof, and attached thereto; together with all and singular, the hereditaments, rights, and privileges unto the said road, land, bridges, toll gates, and toll houses, belonging or in anywise appertaining. * * * And being so seized and possessed and entitled to the possession of the above described property and premises, the defendant, by its agents, on said 27th day of May, 1862, wrongfully and unlawfully entered upon the same, and wrongfully and forcibly ejected the plaintiff therefrom, and still wrongfully withholds the same and the possession thereof from the plaintiffs."

The answer admits that the defendant is a corporation, duly organized, etc., but denies all the other allegations.

The trial was by the Court. The defendant appeals from the judgment and from the order overruling defendant's motion for a new trial.

The plaintiffs, at the trial, to prove their title alleged in the complaint, offered in evidence the judgment roll in an action brought by them against the defendant, by which it appeared the plaintiffs, on the 23d day of September, 1861, recovered a judgment against the defendant for the sum of nine thousand eight hundred and forty-eight dollars. They also offered in evidence an execution issued upon said judgment, together

with the officer's return thereon, showing that the Sheriff on the 28th of October, 1861, levied "upon all the right, title, interest, claim, and property of the Truckee Turnpike Company in and to the Truckee Turnpike Road, a highway," etc.; and "advertised all the above described property for sale at public auction," etc. * * * "And on the 23d day of November, 1861, * * * sold the same to D. S. Wood and son for the sum," etc. The plaintiffs also offered in evidence the Sheriff's deed to the plaintiffs. The deed is not inserted in the record, but we shall assume its subject matter to be identical with the subject matter levied and advertised and sold, viz: "All the right, title, interest, claim, and property of the Truckee Turnpike Company in and to the Truckee Turnpike Road, a highway," etc.

The defendant objected to the introduction of these documents, and on grounds sufficiently comprehensive to include all the questions of error that we shall have occasion to consider.

The discussions in this case have taken a wide range, and involve questions of law of great practical moment, which have not been passed upon as yet in this State by the Court of last resort. In considering the case we shall, however, refrain from passing upon questions a decision of which is not necessary to a just determination of the appeal upon its merits.

The general question raised by the record is, whether the plaintiffs by the Sheriff's deed acquired any property rights, and if they did, then were the rights so acquired of the character recognized by the law as the basis of an action of ejectment.

1. The franchise of the defendant did not pass by the Sheriff's deed, nor by the Sheriff's return under the Act of 1850, (Wood's Digest, 118, Sec. 24,) and for the following reasons: Franchises are special privileges conferred by Government on individuals, which do not belong to the citizens of the country generally by common right. (A. & A. on Corps. Sec. 4.) The persons to whom such privileges are granted hold them in personal trust, and therefore they cannot be transferred by

forced sale, (*Munroe v. Thomas*, 5 Cal. 470; *Thomas v. Armstrong*, 7 Cal. 286,) nor by voluntary assignment (Redfield on Railways, 419-422,) unless by the permission of Government, and even then, if a special mode of transfer is pointed out, that mode must be followed. Therefore the franchises of the defendant did not pass to the plaintiffs by the Sheriff's return nor by his deed, for the mode of sale prescribed by the Act of 1850 was not followed.

Again: the sale does not purport to have been a sale of the franchises of the company, and for that reason the plaintiffs can have no interest in them. All that was offered for sale, and all that the plaintiffs bought was the "road." Even if the plaintiffs by their purchase acquired a title to the "road," still they could not claim the franchises as appurtenant to the road, for franchises are principal things, and lie in grant as such. They are appurtenant to nothing.

2. The plaintiffs acquired nothing by the purchase of the "road" to which the action of ejectment has any remedial relations. "Road" is a legal term, strictly synonymous with the term "way," and in the complaint, and throughout all the title papers of the plaintiffs, their identity is fully recognized. A way is an easement, and consists in the right of passing over another man's ground. (Wash. on Eas., 161.) It is an incorporated hereditament, a servitude imposed upon corporeal property, and not a part of it. It gives no right to possess the land upon which it is imposed, but a right merely to the party in whom the way is vested to enjoy the way. Neither is it considered that the owner of the way is entitled, by reason of such ownership, to a participation in the rents and profits arising from the land upon which the easement is imposed. (Wash. on Eas., 8.) A deed of a way or of a right of way would pass to the grantee no title to or interest in the land. It may be true, as was held in *Sparks v. Hess*, 15 Cal. 186, where the owner of a private bridge, who also owned the land on which the bridge rested, had conveyed the "bridge and all the privileges and appurtenances appertaining or in anywise belonging to said bridge," that the deed passed the title of the

land on which the bridge rested. In the first place, a bridge is a visible structure, and not in itself an incorporeal hereditament; and in the second place, the abutments of a bridge are considered a part of it. (*King v. West Riding of York*, 7 East. 588; *Bardwell et al. v. Jamaica*, 15 Vt. 438.) The fact that a certain descriptive term used in a deed has been held to include what it obviously does include, is certainly not authority for holding that another term includes what it obviously does not include. The authoritative definition which we have given of the term "way" shows that neither land, nor rents of land, nor profits of land, nor any possessory rights in land, are included in its meaning. If the plaintiffs, then, took anything by force of the term "road," they took nothing but a right of way. But it is well settled that an action of ejectment will not lie in favor of a party to try his right to enjoy an easement, nor will it lie against one claiming an easement in land to try his right to enjoy it. (*Child v. Chappel*, 9 N. Y. 246, 251; Wash. on Eas., 568.) And the reason is obvious—the very subject matter of controversy is incorporeal. It is for that reason that an easement "lyeth in grant, and not in livery." It is for that reason that the owner of a way cannot be disseized or otherwise ousted of it; he can only be "disturbed" or "obstructed" in its enjoyment, and for such injury the remedy is by action on the case at common law, or by bill in equity. The rule is stated in Tillinghast's *Adams*, p. 19, as follows: "Ejectment is maintainable only for corporeal hereditaments."

3. But there is another ground upon which we hold that the plaintiffs acquired no title to the land traversed by the road, and no possessory interest in it. The defendant had no such title or interest to be transferred. The reason is found in the want of capacity in the company to hold lands by title. The capacity of corporations to take and hold lands in full ownership was unlimited at common law. The vast social and political abuses engendered by this state of things induced the passage of the statutes of mortmain, ranging from the 9th of Henry III to the 8th of George II. The Act of 1850, pre-

viously referred to, is a statute of mortmain, in so far as it limits the capacity of corporations to take and hold lands. The provision is as follows: "They (corporations) may take and hold such real and personal estate as the purposes of the corporation shall require." Under this provision the capacity is not absolutely fixed. It depends upon occasion. An estate in land adequate to the necessities or reasonable convenience of one class of corporations might be inadequate to the needs of another. We consider, however, that a turnpike company, *prima facie*, has no occasion for any larger interest in land than a way over it. This has been fully demonstrated, as a general truth, by a wide and unbroken observation and experience. On this point the authorities are numerous and decisive. We cite *Tucker v. Tower*, 9 Pick. 108; 3 Kent, 532, 8th ed.

It appears that the lands traversed by the Truckee Turnpike are public lands of the United States, and it is urged that inasmuch as settlers on public lands are considered as the owners of their possessory claims as against all the world except the Government, and are therefore allowed to sue and are held liable to be sued in ejectment, that symmetry of decision requires that the like rule should be applied in the case of turnpike corporations whose roads cross public lands. The argument proceeds upon a false analogy. Settlers, as natural persons, have an unlimited capacity to acquire estates in land, and to hold them indefinitely when acquired. Turnpike companies, *prima facie* at least, can take no estate in land above the level of a servitude upon it. Again: the possessory interests of the settlers named are not analogous to easements or servitudes.

4. But the plaintiffs did not acquire a title to the "road" or way, which, so far as words are concerned, they purchased at the Sheriff's sale.

The way levied upon and sold as the property of the company did not belong to it by any proprietary right. The way was *publici juris*. Its uses were not only public, but it belonged to the public by title. All the interest that the company had in the matter was by reason of the fact that it

Willis v. Farley et al.

had both the right and the power to collect tolls on the line of the road, as a compensation for the public service it had performed by opening a public road for the public good. In legal theory, "A turnpike is a public highway, established by public authority for public uses, and is to be regarded as a public easement, and not as private property. The only difference between this and a common highway is, that instead of being made at the public expense in the first instance, it is authorized and laid out by the public authority, and is made at the expense of individuals in the first instance; and the cost of construction and maintenance is reimbursed by a toll levied by public authority for this purpose. Every traveller has the same right to use it, paying the toll established by law, as he would have to use any other public highway." (*Commonwealth v. Wilkinson*, 16 Pick. 176.) In pursuance of this doctrine it has been considered (*Erie and Northeast Railway v. Casey*, 26 Penn. 287) that the land is not disburdened of a railroad easement by the surrender, forfeiture, or other determination of the charter, but remains subject to it still as a subsisting public right.

Without passing upon the other interesting and important questions raised by counsel, we consider that the ruling of the Court below, in admitting the plaintiff's documentary evidence of title, was erroneous; and inasmuch as the facts found by the Court do not warrant the judgment, the judgment is reversed, and the cause remanded with directions to enter judgment, upon the findings, for the defendant.

T. N. WILLIS v. A. B. FARLEY, MARY FARLEY,
JAMES M. SHIRLEY, JACOB H. SHIRLEY, JOHN
Y. SHIRLEY, THOMAS SHIRLEY, SARAH SHIR-
LEY, AND LUOY SHIRLEY.

DISCHARGE AND ASSIGNMENT OF MORTGAGE.—A mortgage is a mere incident of the debt it was intended to secure, and passes by an assignment of the

Willis v. Farley et al.

debt, is discharged by a payment of the debt, and is barred by the Statute of Limitations when the debt is barred.

JURISDICTION OF DISTRICT COURTS IN EQUITY.—The District Courts, by Article VI, section 6, of the Constitution, have "original jurisdiction in all cases in equity," and an Act of the Legislature depriving them of that jurisdiction, or transferring it to any other Court, is unconstitutional and void.

WHAT COURT CAN FORECLOSE MORTGAGES.—The foreclosure of a mortgage and sale of the mortgaged property for the payment of the debt thereby secured, is a "case in equity," of which the District Courts alone can take cognizance; and the Probate Courts are not competent to afford the full relief to which mortgagees are entitled.

CREDITOR OF DECEASED MAY FORECLOSE MORTGAGE.—A creditor of the estate of a deceased person, whose debt is secured by mortgage, may, after having presented his claim for allowance to the executor or administrator and Probate Judge, whether it be allowed or rejected, proceed at once to foreclose his mortgage in the District Court.

ACT OF ONE OR MORE ADMINISTRATORS.—Administrators in law are deemed but as one person, and the act of any one of two or more co-administrators, in a matter within the sphere of his authority as administrator, is the act of all.

SAME — ALLOWANCE OF CLAIM.—Where there are two or more administrators, the allowance of a claim against the estate by one is the act of all, and binding upon all.

SAME — FILING OF IN PROBATE COURT.—The allowance of a claim against the estate by the administrator and Probate Judge prevents the claim from becoming barred by the statute, even if it is not filed in the Probate Court.

WHEN HEIRS CANNOT PLEAD SUIT AGAINST ADMINISTRATOR IN BAR.—Where a claim against an estate secured by mortgage was presented to the administrator and Probate Judge, and allowed, and after the administrator had presented his final account and been discharged, the owner of the mortgage commenced an action against the administrator in the District Court to foreclose his mortgage, and obtained a decree foreclosing the same, and for a sale of the mortgaged property; *held*, that this decree was no bar to a subsequent suit against the heirs of the deceased to enforce the lien of the mortgage, and for a sale of the mortgaged property.

DISCHARGE OF ADMINISTRATOR.—When an administrator has presented his final account and been discharged, he is no longer the representative of the estate, and has no authority to appear for or bind it in any manner.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

The facts are stated in the opinion of the Court.

H. O. Beatty, for Appellants.

The first question presenting itself, then, is, was the claim regularly presented to the administrators for rejection or allowance, and were the regular steps taken thereafter? The facts are, it was presented to *one* administrator, and by him allowed,

and then to the Probate Judge, and by him allowed; to the other administrator it was never presented. Here, the question arises: is this presentation to one only of the administrators a compliance with the requirements of the statute? I am decidedly of the opinion it is not. But, for the present, let us waive this point, admit that the presentation was correct, and the allowance by *one* administrator and the Probate Judge sufficient to establish the claim against the estate. What other steps were necessary to enforce the claim? After the allowance, the next thing is to *file* the claim. Section one hundred and thirty of the Act in relation to estates reads as follows: "Every claim which has been allowed by the executor or administrator shall be filed in the Probate Court, and be ranked among the acknowledged debts of the estate, to be paid in due course of administration." There is no time fixed within which the claims are to be filed; but surely they must be filed before the final decree of distribution of the estate, or else the claim must be treated as abandoned. It does not appear from the complaint in this case that the claim was ever filed in the Probate Court as a claim against the estate. If it was regularly allowed, and filed as a claim against the estate, the Probate Court obtained competent and *exclusive* jurisdiction of the same as a claim *allowed*, and must enforce the sale of the property and the distribution of the proceeds. The parties interested could not be subjected to the expenses of a suit in equity, where the claim was allowed as a valid *claim* against the estate.

It seems to me, however, the proper view of this case is this: The claim never was properly presented to the administrators for rejection or allowance. Sections one hundred and thirty, one hundred and thirty-one, and one hundred and thirty-two, all relate to the presentation of claims, and all speak of the executor or administrator in the singular. No allusion is made to the supposable case of a plurality of the *executors* or *administrators*. There is nothing definite in the language of the statute in regard to how claims should be presented when such plurality of executors or administrators exists.

Willis v. Farley et al.

But it seems reason and common sense would require the consent of all the representatives of deceased to make a claim valid against the estate.

If this view of the subject is right, then there was no proper presentation of the claim to the administrators within the time limited by the law, and the claim is barred by the statute as a claim against the estate. If it is barred by the statute as against the estate, it is *equally barred against those holding the property* of deceased which was included in the mortgage. (*Graham v. Vining et al.*, 2 Texas, 433-447.)

If the claim was duly presented and allowed, the Probate Court obtained exclusive jurisdiction, and no action thereafter could be maintained in the District Court. If, on the other hand, the presentation to one administrator was not sufficient, the claim is bound under the one hundred and thirty-first section of the Act in relation to estates.

Again: if the District Court never could, under the circumstances of the case, obtain jurisdiction in this case, did it not obtain that jurisdiction in the suit brought in July, 1862, against J. M. Shirley, the administrator who approved the account? If the District Court obtained jurisdiction in that case, then any irregularity in the decree should have been remedied by opening up that case and correcting the decree—not by bringing a new suit. (*Goodenow v. Ewer*, 16 Cal. 470; *Boggs v. Hargrave*, 16 Cal. 566.)

Budd & Carr, for Respondent.

The decree in the case of *Willis v. Shirley, Administrator*, was simply a nullity. There was no personal judgment. At the time of the commencement of that suit, Shirley was no longer administrator of the estate of Thomas J. Shirley. That decree bound no property, and could affect no person. Clearly, a decree of foreclosure and sale in a suit in which a person who had no interest in the land mortgaged, and who is not liable for the debt, was sole defendant, can be no bar to a subsequent action against the real parties in interest. To constitute a judgment or decree at bar, it must be between the

same parties, and they must stand in the same relation and character. (2 Phillips' Ev. 8.)

In this case, appellant did not sue any one as administrator. He merely seeks to enforce a specific lien on certain real estate, and to foreclose the interest of certain parties therein, no matter how they obtained that interest, (and one of whom, Farley, was not heir of the deceased.) No judgment is sought over against any of the defendants, nor to be enforced as a claim against any estate.

The statute will not allow an administrator to be sued, unless on a claim presented and rejected, but it does not prevent the District Court—a Court of general equity jurisdiction—from enforcing a specific lien against real estate because the person creating the lien had since died, and his administrator had become discharged from liability without paying the claim. After the administrators were discharged, and the real estate surrendered up to the heirs, the administrators were no longer necessary parties to a suit to enforce the specific lien on the land. True, if the claim had not been presented for allowance within proper time, it would have been barred against the heirs. (*Graham v. King*, 2 Texas, 433; Belknap's Probate Practice Act, Sec. 130.) So if rejected, if suit is not brought within three months after it becomes due. (Same Act, Sec. 134.)

It has never been held that in event of the discharge of an administrator that a person having a specific lien on lands of an estate cannot enforce the same in the District Court, and more especially when the land is a homestead, subject only to the lien, and cannot be administered on or ordered sold by the Probate Court to pay the debts of the deceased or for any other purpose. (*Estate of Tompkins*, 12 Cal. 125; *James et al. v. James*, 23 Cal. 415.) Even a mere claim, not secured by a lien, if presented and allowed, but not paid, and the administrator is discharged before the estate is fully administered, and the balance of the estate passed over to the other heirs, can be enforced by suit against the heirs in the District Court. (*Montgomery v. Carlton*, 18 Texas, 736.)

Willis v. Farley et al.

By the Court, CURREY, J.

Thomas J. Shirley, being indebted to Rufus Lowell in the sum of twelve hundred dollars, made and delivered to him a promissory note for the amount, and afterwards, in December, 1858, for the purpose of securing its payment according to the tenor and effect of the note, executed and delivered to Lowell a mortgage on two tracts of land—the one situated in the County of Tuolumne, and the other in the County of San Joaquin. Shirley died in November, 1859, intestate, leaving him surviving his wife (who, before the commencement of this action, became the wife of the defendant Farley) and seven children, his heirs-at-law, and also leaving an estate of which the mortgaged premises were a part. In the same month letters of administration were granted by the Probate Court of Tuolumne County to J. H. and J. M. Shirley, sons of the deceased, who immediately thereafter entered upon the duties of their office. Early in January, 1860, the note and mortgage, properly verified, were presented to one of the administrators—J. M. Shirley—for allowance, and the same were allowed as a claim against the estate of the deceased, and on the day following his claim was presented to and allowed by the Probate Judge. It does not appear that it was ever filed in the Probate Court.

The mortgaged premises situated in San Joaquin County were, in October, 1860, set apart by the Probate Court for the use and benefit of the widow and minor children, subject to the mortgage; and in December of the same year, the administrators rendered their final account for settlement, and the same was allowed and confirmed by that Court, and a distribution of the assets of the estate was decreed, and afterwards, in May, 1861, the administrators were finally discharged from their office and trust as administrators.

The claim of Lowell was not entered into the account submitted upon final settlement, nor was any portion of it paid in the distribution of the assets, or otherwise. During the administration of the estate, the plaintiff became the owner and

WILLIS v. FARLEY et al.

holder of the note and mortgage, and sometime in 1862 commenced an action in the District Court for San Joaquin County, against J. M. Shirley, as the administrator of the estate of his father, for the foreclosure of the mortgage, and such proceedings were had in the action that, upon the default of the defendant therein, a decree was entered, ascertaining the amount due on the note and for the sale of the mortgaged premises. No further proceedings were taken under this decree; but upon discovering that the administrators had been discharged before such action was instituted, the plaintiff brought this action against the defendant Farley and his wife, and the children of the deceased, for the foreclosure of the mortgage.

In this action the plaintiff has not sought any other decree than for the foreclosure of the mortgage and the sale of the premises for the payment and satisfaction of the sum due on the note and for the costs of suit.

To the complaint the defendants, Farley and his wife, demurred on several grounds, and the demurrer having been overruled, the same defendants, and J. M. Shirley, answered. The other defendants, some of whom were infants, represented by a guardian *ad litem*, appeared, but made no answer.

The answer filed admitted all the material allegations of the complaint, and set up as an affirmative defense that the portion of the mortgaged premises situate in Tuolumne County had been sold under an order of the Probate Court during the administration, and that the proceeds of the sale had been applied, under the direction of the Court, to the payment of debts of the estate; and, also, that the note in question was never filed in the Probate Court.

At the trial of the action the Court rendered a decree for the foreclosure of the mortgage and for the sale of the mortgaged premises situated in the County of San Joaquin, for the payment and satisfaction of the amount found to be due on the note, and for the costs of the suit, but no personal judgment was rendered against any of the defendants.

From this decree all the defendants have appealed, and the grounds upon which they rely for a reversal are, in substance:

First—That the debt evidenced and secured by the note and mortgage was a simple money claim against the estate of the deceased, and that it was necessary to present such claim, properly authenticated, to the administrators and to the Probate Judge for allowance; and that the presenting of the same to one only of the administrators, and obtaining his allowance thereof, with its approval and allowance by the Probate Judge, was abortive, and that therefore the claim became barred by the one hundred and thirtieth section of the Probate Act.

Second—That the claim, if duly presented and allowed, was not filed in the Probate Court, and therefore it should be regarded as abandoned.

Third—That if the claim can be deemed as duly presented and allowed, and that it thus became ranked among the acknowledged debts, to be paid in due course of administration, without having been filed in the Probate Court, then it became a *quasi* judgment in the Probate Court, and no action could thereafter be maintained in the District Court for the recovery of the debt by a foreclosure of the mortgage.

Fourth—That if the District Court could acquire jurisdiction in such a case, then the decree obtained in the action of the plaintiff against J. M. Shirley, as administrator, after the final settlement and discharge of the administrators, was a bar to this action.

In *Sheldon v. Sill*, 8 How. 450, the Court, in passing upon the character of a bond and mortgage as a "chose in action," say: "In equity the debt or bond is treated as the principal, and the mortgage as the incident. It passes by the assignment or transfer of the bond, and is discharged by its payment. It is, in fact, but a special security or lien on the property mortgaged." The doctrine that a mortgage is a mere incident of the debt which it is executed to secure, and follows the same in whosoever hands it may come by transfer or assignment, and that it remains of subsisting validity so long as the debt so remains, and becomes extinguished by the

Willis v. Farley et al.

payment of the debt, and barred by the Statute of Limitations, when the principal of which it is the incident becomes barred, may be regarded as the settled law of this State. *Ord v. McKee*, 5 Cal. 516; *Peters v. Jamestown Bridge Co.*, 5 Id. 336; *Guy v. Ide*, 6 Cal. 101; *McMillan v. Richards*, 9 Cal. 409; *Naglee v. Macy*, Id. 428; *Haffley v. Maier*, 13 Cal. 14; *Johnson v. Sherman*, 15 Cal. 293; *Lord v. Morris*, 18 Cal. 484; *McCarthy v. White*, 21 Cal. 501.) Thus, it is to be observed that debts secured by mortgage are generally subject to the same rules of law applicable to those which are not secured; and it will hereafter be seen that the only advantage which a mortgage creditor of an estate has over others, is in respect to his remedy for obtaining payment of the amount which may be his due.

At the time letters of administration were granted upon the estate of the deceased, Shirley, the Act concerning estates of deceased persons (Wood's Dig. 404) required all persons having claims against the deceased to exhibit them, with the necessary vouchers, to the executor or administrator, within ten months after notice to the creditors so to do, and declared that claims not presented within the time prescribed should be barred forever; *provided*, that claims not then due, or that were contingent, might be presented within ten months after they might become due or absolute. And the same Act further provided, that "No holder of any claim against an estate shall maintain any action thereon, unless the claim shall have been first presented to the executor or administrator." In the cases which have come before the Supreme Court in this State, involving a construction of the provisions of the Act here referred to, it has been held necessary to present debts secured by mortgage to the legal representative and the Probate Judge for allowance, in order to secure their payment out of the general estate, and to prevent them from being barred by the statute. (*Ellissen v. Halleck*, 6 Cal. 392; *Pico v. De La Guerra*, 18 Cal. 428; *Fallon v. Butler*, 21 Cal. 32.) The language of the Probate Act on this subject is plain, and, it seems to us, imperative in its terms. The manifest object

Willis v. Farley et al.

of the law was to subserve the interests of those concerned in the estates of deceased persons, by affording to the legal representatives the necessary information respecting existing claims, and a reasonable time within which to pay them, without litigation and unnecessary expense. A debt secured by mortgage on specific property, if claimed as due from the estate, forms no exception to the rule prescribed by the statute. If presented and allowed, it is placed in the list of acknowledged debts, to be paid in the due course of administration.

In some of the earlier cases it was held, that a mortgage creditor whose claim was allowed could not maintain an action in the District Court for the foreclosure of his mortgage, but that his debt must abide the administration and settlement of the estate under the supervision of the Probate Court. (*Ellissen v. Halleck*, 6 Cal. 392; *Faulkner v. Folsom's Executors*, 6 Id. 412.) But the doctrine of these cases, in this respect, may be said to have been disapproved by the Court in its later decisions, mainly, if not entirely, on the ground that the District Courts had, under the Constitution as it then existed, original jurisdiction, in law and equity, in all cases where the amount in dispute exceeded two hundred dollars exclusive of interest. (*Belloc v. Rogers*, 9 Cal. 123; *Hentsch v. Porter*, 10 Cal. 559; *Fallon v. Butler*, 21 Cal. 80.) By the Constitution as amended, it is provided that the District Courts shall have original jurisdiction in all cases in equity. (Article VI, Section 6.)

The foreclosure of mortgages, and the sales of the premises for the payment of debts thereby secured, are matters of purely equitable cognizance. Powers which are granted by the Constitution cannot be taken away by legislative enactments, and remedies which are secured to the citizen by the organic law cannot be destroyed by a department of the Government that exists in subordination to the Constitution.

The Probate Court does not possess the power to afford the relief to mortgagees to which they may be entitled in the tribunals created for their use by the Constitution; and as a mortgage creditor has the right to foreclose his mortgage upon

condition broken, he can invoke the aid of a Court competent to afford adequate relief. Hence it is that a creditor of an estate of a deceased person, whose debt is secured by mortgage, may, after having duly presented it to the executor or administrator and Probate Judge, whether it be allowed or rejected, proceed at once to foreclose his mortgage in the proper Court of original equitable jurisdiction.

It is objected by the appellants that the debt which is the subject of this action was presented to and allowed by one only of the administrators, and also that it was not filed in the Probate Court; and it is also insisted that because it was not allowed by the other administrator also, and filed in the proper Court, it became barred by the statute. We do not regard this objection as well founded. At common law, executors were esteemed as but one person, representing the testator, and therefore the acts done by any one of them which related either to the delivery, gift, sale, payment, possession, or release of the testator's goods, were deemed the acts of all. (4 Bacon's Ab., Tit. Executors and Administrators, D.) The reason given for this rule by Lord Hardwicke was, that each executor was considered as entirely representing the testator. (*Hudson v. Hudson*, 1 Atk. 460.) And though it was determined, in a few early decisions of the English Court of Chancery, that administrators had no such power, yet subsequently, in *Jacomb v. Harwood*, 2 Vesey, Sr., 267, it was decided that one administrator stood on the same ground and foundation as one executor. In *Murray v. Blackford*, 1 Wend. 617, Mr. Chief Justice Savage, in speaking of the subject, said: "The difference between the powers of executors and administrators in this respect was said to be founded in the different sources from which the powers were derived — the one being by the appointment of the testator, the other by the appointment of law. I apprehend there never was any reason for the supposed distinction. Their liabilities and responsibilities were ever the same, and their powers should be so."

In *Dean v. Duffield et al.*, 8 Texas, 235, which was a case arising under a statute substantially the same as our own, the

plaintiff had presented his claim, duly authenticated, to one only of several administrators, who refused to allow it, and in his action for the recovery of the rejected demand he alleged the fact of having so presented it and its rejection. The administrators who were defendants demurred, and the demurrer was sustained and the case dismissed. On the appeal, the judgment on demurrer was attempted to be supported on the ground that it appeared that the claim had been presented to and rejected by one only of the administrators. But the Court held this objection untenable, and declared it to be the settled law that joint administrators stand on the same footing and are invested with the same authority in respect to the administration of the estate as co-executors, and, like them, are regarded in law as one person, and consequently, that the acts of one of them, in respect to the administration, are deemed to be the acts of all, inasmuch as they have a joint and entire authority over the whole property. (See, also, *Gage v. Johnson*, 1 McCord, 492.)

These well considered authorities we regard as decisive of the question.

Another objection made by the appellants is that the claim, as presented and allowed, was not filed in the Probate Court. The one hundred and thirty-third section of the Probate Act, as it stood before it was amended in 1861, provided that, "Every claim which has been allowed shall be filed in the Probate Court," etc. The statute did not declare by whom it should be so filed; and whether this duty was to be performed by the creditor or administrator cannot affect the question, as the statute has specified the *presentation* of the claim as the only act essential to save the debt from becoming barred. (Sections 130, 136.)

The remaining objection to be considered is that the decree obtained by the plaintiff against J. M. Shirley, as administrator, after the final settlement and discharge was a bar to this action. In the action against J. M. Shirley, as administrator, the plaintiff only sought to foreclose the mortgage and to obtain satisfaction of his demand by a sale of the mortgaged

Miller v. Stewart et al.

property. J. M. Shirley was sued as administrator, and through him, in his supposed representative capacity, it was sought to obtain a foreclosure that would bind not only the estate, but all those who might be interested in the property mortgaged. When that action was commenced and the decree was entered there was no such administrator, and hence, the whole proceeding was of no binding validity—it was to all intents and purposes a nullity; for, by the discharge of the administrators, they were as completely separated from the business of the estate as if they had been dead; and J. M. Shirley had no right to appear in or be a party to any suit as the representative of the estate which had passed from his hands, and respecting which his authority had long before then wholly ceased. At that time he was to the estate *functus officio*. (*Taylor v. Savage*, 1 How. 284.)

The questions raised by the demurrer are comprehended in the objections of the appellant, which we have already considered, and hence, no further notice of them is required. We are of opinion the decree should be affirmed.

Decree affirmed.

HENRY MILLER v. GEORGE W. STEWART, CHAUNCEY STEWART, AND SYLVESTER MARSHALL.

FRAUDULENT INTENT—QUESTION OF FACT.—In an action where one of the issues raised is a question of fraudulent intent in the sale or disposition of property, the fraudulent intent is a question of fact alone, to be left solely to the determination of the jury.

INSTRUCTIONS ON QUESTIONS OF FACT.—In such cases it is error for the Court to instruct the jury as to the effect or force of the evidence upon the question of fraudulent intent.

SAME.—The Constitution prohibits Judges from charging juries with respect to matters of fact, except to state the testimony and declare the law resulting from the evidence.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

George W. Stewart and Chauncey Stewart, on the 21st day

Miller v. Stewart et al.

of August, 1862, recovered a judgment against D. C. Miller and the plaintiff, Henry Miller, in the District Court of Sacramento County, and George Stewart, on the same day, recovered a judgment in the same Court against the same parties.

Executions were issued on said judgments and placed in the hands of defendant Marshall, as Sheriff, who, by virtue of the same, levied upon and took from the possession of Henry Miller a span of horses and wagon.

This action was brought to recover possession of the same, or their value.

Plaintiff averred in his complaint that he was a farmer by occupation, and that the team was exempt from execution.

The answer denied that plaintiff was a farmer, and averred that he was engaged in the livery business as a co-partner of D. C. Miller; that the team at the time of the levy was the joint property of plaintiff and D. C. Miller, and that about the 7th day of August, 1861, plaintiff and D. C. Miller combined and confederated with one B. Cahoon, to defraud the Stewarts and their other creditors, and made to said Cahoon a fraudulent sale of all their visible property, with the exception of the property sued for, for the purpose of preventing the Stewarts from collecting their judgments, and to enable Henry Miller to claim the property in dispute as exempt from execution.

Harrison & Estee, for Appellants.

The Court charged the jury, "That there was no *sufficient* evidence from which they could infer generally that the transactions which took place about that time were fraudulent as to creditors."

This we consider clearly erroneous. It is a question of fact, strictly for the jury, if there is any evidence or *circumstances* tending to establish the fact. In the case of *Kendall v. Hughes*, 7 B. M. 370, the Court say: "The instruction given for the plaintiff, that the fraudulent intention cannot be presumed, but must be proved like any other fact, is obviously misleading. Fraud, or any other fact, may be presumed, if

there be sufficient evidence of *other facts* which authorize the inference of fraud."

Robert Robinson, for Respondent.

By the Court, SANDERSON, C. J.

This is an action brought to recover certain personal property described in the complaint, or its value in the event a delivery thereof cannot be had. The principal question involved in the case is, as to the *bona fides* of certain transactions or sales on the part of the plaintiff and his brother and co-partner, alleged to be fraudulent as against the defendants, who were creditors of the firm. Among other instructions given by the Court is the following which was excepted to by the defendants, and is here assigned as error: "The circumstances under which this sale of the interest in the property by the partner, D. C. Miller, to Henry Miller took place, have been detailed to you by the witness (Miller) himself; and there is no sufficient evidence in the case from which you could infer generally that the transactions which took place about that time were fraudulent as to creditors. You do not know—it was not elicited by the counsel for either party—whether or not there was a fraudulent misappropriation of the funds raised about that time. Indeed, these circumstances have not so far been detailed to you as for you to find fraud in the transaction. I instruct you upon that point, merely as a matter of law."

Section twenty-third of the Act concerning fraudulent conveyances and contracts (Wood's Dig. 107) reads as follows: "The question of fraudulent intent in all cases arising under the provisions of this Act shall be deemed a question of fact, and not of law" * * *. Whether the transactions in question were entered into by the Millers with intent to hinder, delay, or defraud their creditors, is a question which the statute leaves to the determination of the jury upon such evidence as may be presented for their consideration. The intent is expressly declared to be a question of fact, and must, there-

Alexander et als. v. Greenwood et als.

fore, be for the jury, and not the Court. In the instruction above quoted, the Court, in effect, takes the question from the consideration of the jury, and assumes the decision thereof, notwithstanding the express prohibition of the statute. As a charge, it is also repugnant to the seventeenth section of Article VI of the Constitution, which provides "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law."

If there was no evidence whatever tending to support the allegation of fraudulent intent, we might disregard the error upon the ground that it is an error without prejudice; but there is some evidence in the record tending to establish the alleged fraud upon which the defendants were entitled to take the opinion of the jury. (*Pico v. Stevens*, 18 Cal. 376.) That there is such evidence, the language of the instruction itself implies. This disposes of the appeal, and makes it unnecessary to consider the remaining points made by counsel for the appellant.

The judgment is reversed, and a new trial is ordered.

W. D. ALEXANDER, JAMES PARSONS, JAMES HILL,
G. A. RICHARDS, WILLIAM WEINBEER, P. RY-
LAND, JOHN SUMMERS, SOLOMON GUESS, H.
BURGMANN, WILLIAM TREMAYNE, JOS. SUM-
MERS, M. MEYER, JOHN TREMAYNE, AND ALEX-
ANDER MURCHISON, v. OTIS GREENWOOD, J. D.
PATTERSON, AND JAMES MITCHELL, INTERVENOR.

MORTGAGE — SUBSEQUENT LIENHOLDERS.—The mortgagee of real estate cannot, by virtue of the lien of his mortgage alone, cut off the judgment creditors of the mortgagor who have, by virtue of their judgments, acquired a lien on the mortgaged property subsequent to the mortgage, from all recourse upon the mortgaged property.

FORECLOSURE OF MORTGAGE — PARTIES TO.—A judgment creditor whose judgment lien is subject to the lien of a prior mortgage is not concluded nor are his rights affected by a decree of foreclosure of the mortgage unless he was a party thereto.

SALE OF MORTGAGED PROPERTY BY JUDGMENT CREDITOR — EFFECT OF.—After the execution of a mortgage upon real estate, a judgment was rendered

Alexander et als. v. Greenwood et als.

against the mortgagor, which became a lien upon the mortgaged property; the mortgagee then foreclosed the mortgage, making the mortgagor alone a party defendant, had the mortgaged property sold under the decree, became the purchaser, and obtained a Sheriff's deed; afterwards the judgment creditor procured an execution upon his judgment, and had the property advertised for sale; the holder of the title under the Sheriff's deed filed a bill in equity to enjoin the sale; *held*, that he was not entitled to an injunction, and that the judgment creditor had a right to sell any interest in the land held by the judgment debtor at the rendition of the judgment or levy of the execution. *Held*, further, that the judgment creditor's equitable right of redemption not having been cut off by the foreclosure, he might, during the two years that his judgment was a lien upon the premises, sell under an execution, and purchase the legal title of the mortgagor, not only that he might assert his right of redemption at any time within the period allowed by the Statute of Limitations, but, also, that he might realize any other benefit or advantage that might accrue to him from the sale.

APPEAL from the District Court, Fifth Judicial District, Tuolumne County.

The facts are stated in the opinion of the Court.

George Cadwalader, for Appellant.

The owner of the judgment was neither a party to the foreclosure suit, nor to any of the transactions between the other parties.

He stood upon his judgment lien, which the law declares bound the estate of Daubenspeck for the period of two years, as well as any subsequent interest that Daubenspeck might acquire in the land.

He issues an execution, and the Sheriff is about to sell the interest of the judgment debtor in the land, when both himself and the Sheriff are perpetually enjoined at the instance of plaintiffs.

His right to sell is given by the first subdivision of the two hundred and tenth section of the Practice Act, and he is entitled to the fruits of his execution.

The objection of the respondent is confined to the quantity of the estate which the judgment lien covers; and where some estate is apparent on which the judgment lien attaches it is impossible in a proceeding of this kind to stop its being ripened into a deed without the judgment is paid.

It will likewise be observed that all the proceedings related in the bill were carried on in the face of our judgment and its lien.

We stood passive, granting nothing away—consenting to nothing. There stood our judgment lien as a monument to guide all persons dealing with the property. They may have treated it as “non-existent,” or considered it as worthless—nevertheless, such error of judgment on plaintiffs’ part does not diminish the vigor of the lien or make it cling to a smaller estate than that declared by law.

But again: we are not bound by the foreclosure—not being a party thereto; and, in any event, we have the right to sell and then redeem as against the purchaser at the mortgage sale or his grantees, at any time within the period of the Statute of Limitations. (*Macovich v. Wemple*, 16 Cal. 106; *Goodenow v. Ewer*, 16 Cal. 468.)

The point that because judgment was rendered in the foreclosure suit on the 23d of November, 1860, the case must have been commenced before the 19th, is untenable; because, as a matter of practice, it is well known that many suits are commenced and ended on the same day. If, however, this were true, it would go to show that Greenwood was not a party to the suit.

These considerations show the necessity of pleading the essential facts, where they exist to be pleaded.

H. P. Barber, for Respondent.

The case is identical in principle with that of A., being the owner of real estate, selling to B., (who has a judgment standing against him of record at the time,) and taking back a mortgage for the purchase money. There, though B. has an *apparent* legal seizin which would be bound by the judgment of record against him, yet, equity considers the whole as one simultaneous transaction, and prefers A.’s subsequent mortgage to the prior judgment against B.

The complaint shows inferentially and presumptively that

Alexander et al. v. Greenwood et al.

the Greenwood judgment was obtained after the commencement of the foreclosure suit by Winne.

Whether, as a matter of *fact*, the Greenwood judgment was entered before or after the commencement of Winne's suit to foreclose, Greenwood is still a *statute redemptioner*, his judgment having been obtained long subsequent to the date of the Winne mortgage, as is shown by the record. The decree of foreclosure takes effect *by relation* from the date of the mortgage, and the judgment creditor, if his judgment be obtained subsequent to the *date of the mortgage*, is still a subsequent encumbrancer, having a right to redeem under section two hundred and thirty of the Practice Act, though his *judgment may* be entered prior to the *decree of foreclosure*. (*McMillan v. Richards*, 9 Cal. 365; *Goodenow v. Ewer*, 16 Cal. 461.)

A subsequent encumbrancer (as a judgment creditor) has no right at all to *issue execution* after the purchaser has obtained a *Sheriff's deed* under a prior encumbrance. The Sheriff's deed takes effect by relation from the date of the prior judgment; the execution on the subsequent judgment directs the Sheriff to sell all the interest of the judgment debtor at the *date of the subsequent judgment*. But after the execution of the Sheriff's deed on the prior judgment, and its taking effect by relation from that date, the judgment debtor would have *no interest whatever to dispose of* at the date of the second judgment. If a subsequent judgment debtor could, under such circumstances, *issue execution* against the land, after Sheriff's deed to a purchaser under a prior judgment, this result would follow: that as a judgment is a lien for two years, the purchaser, though having a Sheriff's deed, could put no improvements on his land for two years, for fear that the land might be sold within that period under the subsequent judgment. The statute makes a judgment a lien for two years *only where the prior rights of third parties are not affected*. In case of sale under a prior judgment, the subsequent judgment creditor must enforce his right of sale under execution *before* Sheriff's deed under the prior judgment. *After* Sheriff's deed, the subsequent judgment creditor is barred both of *sale by execution*

Alexander et al. v. Greenwood et al.

and his *statutory* right of redemption under *all* circumstances, and there remains to him *solely*, not a right of sale under execution, but simply what may be termed his common law *right of redemption*.

This common law right of redemption, even, does not exist in the present case, for to enforce that, the judgment creditor must have a lien *on the whole premises* purchased, whereas, in the present case, he has a lien only on *Daubenspeck's share* of them. (*Erwin v. Scriver*, 19 Johna. 379.)

By the Court, RHODES, J.

This action was brought to restrain the defendants—the one being a judgment plaintiff and the other the Sheriff—from selling certain real estate under an execution issued upon the judgment. A decree was entered perpetually enjoining the sale of the premises under the execution already issued, or any that might be issued upon that judgment. The appeal is taken from the final decree alone. The record does not contain the evidence in the cause nor the findings of the Court. The question presented for consideration is, whether the facts stated in the complaint are sufficient to entitle the plaintiffs to the decree as rendered by the Court below.

The plaintiffs allege that Daubenspeck, Sturman, and Fulton, being the owners of a certain ranch, on the 19th day of November, 1859, mortgaged it to Winne for two thousand five hundred dollars, with interest at two per cent. per month, payable in six months after said date, and that on that day the mortgage was recorded, etc.; “That said amount not being paid according to contract, said Winne commenced suit for the recovery thereof and foreclosure of said mortgage against said parties in this Court, and on the 23d day of November, 1860, recovered judgment therein for the sum of three thousand one hundred and seventeen dollars and thirty-three cents,” and interest and costs, with a decree for the sale of the mortgaged premises; that under an order of sale issued upon said decree, the premises were sold by the Sheriff to Winne on the 29th day of December, 1860; that on the 11th of July, 1861, the

Alexander et als. v. Greenwood et als.

premises, not having been redeemed, were conveyed by the Sheriff to Winne; and that by meane conveyance the title so conveyed to Winne vested in the plaintiffs. They also allege that on the 19th of November, 1860, defendant Greenwood recovered judgment in said Court against Daubenspeck for four hundred and eighty-three dollars and ninety-five cents, upon which an execution was issued, and the Sheriff levied the same upon the premises, and under it advertised the premises for sale on the 8th of November, 1862. Other facts are alleged respecting certain contracts and conveyances not necessary to be noticed here.

The complaint does not state when the action was commenced by Winne to foreclose the mortgage, and it will be presumed that it was commenced some time before the rendition of the decree of foreclosure, but not ten days, nor any other certain time, for the decree could, under certain circumstances, have been properly rendered immediately after the filing of the complaint. It is not directly nor inferentially stated in the complaint that Greenwood's judgment was rendered *after* the commencement of the action of foreclosure. The averments upon this point are entirely consistent with the existence of the Greenwood judgment before and at the commencement of the suit by Winne. The plaintiffs have not negatived this state of facts, but as their allegations are to be most strongly construed against them, they will be considered as having averred that the Greenwood judgment was, in fact, entered before the commencement of the foreclosure suit.

The plaintiffs allege in their complaint that it is now pretended that Greenwood's judgment is a lien upon a momentary seizin of an undivided portion of the premises held by Daubenspeck, during the passage of the title from Winne to Platt, the grantor of the plaintiffs, the deed having been executed by Winne to Daubenspeck and Sturman, and by them immediately to Platt, in pursuance of an agreement between the parties, having for its object the vesting of the title in Platt, and the giving to Daubenspeck and Sturman the right to pur-

chase from Platt, upon certain terms mentioned in the complaint.

The decree, however, not merely restrains the defendants from selling the momentary seizin of Daubenspeck only, but it enjoins them from levying upon or selling the land under any execution issued or to be issued upon the Greenwood judgment; and the decree cannot be maintained, if the defendants might, under such execution, sell any interest of Daubenspeck in the land.

The plaintiffs represent the rights of Winne, and the defendants those of Greenwood, and the action is to be determined as it would be if Winne and Greenwood were alone parties to the suit.

It is assumed by both parties, for the purpose of the argument, that the Greenwood judgment became a lien at the date of its entry upon the premises, subject in all respects to the prior lien of Winne's mortgage. It therefore necessarily follows that the judgment, not being satisfied or reversed, continued as a lien for two years, unless the lien was divested by proper legal proceedings. If Winne had delayed the foreclosure of his mortgage, and if, during the delay and within two years after the entry of his judgment, Greenwood had proceeded to sell Daubenspeck's interest in the premises, it would not be pretended that Winne could have enjoined the sale on the ground that his mortgage was a prior lien upon the land. The respondents urge that "the judgment creditor only takes the property of his debtor subject to every liability under which the debtor himself holds it," and there can be no doubt that this is a correct general principle; but it is not deducible from that principle that the judgment creditor can be cut off from all recourse upon the debtor's property by proceedings instituted to enforce any liability or lien upon the property prior to the judgment, (with certain exceptions specially provided for by law,) unless the judgment debtor has his day in Court. The contrary doctrine is fully recognized and affirmed in *Morris v. Mowatt*, 2 Paige, 586, and in most

of the cases cited by counsel of the respondents, and, indeed, it is the well established rule in equity.

If Greenwood had been made a party to the foreclosure suit of Winne, he might have made it appear that the mortgage debt had been paid, in whole or in part, or that some portion of the land was not properly subject to the mortgage as against his judgment, or that some other fact existed that would have rendered his lien more valuable or effectual. And on the other hand, his right of sale might have been cut off, and his remedy restricted to the receipt of the overplus money arising from the sale under the foreclosure, and the statutory right of redemption from the sale. He was not a party to the foreclosure suit, and his rights are not affected by the decree in that case, for a decree of foreclosure is conclusive only upon the rights of the parties who are before the Court. (*Montgomery v. Tutt*, 11 Cal. 315; *Goodenow v. Ever*, 16 Cal. 469.)

Greenwood's right of sale of the equity of redemption of Daubenspeck still subsisted, notwithstanding the decree of foreclosure, and the sale and conveyance under it. The extent or value of the interest that he might acquire will not determine his *right of sale*; but he may sell the slightest interest in the land held by Daubenspeck at the rendition of the judgment or the levy of the execution. His equitable right of redemption not having been cut off by the foreclosure, he might, during the two years that his judgment was a lien upon the premises, purchase the legal title of Daubenspeck under execution issued upon the judgment, which he clearly had the right to do, (*Morris v. Mowatt*, 2 Paige, 586,) and then, according to the well established doctrine of this Court in *Montgomery v. Tutt*, he might assert his right of redemption from Winne's sale at any time within the period allowed by the Statute of Limitations.

He was entitled to the right of sale, not only that he might fully and properly exercise either the statutory or equitable right of redemption within the period allowed by law, but that he might realize any other benefit or advantage that

Aldrich v. Palmer et al.

could accrue to him by the sale under his execution. It is, therefore, unnecessary to inquire whether Daubenspeck had any present right of possession or any equitable interest in the premises, derived from the contract mentioned in the complaint, which could be sold under the execution.

The judgment must be reversed, and it is ordered that the cause be remanded with directions to the Court below to dismiss the plaintiffs' complaint.

LUCIUS A. ALDRICH v. CYRUS PALMER, EDWIN T. KING, W. H. HOWLAND, AND HORACE B. ANGELL.

NEW TRIAL.—The discovery of new evidence which is merely cumulative affords no ground for a new trial.

ERROR NOT PRESUMED.—Where the record does not contain the instructions of the Court below, the presumption will be that the law applicable to the facts was correctly given to the jury.

DAMAGES IN PERSONAL TORTS.—In actions for personal torts, the law does not fix any precise rule of damages, but leaves their assessment to the unblased judgment of the jury.

EXCESSIVE DAMAGES.—In such cases, the Court will not disturb the verdict of a jury on the ground that the damages are excessive, unless the amount of damages is so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool dispassionate consideration of the jury.

APPEAL from the Twelfth Judicial District Court, City and County of San Francisco.

The complaint averred that from January, 1860, hitherto, the defendants had been engaged in carrying on the business of iron founders and machinists, and that about December 12th, 1860, defendants caused a certain large iron shaft of great weight to be placed upon trestles and supports in a careless, insecure, and dangerous position in the immediate proximity of plaintiff, who was then employed about other business of defendants at their special instance and request; that the defendants attempted to move and did move the same in so negligent and careless a manner that it fell on plaintiff's foot,

Aldrich v. Palmer et al.

by means whereof the foot was fractured, broken, and bruised, etc.

The answer denied all the allegations of careless negligence or wrong on the part of defendants, and averred that the injury was caused by the carelessness, negligence, and want of ordinary prudence of plaintiff, etc.

The jury found a verdict for plaintiff for two thousand two hundred and fifty dollars, for which sum judgment was rendered.

Defendants appealed from the judgment and from the order denying a new trial.

F. M. Pixley, for Appellants.

The rule regulating the obligation between master and servant is, the servant has no remedy against his employer for accidents occurring in the course of his employment which are not induced by the carelessness or improper conduct of the employer. If the servant contributes to the accident by his own negligence or carelessness, he cannot recover against the master unless for his gross or criminal negligence. The proof of unskilful conduct or negligence lies with the plaintiff. If the injury happens from unavoidable accident, no one is liable.

The servant takes the risk of his employment, and is presumed to know and understand the perils of the position to which he hires; his compensation is adjusted accordingly. An employer is not responsible to a servant for an injury incurred by the act of another servant in the same employ, unless the master has hired an incompetent and improper person, and placed him in a position where his negligence or unskilfulness directly occasions the injury.

A servant is presumed to be in the enjoyment of all his senses, and must exercise ordinary precaution and reasonable care in preventing an accident, and in taking care of himself. (4 Edition Cowen's Treatise, 193; 5 Carr & Payne, 379; 6 Carr & Payne, 23; 19 Wend. 400; 1 Cal. 366; 21 Wend.

Aldrich v. Palmer et als.

615-18; 6 Hill, 592; 18 New York, 540; 4 Metcalf, 49, 57; 8 Wend. 473; 6 Cal. 210.)

Shafters, Heydenfeldt & Gould, for Respondent.

By the Court, SANDERSON, C. J.

This is an action brought to recover damages for personal injuries alleged to have been sustained by the plaintiff while in the employment of the defendants, through their carelessness, negligence, and unskilful management. The case was tried by a jury, who found a verdict in favor of the plaintiff for the sum of two thousand two hundred and fifty dollars. The defendants move for a new trial upon the following grounds: First—Newly discovered evidence; Second—The verdict is against law and evidence; Third—Excessive damages, appearing to have been given under the influence of passion or prejudice.

In support of the first ground several affidavits were read. The new evidence disclosed by the affidavits is merely cumulative, and does not present any facts which were not before the jury at the trial. Where such is the case, as has been repeatedly held, the new evidence affords no ground for a new trial.

As to the second ground, the evidence is conflicting, and the record does not contain the instructions which were given to the jury. In the absence of the instructions, we are bound to presume that the law applicable to the facts of the case was correctly given by the Court. As to the facts, the evidence, as presented to us in the record, is conflicting, as we have already stated; and where such is the case, this Court has uniformly held that the verdict cannot be disturbed.

Nor, in our judgment, should a new trial be granted upon the ground that the damages are excessive. The testimony clearly shows that by reason of the carelessness, negligence, and unskilful management of the defendants and their employés, the left foot of the plaintiff was seriously and permanently injured; that in consequence thereof he was for a long

time confined to his apartments under medical treatment, attended with much suffering and pain; that two of his toes were fractured, and in consequence thereof twice amputated, and two of the others mutilated and thrown out of joint; that at the time of the last amputation great doubt of his recovery was entertained by his surgeon, in consequence of symptoms of *tetanus*; that for about three months he was unable to walk, and was prevented from attending to his business, which was that of a machinist; that at the end of thirteen months after the injuries were received, he was unable to walk without limping, and, in the opinion of the surgeons who were examined as witnesses, his condition in that respect will never improve; that the efficiency of his foot, thus disfigured and mutilated, is greatly impaired for the remainder of his life.

In actions for personal torts the law does not attempt to fix any precise rules for the admeasurement of damages, but, from the necessity of the case, leaves their assessment to the good sense and unbiased judgment of the jury. Their verdict, as in all other cases, is subject to review by the Court, but it will never be disturbed unless the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate consideration of the jury. The leading object of such actions is to obtain reasonable and just compensation for the injury sustained, comprehending both the present and the future. But to ascertain what is a fair and just compensation in such cases, is a judicial problem of difficult, if not impossible, solution. None, however, are more competent to its proper solution than the jury. Hence, the Courts have always sparingly exercised the power of granting new trials in such cases. Where the law furnishes no rule for the measurement of damages, their assessment is peculiarly the province of the jury, and the Court will never interfere with their verdict merely on the ground of excess. Upon such a question the Court has no right to substitute its

opinion for that of the jury, merely because it happens to differ from theirs.

In *Bodwell v. Osgood*, 3 Pick. 379, Judge Wilde said: "We do not doubt our power to grant new trials on the ground of excessive damages in cases of personal torts; and when they are clearly excessive and greatly disproportionate to the injury proved, we are bound to interpose. But a strong case must be made out."

"In actions for personal injuries," say the Supreme Court of Illinois, in *McNamara v. King*, 2 Gilm. 432, "Courts will not set aside verdicts for excessive damages unless the damages are so excessive as to make it manifest that the jury acted from passion, partiality, or corruption; and to enable the Court to draw this conclusion it is not enough that, in their opinion, the damages are too high, or that much less damages would have been a sufficient satisfaction to the plaintiff."

"In actions of trespass," say the Court of Appeals of Kentucky, in *Vanzant v. Jones*, 3 Dana, 464, "a new trial will not be granted on the ground of excess of damages, unless they are so excessive as *per se* to indicate passion or prejudice."

In *Worford v. Isbel*, 1 Bibb, 247, which was an action for assault and battery, the Court said: "In cases sounding merely in damages, without any medium of admeasurement, the Court should be very cautious in setting aside a verdict barely for excess. If, in such cases, a new trial is granted for that cause, the rule is that the damages must be such as that all men who hear the circumstances would pronounce the damages outrageously excessive at first blush."

In *Edgell v. Francis*, 1 Man. and G. 222, it was said: "To induce the Court to grant a new trial on the ground of excessive damages, it must be shown that they are very excessive, or that a perverted view of the case has been taken by the jury."

Under the rule laid down in the foregoing cases, and numberless others to the same effect which might be cited, we are unable to perceive how it can be seriously contended, in view

French v. Teschemaker et als.

of the severe and permanent injuries proven to have been sustained by the plaintiff, that the damages found by the jury in the present case are either outrageous or excessive. In our judgment, no candid man, after a careful perusal of the evidence, would be either shocked or startled at the verdict. The amount of the verdict is not suggestive of either passion or prejudice, or corruption; but, on the contrary, we are fully satisfied from the evidence adduced that the jury have not gone beyond the exercise of a sound discretion.

Judgment affirmed.

Mr. Justice SHAFTER, having been of counsel, did not sit on the trial of this case.

WHEELER N. FRENCH v. HENRY F. TESCHEMAKER, A. H. TITCOMB, MYLES D. SWEENEY, H. DE LA MONTANYA, H. L. KING, DOMINICK GAVEN, W. C. HINCKLEY, G. W. BELL, JOHN C. MERRILL, JOHN H. REDINGTON, FRANK MCCOPPIN, AND J. W. CUDWORTH.

CONSTRUCTION OF CONSTITUTION.—Constitutions, like statutes and private instruments, must be so construed, if possible, as to give some force and effect to each of their provisions.

STOCKHOLDERS OF CORPORATIONS — PERSONAL LIABILITY OF.—Section thirty-six of Article IV of the Constitution, relating to the liability of the stockholders of corporations for corporate debts, is not self-executing, nor does it contain within its own terms a rule of conduct broad enough to embrace and definitely settle every question that may arise touching the individual and personal liability which it imposes upon the stockholders.

SAME.—Legislation is necessary to give practical effect to said clause in the Constitution, and without the aid of legislation it is inoperative.

SAME — POWER OF LEGISLATURE.—The Legislature has the power to say, not that the stockholder shall not be liable for any of the debts of the corporation, but that he shall be liable for his portion, and what that portion shall be.

SAME.—The Legislature must also impose the same rate of liability upon all stockholders, and the law must operate alike upon all corporations.

CORPORATIONS — POWER OF LEGISLATURE.—An Act of the Legislature authorizing the formation of corporations, without attaching to the stockholders an individual liability, would be unconstitutional, and the persons organized under such an Act would acquire none of the rights of a corporation.

French v. Teschemaker et al.

STATUTE — PART UNCONSTITUTIONAL.— A provision or section of an Act which is unconstitutional, but independent, and does not enter into the general object and purpose of the Act, and may be stricken out without prejudice to the general intent and design of the Act, does not vitiate those portions of the Act which are constitutional.

MUNICIPAL CORPORATIONS — POWER TO SUBSCRIBE STOCK.— Municipal corporations have no power to subscribe to the stock of private corporations without being authorized so to do by the Legislature.

SAME — HOW MADE.— When such power is given by legislative enactment, the subscription must be made in the mode and manner and upon the conditions prescribed in the Act.

SAN FRANCISCO — SUBSCRIPTION OF STOCK TO CENTRAL PACIFIC R. R. COMPANY.— The seventeenth section of an Act entitled "An Act to authorize the Board of Supervisors of the City and County of San Francisco to take and subscribe one million dollars to the capital stock of the Western Pacific Railroad Company and the Central Pacific Railroad Company of California, and to provide for the payment of the same, and other matters relating thereto," approved April 22d, 1863, is not an independent provision which could be left out without doing violence to the intent of the Legislature in passing the Act.

CONSTRUCTION OF STATUTES.— When an Act of the Legislature is ambiguous upon its face, and susceptible of different constructions, such construction as would declare it unconstitutional should be avoided when it can be fairly done.

SAME — VIEWS OF ELECTORS VOTING ON.— The intent or proper construction of an Act of the Legislature which took effect upon the contingency of receiving a majority of the votes of the electors of a municipal corporation, is not to be determined by the views entertained of its provisions by the electors when they adopted it.

WAIVER OF PERSONAL LIABILITY OF STOCKHOLDERS.— An Act of the Legislature authorizing a municipal corporation to subscribe for stock of a railroad company, the subscription to be made upon the condition that the municipal corporation shall not be liable for the debts of the company, and that the provision as to said liability be made a part of and be stipulated in all contracts made by the railroad company for the construction and equipment of its road, does not exempt the municipal corporation from liability for the debts of the railroad company further than such exemption can be secured by persons contracting with the railroad company expressly stipulating in their contracts to waive all claims against the municipal body for payment of the debt.

SAME — BY CONTRACT.— Persons contracting with a corporation may insert a stipulation in the contract waiving the right to hold the stockholders of the corporation liable for a debt or liability of the corporation created thereby, and such stipulation is not unconstitutional, but may be enforced.

SAME.— Corporations, by inserting such stipulations in all contracts whereby corporate debts are created, may effectually guard stockholders from all liability for the debts of the corporation.

APPEAL from the Twelfth Judicial District, City and County of San Francisco.

April 22d, 1863, the Legislature of this State passed an Act to authorize the Board of Supervisors of the City and County

of San Francisco to take and subscribe one million of dollars to the capital stock of the Western Pacific Railroad Company, and the Central Pacific Railroad Company of California.

The first section of the Act provided that on the third Tuesday in May, 1863, a special election should be held in the City and County of San Francisco, for the purpose of submitting to the qualified electors of said city and county the proposition for said subscription, and that if the majority of the electors voted for the subscription, then, when the result of the election was declared, the Board of Supervisors should immediately subscribe, in the name of the city and county, and for its use, benefit, and advantage, the sum authorized in the said Act.

The Act further provided that the subscription should be paid in the bonds of the city and county, and that as the payment to such subscription should be required to be made by the Board of Directors of each of the railroad companies, the Board of Supervisors should direct its President, and the Auditor and Treasurer of the city and county, to issue the bonds in sums of one thousand dollars each.

The election was held in pursuance of the law, and a majority of the electors voted in favor of the subscription.

The defendants constituted the Board of Supervisors of the City and County of San Francisco, and on the 23d of May, 1863, the plaintiff commenced this action.

The complaint averred that the plaintiff was an owner of real estate and personal property in the city and county, liable to taxation, and that he brought the action on his own behalf, and on behalf of all other tax payers in the city and county, and that the defendants were about to make the subscription as directed by the law, and order their President and the Auditor and Treasurer to issue bonds to the railroad companies to the amount directed by the law, and thus cause the city and county to become a stockholder in said railroad companies to that amount.

The complaint further averred that prior to the commencement of the action each of the railroad companies had con-

French v. Tenchemaker et al.

tracted debts and liabilities to a large amount, for which, if the subscription was made and the bonds were issued, the city and county would become liable in a larger amount than the proposed subscription; that the Act of the Legislature under which the Board of Supervisors proposed to subscribe was in conflict with and in violation of the provisions of the Constitution of the State of California, and therefore conferred no power or authority on the Board of Supervisors to make the subscription; that the seventeenth section of the Act expressed the conditions upon which the electors voted their assent to the subscription, and that it was unconstitutional, and could not be maintained, and it would operate as a fraud upon the electors and upon the city and county to allow the subscription to be made; that if the subscription was made and the bonds were issued, plaintiff and the other tax payers of San Francisco would be subjected to a large amount of increased taxation, etc.

A perpetual injunction was prayed for, prohibiting the Board of Supervisors from making the subscription, and from ordering the President of the Board and the Treasurer and Auditor to issue the bonds.

The Court below denied the injunction and gave judgment for defendants. Plaintiff appealed.

H. & C. McAllister, and Hoge & Wilson, for Appellant.

Our sole point is, that the Act of April 22d, 1863, in authorizing the City and County of San Francisco to subscribe one million dollars to the capital stock of the Western Pacific Railroad Company and the Central Pacific Railroad Company of California, is unconstitutional and void.

Constitution of California, Art. IV, sec. 36: "Each stockholder of a corporation or joint stock association shall be individually and personally liable for his proportion of all its debts and liabilities."

Respondents contend that sections thirty-two and thirty-six of Article IV of the Constitution are inoperative without legislation.

This may be true as to section thirty-two, but section thirty-six is all-sufficient for our purpose, and is *self-executing*. The stockholder is thereby liable for his proportion of all the debts and liabilities — that is, the amount of his liability is proportioned to the amount of his stock, and that liability is not satisfied by the whole value of the stock he holds, but may extend far beyond his interest in the stock of the corporation. The meaning of the Constitution is plain and palpable.

Debates in the Constitutional Convention of California, p. 136: "The 36th section of the report of the committee being under consideration, as follows: '36. The stockholders of every corporation or joint stock association shall be individually responsible to the amount of their respective share or shares of stock in any such corporation or association for all its debts and liabilities of every kind;' Mr. Jones moved to *strike out* the section and insert the following, which was *adopted*, viz: '36. Each stockholder of a corporation or joint stock association shall be individually and personally liable for his proportion of all its debts and liabilities.'"

The Constitution upon this question, to-wit: the liability of a corporator, is clear, explicit, and plenary — requiring no legislation to give it force and activity, but *self-operative*, and constituting of *itself* a practical law of corporate conduct and corporate responsibility.

An illustration of the *self-acting* power of the Constitution is to be found in Article XI, section fourteen:

"Sec. 14. All property, both real and personal, of the wife, owned or claimed by marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property, and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property, as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property."

Selover v. American Russian Com. Co., 7 Cal. 266, syllabus: "The capacity of the wife to hold separate property is created

by the Constitution, and her title thereto depends upon the mode of acquisition, and vests before the inventory can be filed. * * * Mr. Justice Burnett: 'The counsel for the defendant assumes, substantially, that the capacity of the wife is created *by the statute*, and that she can only acquire that capacity by strictly complying with the provisions of the third, fourth, and fifth sections in the same way that a *feme sole* trader does, by complying with the statute creating that capacity. And he insists, that until the property is properly inventoried, it is not separate property within the meaning of the Act, and is subject to the disposition of the husband.' This position would seem to be incorrect. The capacity of the wife is created *by the Constitution*, and her title to her separate estate depends *alone* upon the *mode of its acquisition*, and vests in her before the inventory can be filed."

Whenever the organic law can execute its own provisions, there is no necessity of legislation; neither should the whole operation of the Constitution be dependent upon the legislative will; for a Constitution whose provisions are put into activity or made inoperative *by statute*, is no Constitution at all.

Besides, if this clause of the Constitution as to the liability of stockholders is, as claimed by respondents, a mere power conferred, to be executed by legislation, there has been a valid execution of the power; laws have been passed which impose the same liability upon the stockholder as that established by the Constitution, and those laws cannot be *so repealed* as to render this constitutional provision inoperative.

By Article IV, section thirty-six, Constitution, every stockholder of a corporation is explicitly liable "*for his proportion of all its debts and liabilities.*"

The Constitution imposing the liability, the statute seeking to release the liability, use the very same terms. The former establishes, the latter seeks to overthrow, to destroy the organic policy—to nullify the very language and letter of the Constitution.

Can there be a clearer, grosser violation of Constitutional

provisions? The exemption from liability is general — there is no limiting or qualifying language; it is made *the condition* of subscription; it is to be inserted as part and parcel of the subscription “on the books of each of said companies,” and is to apply to all debts and liabilities. The words are: “*Upon the express condition that the said city and county shall not be liable for any of the debts and liabilities of either of said companies.*”

The subsequent provision, that this exemption shall be expressly stipulated for in all contracts for construction and equipment, is a mere additional precaution, suggested, doubtless, by the idea that the general exemption from liability might prove invalid, and in the vain belief that these contracts for equipment and construction would constitute the primary and principal liabilities of the corporations.

The comprehensive grasp of the Constitution embraces every form in which associated wealth secures to itself any of the powers or privileges of corporations not possessed by individuals or partnerships. The power to incorporate for banking purposes is taken away. Additional guards and restrictions are provided for, and then follow the provisions aimed at the great evil of the system, so much complained of, and leading to such disastrous consequences to the general public: “*Every stockholder of a corporation or joint stock association shall be individually and personally liable for his proportion of all its debts and liabilities.*” This is the great provision for the security of the public. It is inserted in pursuance of grand considerations of public policy for the guaranty and protection of great public interests and forms, with the other provisions alluded to — a harmonious whole, well calculated to promote the great object in view.

It is beyond the reach of legislative expediency. It cannot be avoided or defeated by any legislative arrangement or manoeuvre. It enters into and becomes a part of the very meaning and essence of a corporation. There can be no such thing in this State as a corporation without it. The Constitution has made the principle enter into and become of the very nature of the corporation. To strike it out, to avoid it

French v. Teschemaker et al.

by any indirection, to dispense with it upon any pretext, however plausible, is to destroy the very essence of the corporation itself. To create a corporation with freedom from this constitutional necessity, or to engraft it upon an existing one, is beyond the power of the Legislature.

While a common law policy may be modified or waived so far as the discretion and judgment of Courts may permit, a constitutional policy, when not a mere personal privilege, never can be.

The usages, customs, policy of the common law, may be swept away by statute, stipulated away by contract; but against constitutional language and policy all such attacks are futile. It is an instrument above public clamor, above legislation; and this Court has recently vindicated its invincibility against the strongest legislative, political, and public pressure.

In Matter of Oliver Lee & Co.'s Bank, 21 N. Y., 7 Smith, 11: Mr. Justice Denio: "The first question to be determined relates to the construction of the constitutional provision imposing personal liability upon the stockholders of banks (Const. Art. VIII, Sec. 7); and the inquiry is, whether it is limited to banks thereafter to be created, or applies equally to existing banking corporations. There is nothing in the language which looks to a discrimination between the two classes. It declares, generally, that the stockholders in every corporation and joint stock association for banking purposes issuing bank notes after January 1st, 1850, shall be individually responsible, etc. * * * It is argued that because the Act left it to the election of the stockholders to determine whether they would embark in the business upon the footing of personal liability, or upon that of corporate liability only, and they declared by the articles that they would not incur any individual responsibility, a private contract was established which was beyond the influence of the clause allowing a modification or repeal of the Act. It is not in the power of the associates, by any stipulations inserted in their articles of association; to limit the power of the Legislature under the reservation contained in the Act. * * *. The power of the

corporation to contract at all was a corporate franchise, and subject to the control of the Legislature by force of the reservation."

In Matter of Reciprocity Bank, 22 New York, 8 Smith, 12. Mr. Chief Justice Comstock: "This Court has recently determined in the matter of *Oliver Lee & Company's Bank*, 21 N. Y. 9, that the free banking associations in this State, created before as well as after the Constitution of 1846 was adopted, are within the personal liability clause of that instrument, and also within the Act of April 6th, 1849, which was enacted to provide the means of enforcing such liability. * * * Proceeding now to such questions as affect the separate or particular interests of some of the appellants and not others, it appears that Mrs. Lansing, in 1840, while a *feme sole*, became the owner of some shares of the stock. She was married to Mr. Lansing in 1841, but the stock has stood in her name to the present time, and she has received the dividends thereon. It is insisted that she is not liable to be assessed in respect to this stock to pay the creditors of the bank. * * * It is said that Mrs. Lansing, being under the disabilities of coverture, could not make a transfer of her shares, and so avoid this liability, if she had wished to do so. This is a circumstance which might have been properly addressed to the legislative discretion, *if, indeed, the Legislature had any discretion under the injunction of the Constitution*; but it does not authorize the Courts to allow an exemption where neither the Constitution nor the law has declared any. It is also said, that *femes covert* are not liable to suit or judgment at the common law, and in general, this is true. It is also true that the apportionment of liability amongst stockholders in banks, when duly confirmed, becomes a judgment against each stockholder, to be enforced by execution as in other cases. But it was competent for the Legislature to depart from the rules and analogies of the common law, and to make married women and their estates liable in this proceeding as other shareholders in banks are made liable. This, we think, has been done, and it seems to us proper to add, that we see no reason why it ought not to be done, in order to effectuate

the policy in which the constitutional provision and the statute are founded. It might go far to defeat that policy, if married women could take and hold stock without liability to the creditors."

If the provisions of this statute of April 22d, 1863, exempting San Francisco from liability as a stockholder, are unconstitutional and inoperative, then the proposed subscription must fail; for these provisions are intimately connected with the whole subject matter of the statute, are prominent considerations to the passage of the Act, and also to the assent to subscribe, and constitute the terms and conditions upon which the subscription is to be made and the stock is always to be held.

The statute has but one subject matter, to wit: the subscription by San Francisco of one million of dollars.

The seventeenth section is of the essence and pith of the statute. Note its emphatic expressions, and observe, also, that it contains strong language, not found in the statute, as to the Sacramento subscription passed upon in *Robinson v. Bidwell*—such as, that the subscriptions are to be made "*on the books of each of said companies,*" and that "*the said City and County shall never make any other or further subscription to the capital stock of said companies, or either of them, than that provided for by this Act.*"

The conditions of subscription set forth in the seventeenth section are clearly and emphatically expressed; they are to be embodied in the very terms of subscription, "*on the books of each of said companies,*" in the primary and principal obligation of the municipality, the act of subscription, to which the bonds are but of subordinate importance.

The power of subscription is coupled with these express conditions of the seventeenth section; the proposition submitted by the Legislature to the electors is a proposition of which these conditions are part and parcel; the vote taken, the assent given, has been *upon the faith* of this restricted liability—this complete exemption from corporate responsibilities; the municipal act which executes this huge mortgage is

French v. Teschemaker et al.,

to embody them; the construction and equipment contracts of the companies are to express them; whether or not expressed therein, these exempting conditions "*shall be a part*" of such contracts; and, under all circumstances and contingencies, "*the said City and County shall not be liable for any of the debts or liabilities of either of said companies beyond the amount so subscribed.*"

Mr. Justice Norton observes in his second opinion in *Robinson v. Bidwell*, of a similar section of the Sacramento law: "*The purpose of that section is only to add a certain incident and effect to the act of becoming a stockholder.*"

An incident signifies "something beside the main design." Can it be said that these terms and conditions were beside the main design?

They were manifestly and prominently in the mind of the Legislature; without doubt, constituted important inducements and considerations to the passage of the Act; are fully and clearly set forth therein; are made the express conditions of the whole subscription; are obviously serious and substantial parts of this statute. Can they with justice be called mere incidents, immaterial additions?

Though the last words of the statute, they should lose no importance from that fact, but rather receive, by the usual rules of construction, especial weight.

"If a proviso in a statute be directly contrary to the purview of the statute, the proviso is good; and not the purview, because it speaks the later intention of the legislators." (*Attorney-General v. Governors Chelsea, etc.*, Fitzgibbon, 195, cited 9 Bacon Abridg. 243.)

"The proviso is generally intended to restrain the enacting clause, and to except something which would otherwise have been within it, or in some measure to modify the enacting clause." (*Wayman v. Southard*, 10 Wheat. 30.)

There is no law granting the power of subscription to a municipal corporation, where so important a part, so much of the essence of the whole legislative scheme, has been invalidated as in this case, that has been allowed to stand.

Are all the burdens of the statute to be enforced, and all its benefits annulled? A huge mortgage of one million of dollars to be fastened upon the homesteads of San Francisco for thirty years to come, and longer if not then paid, with all the onerous provisions of the mortgage binding and operative, and all the alleviating and compensatory conditions invalid and of no effect?

The Legislature evidently thought—must be presumed to have thought—these *express conditions* constitutional, valid, and susceptible of practical operation. It will hardly be supposed that the Legislature intended a fraud upon the voters of San Francisco, and inserted these ameliorating conditions and exemptions as a delusive deceit. If, then, the Judicial Department adjudicates them unconstitutional and invalid, shall the subscriptions still be enforced?

They are terms of no unimportant character, but of vital benefit. Terms which might, could they be effectuated, protect our metropolis from future bankruptcy; which any business man would eagerly grasp; which, could they be applied to all corporations in this State, would largely increase the number of such organizations.

There can be no exaggeration of the plain and palpable injustice of *compelling* the subscription under such circumstances. It is as if a deed and defeasance, constituting but one transaction, are so enforced that the defeasance is annulled and the deed is construed as an absolute conveyance.

Neither should *the rights of the minority of the electors* be lost sight of in this case. (*Foster v. The City of Kenosha*, 12 Wis. 622.) One of the great advantages and blessings of a written constitution above all others is that *the minority* can invoke its protection against the demands and oppression of a violent majority."

The evidence shows a large minority (perhaps representing the greater property interest) opposed to this subscription. Their interests are entitled to the protection of the Constitution; and that protection they have a right to invoke. If they are to be subjected to taxation to meet and defray the liabilities

French v. Teschemaker et al.

imposed upon them by the majority, they have at least the right to demand that this should be effected according to the principles of the Constitution, and the *whole mandates* of the law which that majority sets in operation against them.

The majority cannot be permitted to waive or avoid constitutional protections *for the minority*; nor can the Legislature authorize a majority to sacrifice the rights or interests of a minority upon any pretext whatever.

This is one answer to the argument that the electors must be presumed to have known the law unconstitutional when they voted for it.

Only the majority voted for it; they could not *accept* an unconstitutional law for the minority.

The true view, however, is that the law was constitutional or unconstitutional at *the moment* of its passage; and that its character *in that respect* was not and could not be affected by the vote of the people.

Pixley, Smith, & Hale, for Respondent.

Section thirty-two is neither repealed nor qualified by the subsequent section, thirty-six. They both stand as if in a single section, jointly expressive of a single principle. Taken separately, and without legislation, they are both defective and inoperative.

The very language used points to the necessity of legislation, and not legislation to carry out a specific law in a certain manner, but broadly empowers the Legislature to pass laws "for the securing of dues from corporations," "by individual liability or *other means*. Had the intention of the Constitution been merely to make corporators irrevocably liable to the extent of their corporate interests without further legislation, then the language of the Constitution would have been definite and certain; and without providing for securing the same by "*other means*, as may be prescribed by law," would have fixed the same upon the individual responsibility of its stockholders, and thus cut off legislative interference: whereas, the Legislature has been by this section,

not prohibited the use of, but clothed with power somewhat discretionary to pass such laws as will effect the "collection of dues from corporations," *that* being the gist of the section, and not the mere holding of stockholders individually responsible.

The statute of April 22d, 1864, is perfect without section seventeen, and the unconstitutionality of that section does not invalidate the Act.

This section is not the essence of the Act. Take it away, and the Act in all its parts remains perfect and unimpaired. Without it, the meaning of the Act is still full, definite, certain, and without vagueness.

We suppose the principle is now well settled that where a statute has been passed by the Legislature under all the forms and sanctions requisite to the making of laws some part of which is not within the competency of legislative power, or is repugnant to any provisions of the Constitution, such part thereof will be adjudged void and of no avail, whilst all other parts of this Act not obnoxious to the same objection will be held valid, and have the force of law. (*Commonwealth v. Kimball*, 24 Pick. 359; *Fisher v. McGirr et al.* 1 Gray, 21.)

If the main objects and purposes of the Act are constitutional, *they* may be carried into effect, although there may be isolated clauses or separate or independent enactments obnoxious to the charge of being in violation of the Constitution. (*Warren v. Mayor of Charlestown*, 2 Gray, 97.)

But why search for authorities in Massachusetts, Ohio, or New York, when our own Courts have repeatedly and emphatically decided the very point here at issue?

In the case of *Guy v. Hermance*, 5 Cal. 74, the Court say: "That portion of the Act of 1853, entitled 'An Act to provide for the sale of the interest of the State of California in the property within the water line,' etc., which prescribes that no injunction shall be issued against the Commissioners, is invalid."

The seventeenth section of this statute does not, in either its language or meaning, deprive or take away the rights of any

individuals—it interferes with no existing contracts, lessens no remedy, and infringes upon no privilege of either life or property.

The intention of the Legislature was simply to create a condition upon which, in the giving out of *certain contracts*, parties desiring to take them may, by a voluntary act of their own, *stipulate in writing* to waive all personal claim against the City and County of San Francisco in the event of default of payment.

It was clearly not the design of our Legislature to pass an Act that should be unconstitutional in one of its provisions, even though an immaterial one, for after enacting that the city and county “shall not be liable for any of the debts or liabilities of either of said companies beyond the amount so subscribed,” immediately and in the same section qualifies the general language by the subsequent provision, thus: “and this provision as to the liability of said city and county shall be a part of, and so expressly stipulated, in all contracts made by said companies for the construction and equipment of said roads.” Then the penalty is prescribed, in the event “said companies shall fail or refuse to make such stipulation in all of their said contracts,” etc.

Now, had the Legislature intended the first sentence of section seventeen to be interpreted independent of the subsequent parts of the same section, and as including liabilities of all and every character, why specially provide for stipulations in *contracts*, and not in bonds, agreements, and notes, etc., or is the term “contract” sufficiently comprehensive to embrace all liabilities that can be incurred?

Therefore, the most natural and rational construction is, that the Legislature, deeming it competent for parties to waive, *by voluntary act*, their constitutional right in the premises, provided by section seventeen that the companies shall contract (where contracts are necessary) with only such parties as are willing, by their *written consent*, to so release the City and County of San Francisco.

In *this* construction there can be no constitutional objection ;

which mere fact is of itself sufficient to recommend it to the mind of the Court; for where a statute can be so construed as to render it free from constitutional objection, it is the duty of the Court to give it such construction.

Unless the first sentence of section seventeen is sufficient of itself to exempt the city and county, (and if so, then the section should have stopped there,) and the Courts will hold the residue of the section with its penalty clause to be mere surplusage; in which event every agreement or obligation of the companies, every charge or liability, whether contingent or certain, written or parol, executory or executed, it must be assumed (*in defiance of the Statute of Frauds*, and of every hitherto established principle of law) exists by virtue of the law, independent of any personal claim, on the city and county, and the force of which enactment, by its own inherent power, is sufficient to create that exemption without regard to the consent of the contracting parties; and this is too monstrous a proposition for even illustrative use, otherwise *contracts* would be inevitable with every clerk, engineer, fireman, and laborer—for every nail, bolt, bar, or pound of coal bought—with every passenger, and consignor of freight, with every cattle owner in the county, and every inhabitant of the State, who might possibly be run over; for without any regard to the amount involved or the time of performance, *every such contract, being in fact a promise by certain of the stockholders to answer for the debt or default of a certain other stockholder*, (unless the first sentence of section seventeen repeals the Statute of Frauds, and all other conflicting laws,) *must be in writing, and for a consideration, to be of any valid effect.*

If it be not such agreement on the part of the stockholders, it must be an agreement *by* the contractors or creditors, whereby they covenant, in default of payment, to release such proportion of the companies' liabilities as the stock owned by the City and County of San Francisco bears to the whole; but even then an agreement in writing and for a consideration would be necessary. In short, take any view of the

meaning of the Legislature besides the one advanced, and the amount of writing and time necessary to carry into *practical* effect its provisions would be so to hinder and clog their business as to make the intended benefit to these companies burdensome and insupportable.

It is perhaps not essential to discuss in this form of action, whether it is competent or not for contractors or creditors to waive a constitutional right; yet as we desire to dispose fully of all the issues raised, we ask the indulgence of the Court for a brief space.

Admitting the provisions of the Constitution to be in full force without legislation, then it is in force as to the creditors of the company, and they may at their own volition waive that right; in fact, the question of waiving a constitutional right has been affirmatively determined repeatedly in America. In the case of *Lee v. Tillotson*, 24 Wend. 338, as to the right of trial by jury, Judge Cowen held that "the objection called for the less countenance in this case, inasmuch as the parties mutually consented to the reference by writing. This of itself is a waiver of the objection, even if the Constitution stood in the way. A party may waive a constitutional as well as a statute provision made for his own benefit. The contrary argument would deprive a criminal of the power to plead guilty."

Again: as to the waiver of the right of trial by jury, in *People v. Murray*, 5 Hill, 472, Mr. Chief Justice Nelson held that "the defendants took the grant to build the dam, with the condition attached to it, and they are not now at liberty to make the objection, though under other circumstances it might have been effected. It was competent for them to waive the right of a trial according to the common law, even if without such a waiver they would be considered entitled to it."

As to the laying out of roads, in *Baker v. Braman*, 6 Hill, 48, and which principles were subsequently sustained in the Court of Appeals in *Embury v. Conner*, 3 Com. 518, Judge Cowen says: "In the light of the Constitution, if not that of a law which lies at the foundation of all governments, this

statute must be read with the proviso that the owner consent. That consent removes all obstacles, and lets the statute in to operate the same as if it had in terms contained the condition."

In the case referred to above of *Embury v. Conner*, 3 Com. 518, the Court say: "But it is insisted that, as the enactment is only held to be void on the ground that it takes private property for private uses against the owner's consent, if the consent be given, all objection on the ground of unconstitutionality is removed. The decisions to which I have referred proceed upon that principle; and Mr. Justice Bronson, in *Taylor v. Porter*, in terms concedes that the objection has no application when the owner consents. If we read the statute in question with a proviso that the owner consent, and I think we should, that consent removes all obstacles and lets the statute in to operate, the same as if it had in terms contained the condition."

Through an entire course of English authorities the doctrine is sustained that parties may waive their statutory rights, provided it is done by *consent*.

We refer the Court to *Hallett v. Dowdall*, 9 Eng. Law and Eq., 347; 4 Exchequer, 324.

Mr. Sedgwick, in his able treatise on statutory and constitutional law says, at page 111: "The general rule holds good as well in regard to Constitutions as to statutes—a party may waive a constitutional as well as a statutory provision made for his benefit."

It must also be borne in mind that the cases of *Wilson v. Pollock*, 2 Cal. 94, and *Exline v. Smith*, 5 Cal. 112, turned on the *absence of consent* to the waiver of a constitutional right, and not to the waiver itself, which the Court in both cases held would have been good if *consented* to, and to which cases, as authorities for respondent, we respectfully refer the Court.

Patterson, Wallace & Stowe, also for Respondents.

"Where a provision in a statute is of such a nature and has such a connection with the other parts of the statute as to be

essential to the law, its unconstitutionality vitiates the whole enactment. But if an independent provision, not in its nature and connection essential to the other parts of the statute, be unconstitutional, it may be treated as a nullity, leaving the rest of the enactment to stand as valid." (3 Ohio State R. 34.)

To the same effect are: 11 Indiana, 424, 482; 1 Gray, Mass. 1; 2 Id. 84; 5 Id. 100; *People v. Hill*, 7 Cal. 97; 19 Illinois, 376; *Mills v. Lathrop*, 19 Cal. 518.

Section thirty-seven, Article IV of the Constitution, provides: "It shall be the duty of the Legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and in contracting debts by such municipal corporations."

Now, by the Act under consideration the Legislature authorized the city and county to contract a liability to a certain amount and no other. It has no power by its charter as a municipal government to become a stockholder at all; the power given by the Act is a restricted power, and cannot be exceeded. The city and county does not voluntarily propose to exceed it. The railroad corporations do not ask that it shall be exceeded. The plaintiff does not show it will be exceeded, but contends it possibly may be.

The city and county cannot become liable on an implied obligation against the express stipulation of her contract and against the restriction imposed by the Act. (*New York F. Ins. Co. v. Ely*, 5 Conn. 572; *Head v. Providence I. Co.*, 2 Cranch, 127; *Goszler v. Georgetown*, 6 Wheaton, 597.)

The position of the city and county is like the case of an infant who subscribed to stock; like that of a married woman under disability; like that of a lunatic.

The claim that section seventeen is unconstitutional ought to be considered determined by reference to section eighteen, page three hundred, of the Session Laws of 1857. "Neither the said Board, etc., * * * shall in any event be liable for the debts of said railroad company in any amount beyond

the subscription made as herein provided;" and the case of *Pattison v. Board of Supervisors of Yuba County*, 13 Cal. 175, where the question was raised upon the constitutionality of the whole Act (p. 182,) and the case of *Robinson v. Bidwell et al.*, 23 Cal. 379.

E. B. Crocker, for Respondents.

Corporations have a clear and undoubted right, under the Constitution, to thus limit the liability of their stockholders by express stipulations to that effect in their contracts. A creditor of the corporation, by entering into such a contract, expressly waives the benefit of the constitutional provision relating to the liability of the stockholders of a corporation. Section thirty-six of the Constitution, above cited, was intended for the benefit of the creditors of the corporation. Its most enlarged construction is to confer upon the creditor a right which did not exist at common law—that is, a right to resort to the individual and personal responsibility of the stockholders. But the Constitution does not compel the creditor to accept this benefit, or prohibit him from waiving it. It is clearly to be classed among those rights which he may *waive* by agreement, and he will be held bound by an agreement to that effect, for a person may waive a constitutional as well as a statutory provision made for his benefit. (Sedgwick on Stat. and Const. Law, 111; *People v. Murray*, 5 Hill, 472; 3 Comstock, 518; 24 Wend. 337.)

By the Court, SANDERSON, C. J.

The only question presented for our consideration in this case relates to the constitutionality of an Act passed by the Legislature in 1863, entitled "An Act to authorize the Board of Supervisors of the City and County of San Francisco to take and subscribe one million dollars to the capital stock of the Western Pacific Railroad Company, and the Central Pacific Railroad Company of California, and to provide for the

French v. Teschemaker et al.

payment of the same, and other matters relating thereto." (Statutes of 1863, p. 380.)

The charge that this Act is unconstitutional is founded upon certain provisions contained in the seventeenth section, which reads as follows:

"SEC. 17. The subscriptions of stock authorized by the provisions of this Act shall be made by said Board of Supervisors on the books of each of said companies, upon the express condition that the said city and county shall not be liable for any of the debts or liabilities of either of said companies beyond the amount so subscribed; and this provision as to the liability of said city and county shall be a part of and so expressly stipulated in all contracts made by said companies for the construction and equipment of said roads; and, in case either of said companies shall fail or refuse to make such stipulation in all of their said contracts, then the said Board of Supervisors shall have power to declare the said subscription to the capital stock of such company void and of no effect, and may recover of said company any previous payments that may have been made thereon at the time of such failure or refusal, and the said city and county shall never make any other or further subscription to the capital stock of said companies, or either of them, than that provided for by this Act."

It is claimed by counsel for appellant that the foregoing section exempts the City and County of San Francisco from all liability for the debts and other liabilities of the railroad corporations mentioned in the Act, and is therefore in direct conflict with the thirty-sixth section of Article IV of the Constitution. And it is further contended that the provisions of the section in question are so interwoven and interblended with the whole scope and purpose of the Act as to entirely vitiate the same and render it unconstitutional and void.

I. There are two sections (thirty-two and thirty-six in the fourth Article of the Constitution touching the individual and

personal liability of members of a corporation, between which there is an apparent repugnancy. They provide as follows:

“Sec. 32. Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law.”

“Sec. 36. Each stockholder of a corporation or joint stock association shall be individually and personally liable for his *proportion* of all its debts and liabilities.”

The first is a positive injunction requiring the legislative department of the Government to provide security for corporate dues, by laws imposing, in connection with other means, some degree of individual liability upon the members of the corporation, but leaving the extent of that liability to the wisdom and sound discretion of that department. But the latter section, by itself considered, seems to fix, upon first impression, the precise degree of liability, leaving no room for the exercise of legislative judgment. To harmonize these apparently conflicting provisions, or, if the conflict is irreconcilable, to determine which is to furnish the rule of conduct, is the office of judicial construction.

Constitutions, like statutes and private instruments, must be so construed, if possible, as to give some force and effect to each of their provisions. The legal intendment is that each and every clause has been inserted for some useful purpose, and when rightly understood may have some practical operation. For the purpose of harmonizing apparently conflicting clauses, each must be read with direct reference to every other which relates to the same subject, and so read, if possible, as to avoid repugnancy. And, to that end, sections, paragraphs, and sentences may be transposed; elegance of composition may be sacrificed; and the meaning of words and phrases may be restricted or enlarged.

If we read the thirty-sixth section as imposing a liability separate and distinct from that imposed by the thirty-second section, it is clear that the latter has no office to perform, and is, in effect, stricken from the Constitution. This result, how-

ever, must be avoided, if possible, and some practical operation accorded to the latter section. And this may be done, if it appear, upon a careful examination, that the thirty-sixth section, when considered by itself or with the aid of some established rule of the common law, is not complete or self-executing, or, in other words, does not, within its own terms, provide a complete rule of conduct, and such defect is not cured by any rule of common law. If such be the case, the power of supplying the needed element exists in the legislative department, and its exercise is enjoined by the provisions of the thirty-second section. Is the thirty-sixth section, then, complete in itself? Is it self-executing, and does it contain within its own terms, aided or unaided by the established rules of the common law, a complete rule of conduct broad enough to embrace and definitely settle, in all its relations, every question that may arise touching the individual and personal liability which it imposes upon stockholders?

That it does not contain such a rule in its own terms is manifest. It declares that each stockholder of a corporation or joint stock association shall be individually and personally liable for his proportion of all its debts and liabilities, but does not determine what that proportion shall be, nor does it prescribe any rule by which it shall be ascertained. Is this manifest omission supplied by any established rule of common law? If so, it may be intended that the section was framed with direct reference to such rule, and that in legal contemplation such rule was impliedly incorporated in the section, with the same force and effect as if expressed in terms.

At common law no individual liability is imposed upon the members of a corporation, and there is therefore no department of the common law to which we can look for such a rule, except that which relates to partnerships or associations formed for trading purposes. Upon examination it will be found that that fountain fails to supply the needed element. By the law of partnership each member, as to third persons, is jointly and severally liable for the full amount of the liabilities of the firm. As between themselves, each one's propor-

tion of liability may or may not be regulated by private agreement. In the absence of any such agreement they are bound to share the burden equally, and the right to contribution exists. It will not do, therefore, to say that the section in question has adopted the common law rule of partnership liability and extended it to stockholders of a corporation, because that proves too much, and carries us beyond the express terms of the section. Whatever be the extent of the liability, and by whatever rule it is to be ascertained, it is clear, from the terms used, that it was not the intention of the framers of the Constitution to impose upon the stockholders of a corporation a liability co-extensive with that of co-partners at common law. The liability is not joint and several, but is individual and personal, without any right to contribution, and is not for the whole amount of the debt, but is for some indeterminate proportion. So much is clear from the language itself, without foreign aid. From what has been said, it would seem that the thirty-sixth section does not contain a complete and obviously perfect rule of liability, and cannot therefore be held to be self-executing; and it would further seem that the missing quantities, necessary to make it such, cannot be drawn from the common law.

But it may be said that if the rules of law fail to cure the defect or supply the missing quantities, we are at liberty to invoke the aid of some other science. Admitting, for the sake of argument, that the law fails to supply rules sufficient for the just interpretation of legal instruments, and that a resort, if necessary, may be had elsewhere, is there any other branch of learning whose rules are sufficient to enable us to determine with certainty the precise signification intended to be given to the word *proportion*, as used in the Constitution? In this view there is no promise of aid except it be found in the science of mathematics. Conceding, then, that a mathematical proportion is intended, are all the difficulties in the path of the self-acting theory removed? Once in the field of mathematics, we are confronted with a complete array of proportions — arithmetical and geometrical, direct, inverse, and

reciprocal, and perhaps many others which neither the bench nor the bar are bound to know. How are we to determine which of these numerous proportions is intended? But assuming, as it may be claimed we ought to do, that the simplest form of proportion is intended, we may be said to have three quantities given by which to find a fourth, the given quantities being the capital stock of the corporation, the stock of the individual stockholder, and the liability of the corporation; the fourth, or one to be found, being the liability of the stockholder. Stated in mathematical form it would read as follows: As the corporate stock is to the individual stock, so is the corporate liability to the individual liability. Substitute this language for the word "proportion," and is all that was wanting to make the section self-executing supplied? Have we now language broad enough to embrace and definitely settle every question which may arise touching the individual liability of a stockholder, or is there still an element wanting? The rule would be sufficiently comprehensive and explicit if the given quantities always remained the same. But suppose A., being a stockholder, sells to B., does the existing liability follow the stock and impose itself as a burden upon the shoulders of B., or does it follow the person and cling to the skirts of A.? Or does it divide itself, and one moiety remain with A. and the other follow B.? Or does it multiply itself by the number of individuals into whose hands it may come, and attach an aliquot part of the last multiple to each? For the solutions of these various questions even the science of mathematics, whose aid we have invoked for the purpose of upholding, if possible, the self-acting theory, manifestly furnishes no rules.

In order to render the thirty-sixth section self-executing, that is to say, operative without the aid of legislation, it should define what the proportion of the stockholder's liability shall be, and provide whether it shall embrace all the corporate debts and liabilities, past, present, and future, or be restricted to such debts and liabilities as are created or incurred during the time that he is a stockholder. If it be said that these missing quantities, if necessary to give operative effect, may

be engrafted on the section by construction, the answer is, that if such a proceeding is permitted at all by the rules of construction, it is for the purpose of reconciling apparent conflict, and not for the purpose of promoting it.

From what has been said, it results that the thirty-sixth section of the Constitution, even when aided by the rules of law and mathematics, does not make a complete rule broad enough in its terms to embrace and definitely settle all the conditions upon which the liability of the stockholder must rest; and, as a corollary, it further results that legislation is necessary to give it a reasonable and practical operation. And such seems to have been the conclusion to which the Legislature has arrived.

The thirty-second section of the Act concerning corporations, passed in 1850, (Wood's Digest, 115,) provides that "each stockholder of any corporation shall be individually and personally liable for a portion of all its debts and liabilities proportioned to the amount of stock owned by him." Here the word "proportion," as used in the Constitution, is to a certain extent defined, and declared to be a mathematical proportion. But this enactment was insufficient to give a reasonable and practical operation to the thirty-sixth section, as we have already seen. This truth seems to have been discovered by the Legislature, for in 1853 they passed another Act concerning incorporations, in which we find the following section:

"SEC. 16. Each stockholder shall be individually and personally liable for his proportion of all the debts and liabilities of the company *contracted or incurred during the time that he was a stockholder*. For the recovery of which joint or several actions may be instituted and prosecuted."

It is true that the Legislature, in supplying what was needed and omitted from the Act of 1850, left out the provision of that Act which defines the word "proportion;" yet, although neither by itself affords a perfect rule, the two com-

bined contain what is omitted in the thirty-sixth section of the Constitution and is needed to give it a practical operation.

If we read the thirty-sixth section in the manner suggested it is made to harmonize with the thirty-second, and each is made to serve a useful purpose, and neither is allowed to sacrifice the other.

Such seems to us to be the reasonable and proper construction to be given to the thirty-sixth and thirty-second sections of the Constitution. By such reading harmony is preserved and some force and effect is given to each. Any other reading must manifestly sacrifice one section to the ambition of the other, and practically strike it from the Constitution.

Under this construction, the Legislature has the power to say, not that the stockholder shall not be liable for any of the debts of the corporation, but that he shall be liable for his *portion*, and to say what that portion shall be. Thus the Constitution is made to say to the legislative department of the Government, the stockholder shall be individually and personally liable for his proportion of the debts and liabilities of the corporation, but to your wisdom and sound discretion is intrusted the power to adjust the mode and measure of the liability. It is the duty of the Legislature to carry out this provision according to its spirit, and to fix the liability of the stockholder at a figure adequate to guard effectually against the evils for which the Constitution seeks, through the co-operation of the Legislature, to provide a remedy.

But the exercise of this power is subject to the rule that "all laws of a general nature shall have a uniform operation," as provided in section eleven of Article I of the Constitution, and the same rule of liability must be imposed upon all stockholders of corporations and joint stock associations. The Constitution knows no distinction between persons, and the Legislature cannot discriminate, or grant an indulgence to one which is not accorded to another. Every general law must have a uniform operation; that is to say, it must operate equally on all persons and upon all things upon which it acts at all.

Where, under the Constitution, a law must impose some indeterminate liability upon a class of persons, as, for example, stockholders of a corporation, it must impose the liability, at whatever rate it may be fixed, upon all alike, and cannot exempt one any more than it can exempt all; nor can it attach a lower rate of liability to one than it does to another; nor can it attach a greater or less liability to the stockholders of one corporation than it does to the stockholders of another.

If it be said, that by reason of the construction which we have given the thirty-second and thirty-sixth sections of the Constitution, the Legislature are enabled to defeat the purpose of the Constitution by non-action, the answer is, that by the same non-action they would defeat the creation of corporations as contemplated and authorized by the Constitution. The individual liability of the stockholder is a constituent element in the artificial life of a corporation, made so by the author of its creation, and that life can no more exist under the Constitution without the element, than a natural person can exist when deprived of an element made indispensable to his existence by the laws of nature. Hence, an Act of the Legislature authorizing the formation of corporations without attaching to the corporators an individual liability, would be as obnoxious to the Constitution as would be the creation of a corporation by special Act; and the Courts would be bound to hold that persons organized under such an Act had acquired none of the rights of a corporation. And it may be further answered, that the adoption of a Constitution is but the initiatory step toward the organization of a Government, and its whole purpose may be defeated by a failure on the part of the people to organize the various departments of Government pursuant to its provisions, or by failure of either of the departments, when organized, to perform its allotted functions pursuant to the behests of the Constitution. For such consequences there is no remedy except in the good sense of mankind. The argument proves too much, and carries with it the germ of its own refutation.

II. It is apparent that the construction which we have given

to the thirty-second and thirty-sixth sections of Article IV of the Constitution does not materially aid us in the solution of the difficulties involved in the present case. If the Act in question, upon a fair and reasonable construction of the terms of the seventeenth section, does exempt the city and county of San Francisco from all liability for the debts and liabilities of the corporations therein named, as is claimed by counsel for appellant, it is in direct conflict with the Constitution as we have interpreted it. It is not only in conflict with the thirty-second and thirty-sixth sections of Article IV, but, as we have already intimated, with section eleven of Article I. And if this be so, we are bound to declare the whole Act unconstitutional, unless, as is claimed by respondents, the seventeenth section is an independent provision, not entering into the general object and purpose of the Act, and may, therefore, be stricken out without prejudice to the general design and intent of the Legislature.

Hence, two questions are presented: First—If unconstitutional, is the seventeenth section so intimately connected and interwoven with the other provisions of the Act that we cannot intend that the Legislature would have passed the Act with the seventeenth section left out? Second—Is the seventeenth section, upon a fair and reasonable construction of its terms, made in conformity with the established rules of interpretation, in clear and manifest conflict with any provision of the Constitution?

1. In *Robinson v. Bidwell*, 22 Cal. 379, a statute similar to the present came before the late Supreme Court for construction. The section of that statute which was claimed to be obnoxious to constitutional objection, if unconstitutional, was more clearly so than the one now under consideration, but bore the same relations to the other provisions of the Act. The Court, however, held that it was an independent provision, and not, in its nature and connections, essential to the law, and, therefore, admitting it to be vicious, it might be treated as a nullity, leaving the rest of the statute to stand as valid.

The correctness of that conclusion has been directly assailed by counsel for appellant.

Necessarily, no precise rules can be found by which a Court can determine questions of this character. Whenever a question of this kind arises, its solution must be worked out by a patient comparison of the suspected provision with all others contained in the Act, keeping in constant view the main design and scope of the law, unaided, from the very nature of the case, by any rules of construction except such as are of the most vague and general import. Hence, it is no impeachment of each other's legal acumen if different Judges arrive at opposite conclusions upon such a question, in a case of nice discrimination.

In *Lathrop v. Mills et al.*, 19 Cal. 529, Mr. Justice Baldwin said: "It is true that the Constitution merely interdicts Acts which oppose its provisions, and that if in any Act there be found a provision which is constitutional, that provision may be carried out, provided the excepted provision is *entirely disconnected* from the vicious portions of the Act; and the Legislature is presumed to intend that, notwithstanding the invalidity of the other parts of the Act, still, this particular section shall stand. The saving of the particular provision; even when not upon its face unconstitutional, in such instances is a matter of legislative intent. In order to sustain the excepted clause, we must intend that the Legislature, knowing that the other provisions of the statute would fall, still willed that this particular section should stand as the law of the land."

In *Warren et al. v. Mayor of Charlestown*, 2 Gray, 98, the learned Chief Justice Shaw said: "It is no doubt true, as has been argued by the learned counsel for the prosecutors of this writ, that the same Act of legislation may be unconstitutional in some of its provisions, and yet constitutional in others. * * * Such Act has all the forms of law, and has been passed and sanctioned by the duly constituted legislative department of the Government, and, if any part is unconstitutional, it is because it is not within the scope of legiti-

mate legislative authority to pass it. Yet, other parts of the same Act may not be obnoxious to the same objection, and, therefore, have the full force of law, in the same manner as if these several enactments had been made by different statutes. But this must be taken with this limitation, that the parts so held respectively constitutional and unconstitutional, must be wholly independent of each other. But, if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant a belief that the Legislature intended them as a whole, and that, if all could not be carried into effect, the Legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected, must fall with them."

By the light of these general rules the Act in question must be examined, and the dependence or independence of the seventeenth section determined. Viewing the Act as a whole, we find it is a grant of power to the City and County of San Francisco, a municipal corporation, and may be regarded as a last chapter in its charter, conferring powers not before possessed, and which cannot be conferred except by grant from the sovereign power, of which the City and County of San Francisco is itself a creature. The Act is divided into eighteen sections:

The first provides for the submission of two propositions to the qualified voters of the city and county, for the Board of Supervisors to take and subscribe certain amounts to the capital stock of the two railroad companies therein named.

The second provides for the publication of a notice stating the character of the propositions to be submitted; prescribes the manner of voting, and how the votes shall be canvassed: requires the Board to meet to count the votes and declare the result; and, if the result be in favor of the propositions thus submitted, to meet as a Board *for the purpose of "perfecting the subscriptions of stock as hereinafter provided."*

The third directs the Board to take and subscribe the stock

thus authorized to be subscribed, in the name of the city and county, and "to pledge the faith and credit of the city and county for the payment of the same, *in the manner hereinafter provided.*"

The fourth prescribes by whom the subscriptions shall be made, and that they shall be made upon the condition that they shall be paid in the *bonds* of the city and county, and *not otherwise*, and that the same shall be received *at par, dollar for dollar.*

Sections five and six provide for the issuing and paying over the bonds.

The seventh provides that the bonds, and an equal amount of other funds, shall be expended by the respective companies, from time to time as the bonds are issued, in the actual construction of their roads; and in the event of their failure to do so, authorizes the Board to withhold subsequent payments, and in its discretion to declare the subscriptions void; and in such event to sue and recover back payments already made.

The eighth, ninth, tenth, eleventh, twelfth, and thirteenth, provide the ways and means, and the mode and manner of raising and disbursing the same.

The fourteenth provides the liability and compensation of the officers appointed to supervise the matter.

The fifteenth and sixteenth provide the powers of the Board as stockholders, and other matters not material to mention.

The seventeenth, and suspected section, prescribes the manner and additional conditions upon which the subscriptions are to be made, and imposes upon the companies the penalties for a violation of those conditions.

The eighteenth and last declares the Act to be a public Act.

We have thus given a brief synopsis of the various provisions of the Act, in order that the leading features or ideas of the law may be brought into close proximity.

The City and County of San Francisco, being a municipal

French v. Teschemaker et al.

corporation, had no power to subscribe to the stock of a railroad or other private corporation. It had, therefore, to resort to the Legislature to get that power; and it was granted upon such terms and conditions, and under such restrictions, as were suggested by the wisdom of that body. The Legislature had the power to give or refuse, to grant absolutely or conditionally. The petition of the city and county was, to be allowed to subscribe to the capital stock of the railroad corporations named in the Act. The Legislature responded: You may do so upon certain terms and conditions, which must be strictly observed. Such, by legal intendment, is always the language of legislative grants of corporate power, and the exercise of such power must be enjoyed in the mode and manner and upon the conditions prescribed in the grant.

In the case of *Zottman v. The City and County of San Francisco*, 20 Cal. 102, Mr. Chief Justice Field said: "The rule is general, and applies to the corporate authorities of all municipal bodies; where the mode in which their power on any given subject can be exercised is prescribed by their charter, the mode must be followed; the mode in such cases constitutes the measure of the power * * *. Aside from the mode designated, there is a want of all power on the subject. This is too obvious to require argument, and so are all the adjudications. Thus, in *Head v. The Providence Insurance Co.*, 2 Cranch, 156, Mr. Chief Justice Marshall, in speaking of bodies which have only a legal existence, says: 'The Act of incorporation is to them an enabling Act; it gives to them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe the mode, *or the instrument no more creates a contract than if the body had never been incorporated.*'"

In *The Farmers' Loan and Trust Co. v. Carroll*, 5 Barb. 613, the Supreme Court of New York said: "Where a corporation relies upon a grant of power from the Legislature for authority to do an act, it is as much restricted to the mode prescribed by the statutes for its exercise as to the thing allowed to be done."

If the law governing the exercise of corporate powers be correctly stated in the foregoing cases — of which there can be no question; if the mode of its exercise is the measure of the power, as stated by Mr. Chief Justice Field; or if, in cases of contract, as stated by Mr. Chief Justice Marshall, the mode prescribed must be strictly observed, or the contract, is a nullity; or if, as stated by the Supreme Court of New York, the corporation is as much restricted to the mode prescribed as it is to the thing to be done, it follows that the mode enters into the essence, so to speak, and becomes a constituent element of the power itself, resulting in a single entity. Applying these principles to the case in hand, we find that the City and County of San Francisco is empowered to tender to the railroad corporations, and, if agreed to by them, to enter into a contract already drafted and engrossed by the Legislature, without any power on the part of either of the contracting parties to change or modify it in any particular. The contract contains the power and the mode; both are of the substance, and neither can be departed from without nullification. Can it be said, in view of the law of corporate power and the provisions of this Act, that the Board of Supervisors can subscribe the specified amount of stock in the name of the city and county, and pledge its credit in payment thereof, without first submitting the proposition to a vote of the people? Can it be said that the Board may make the subscription without stipulating that the same shall be paid in the bonds of the city and county *at par*, dollar for dollar? Or without stipulating that the bonds and an equal amount of other funds shall be used in the actual construction of the roads, under penalty of forfeiture and recovery? Or without stipulating for the exemptions from individual liability, as provided in the seventeenth section? The same reasoning which would declare the latter provision independent and not essential to the complete execution of the legislative intent, would erect each of the preceding provisions into independent propositions, wholly useless to what *Robinson v. Bidwell* calls the leading design of the law; and thus, by the hand of judicial construction, one

by one, every provision of the statute, wisely intended by the Legislature for the security and protection of the city and county, may be plucked from the body of the Act. Such a sweeping slaughter of paragraphs and sections strips the Legislature of all its conservative power. Under such a doctrine the Legislature may dispense power, but it cannot direct or control its exercise. Thus, a corporation, once vested with power, becomes sovereign as to its exercise, and may set at defiance the behests of the Legislature.

Such, we think, are some of the legitimate fruits of the construction contended for by respondents. But, independent of the foregoing considerations, the Act in question bears upon its face evidence sufficient to establish the dependent condition of its various provisions, and prove beyond question that they are but parts of a single and complete design. In *Robinson v. Bidwell* the scope and object of a similar statute was declared to be "to authorize the City and County of Sacramento to subscribe for stock of the railroad company, and to provide for the payment of the same." (22 Cal. 387.) This statement of the main design of the Act is too broad for logical purposes, and it is, by reason of its generality, deceptive. It implies a grant of *unlimited* power to subscribe; whereas, it is a grant of *restricted* power. It is not a grant of power to subscribe and provide the means of payment, but to subscribe in a particular mode and upon express conditions, and to provide means in a way expressly pointed out. The leading design of the Act is not to grant a power of *absolute*, but *conditional* subscription. Thus viewed, each condition is not a mere incident, or something aside from the purpose, but enters into the main design, and becomes indispensable to its achievement. Thus, the mode of subscription, in the language of Mr. Chief Justice Field, in *Zottman v. The City and County of San Francisco*, is made the measure of the power to subscribe, and the mode of payment is made the measure of the power to pay.

It is also worthy of remark that the expressions "as hereinbefore provided," "as herein provided," and "as herein

after provided," are of frequent occurrence throughout the body of the Act. Such expressions are connecting links which bind a statute together, and establish in a measure the dependent relation of its several parts. By some of these expressions the seventeenth section only, as appears from the general context, is referred to.

In view of the foregoing considerations, with all due deference to the acknowledged learning and ability of our immediate predecessors, we are forced to the conclusion that the seventeenth section is not an independent provision, and that it cannot be left out without doing violence to the legislative intent; nor can we, under the rules of legal construction, intend that the Legislature would have passed the Act, had they known that the seventeenth section could have no legal effect. We are, therefore, of the opinion that the seventeenth section, if it must fall by reason of its alleged repugnancy to the Constitution, is so interblended with the main designs of the Act as to vitiate the whole.

2. We have now to determine what is the proper and legal construction of the seventeenth section of the Act. If that section is to be read as exempting the City and County of San Francisco from all liability to *third persons* for the debts and liabilities of the corporations named in the Act, we must, in accordance with the views already expressed, hold that it is unconstitutional and that the whole Act must fall with it.

To construe a statute, is to search after the legislative intent as expressed in the language of the statute. "The end of construction is to find what was the intent and meaning, and to clear up that meaning, when obscure; to ascertain the sense of ambiguous words; to determine the design when imperfectly expressed." (Smith's Commentaries, 692.) The search, if need be, must not be confined to the doubtful passages or words, but may be extended to every provision of the Act. In interpreting the letter of the statute, punctuation may be entirely disregarded, and the rules of grammar need not be strictly followed. *Mala grammatica non vitiat chartam*. But the search need not be confined to the letter

of the statute. The law looks to the substance and not the form. *Quæ hæret in litera hæret in cortice.* The whole scope and design of the statute is to be studied, and its language is to be so construed as to aid that design, and not to defeat it. Particular sentences are not always so framed as to express clearly the legislative intent; yet, if that intent can be gathered from the immediate context, or from the general scope and purpose of the Act, such sentence is to be so construed, if possible, as to harmonize with it. If a particular construction has the effect to declare the Act or any part of it unconstitutional, such construction must be avoided, when it can be fairly done, for the legal presumption is that the Legislature could not have so intended. This, however, is to be taken with the qualification that where the language used is unambiguous, and the meaning clear and obvious, an unconstitutional consequence cannot be avoided by forcing upon it a meaning, however plausible it may be, which is, upon a fair test, repugnant to its terms. But if the language upon its face is ambiguous and susceptible of different constructions, it may be forced, so to speak, to the extent of adopting the less obvious construction, in order to uphold the law. All doubts are to be resolved in favor of and not against the validity of the statute.

Upon a careful examination of the language of the statute, we are satisfied that it was not the intent of the Legislature to exempt the City and County of San Francisco from liability for the debts and liabilities of the railroad companies; but that, with a full and perfect knowledge of its inability to do so, it has sought, so far as possible under the provisions of the Constitution, to guard the city and county against the consequences of that liability. This the Legislature proposes to do by acting directly upon the railroad companies, and interposing them, so far as the circumstances of the case will permit, between the city and county and the creditors and claimants of the corporations. And that, so far as the measures adopted to that end could effect it the Legislature has intended to go, and no further. There is but a single

expression in the whole Act which, even apparently, runs counter to this theory, while it is upheld by all the other language of the statute, together with its general scope and design. To what extent the measures adopted may prove effectual is a matter of no consequence here. If none of them are obnoxious to constitutional objection, that is sufficient for the purposes of the present case. Should they prove wholly inconsequential, such a result could have no effect upon the validity or invalidity of the Act. Nor is it of any consequence whether the voters of the city and county would have sanctioned the law had they understood it as we are now interpreting it. Upon this point, Mr. Justice Norton, in *Robinson v. Bidwell*, well said: "Whether they would or not, is, however, purely a matter of conjecture; and, besides, it is immaterial, because their vote was not the act of legislation. It is precisely because this vote is not itself the enactment of the law which relieves the Act from the objection that the Legislature cannot delegate its powers directly to the voters. The result of this vote is only the contingency upon which the Legislature have expressed their will that the law shall take effect. The event has occurred, and the law, so far as it was dependent upon this event, takes effect, because the Legislature has enacted that it should take effect on the happening of that event. The result of the vote is a fact the effect of which cannot be varied by any speculations as to what it might have been."

The language which, as is claimed, exempts the city and county from liability is as follows: "The subscriptions of stock authorized by virtue of the provisions of this Act shall be made by said Board of Supervisors on the books of each of said companies upon the express condition that the said city and county shall not be liable for any of the debts or liabilities of either of said companies beyond the amount so subscribed and this provision as to the liability of said city and county shall be a part of and so expressly stipulated in all contracts made by said companies for the construction and equipment of said roads."

Statutes are to be read without breaks or stops, and we have therefore omitted the punctuation. The foregoing is but one clause, and has but one subject, viz: exemption from personal liability. In order to get its full meaning, we read all that is said upon that subject, aided by the legal presumption that no word is idle or useless, and that each has its office to perform in giving expression to the legislative intent; and aided, also, by the presumption that the Legislature does not intend to do an unconstitutional act; and not forgetting that the less obvious construction, in cases of doubt, may be adopted in order to uphold the law.

It is conducive to correct results for Judges, when called upon to construe a statute, to place themselves so far as possible in the position of the Legislature, and assuming each adversary theory in turn, attempt to give it expression as near as may be in the language of the Legislature, not forgetting the established rules of construction already suggested. Assuming, then, that the Legislature has the power to exempt the City and County of San Francisco from all liability of every character and kind, past, present, and future, and desires and intends to exercise that power, we find that full, clear, and complete expression of such intent is contained in the following words: “* * * the said city and county shall not be liable for any of the debts or liabilities of either of said companies beyond the amount so subscribed.” If such was the intent, it is obvious that language more natural and apt could not be found. But, assuming such to be the intent, it is equally obvious that one of the most persistent rules of construction is grossly violated, for more than half the language used to express that intent is made entirely useless. The language used assumes the power, and declares the intent in broad and general terms, yet so clear and explicit that no doubt can attach itself to the meaning, and construction has no duty to perform. But these words do not stand alone; they are accompanied by others, to which meaning must also be allowed: “* * * and this provision as to the liability of said city and county shall be a part of and so expressly stipulated

in all contracts made by said companies for the construction and equipment of said roads." These two clauses contain all that the Legislature has said upon the subject. Considered separately, it is manifest that each clause has a theory which is consistent with itself, but each theory is inconsistent with the other. The first clause proceeds upon the theory that the Legislature has the power to exempt the city and county from liability; the second proceeds upon the theory that the Legislature has not the power, but that each of the companies has, and that it lies in contract. This theory, of course, involves the doctrine of waiver, but of that, we shall speak hereafter. If the first theory is to prevail, the Act is thereby made unconstitutional, which, as we have already seen, is to be avoided, if possible. If, however, its general words may be restricted so as to harmonize with the latter theory, the Act may be upheld, if the doctrine of waiver, upon which it is founded, is not itself repugnant to the Constitution. We think that even under the strictest rules of construction these seemingly independent clauses are to be regarded as one, and as expressing but one intent. The more general words are qualified and limited by those which follow, and give a narrower scope to the legislative intent. The words "not any," used in the former part of the clause, are equivalent to the word "all," and the clause may be read in the following manner: "The city and county shall be exempt from liability on all contracts made and liabilities incurred by said companies beyond the amount so subscribed, and this provision shall be a part of and expressly stipulated in all contracts for the construction and equipment of said roads." Thus read, the meaning of the words "not any" or "all," are qualified by what follows, and their meaning confined to the character or class of liabilities specifically named. In this manner a meaning is given to the whole, which leaves no part of the language useless, and is not repugnant to the Constitution, unless, as we have before stated, the doctrine of waiver is to be so held. This reading, if not the most obvious, when merely the words and punctuation are considered, is reasonable, and in harmony with the doctrine of

waiver, the application of which to the case in hand was, in our judgment, the leading intent of the Legislature. In speaking of the signification of such words as "not any" and "all," in *Phillips v. The State ex rel. Saunders and another*, 15 Geo. 518, the Supreme Court of Georgia said: "True, it (the statute) says that in *all* cases where a levy is made, etc. One is amazed, in casting a glance over our statute book, to find how often this form of expression occurs—frequently signifying, as here, not absolutely all, but all of a *particular class* only. Indeed, it seems to be common to all writings—lay as well as legal, sacred as well as profane—and the generality of the phrase is frequently to be restrained in an Act, not only by the context, but by the general form and scheme of the statute, as demonstrative of the intention of the Legislature."

And so in *The City of Covington v. McNickel's Heirs*, 18 B. Monroe, 286, say the Court of Appeals of Kentucky: "A well known rule for the construction of statutes—which, though ancient, is always adhered to—is that the general words in one clause of a statute may be restrained by the particular words in a subsequent clause of the same statute." (See, also, Dwarrris on Statutes, 765.) This rule finds a familiar illustration in the construction of powers of attorney, where the more general terms used in the commencement are always held to be restrained by the subsequent and more particular specifications.

We are therefore of the opinion that the seventeenth section does not, upon a legal construction of its terms, necessarily exempt the city and county from liability further than such exemption can be secured by express contracts of waiver; and this brings us to the last question involved in this case.

III. The construction which we have given to the thirty-second and thirty-sixth sections of Article IV of the Constitution destroys the force of the able argument made by the learned counsel for the appellant against the doctrine of waiver, so far as that argument is founded upon grounds of public policy predicated of the Constitution. If the extent of the personal liability of the stockholder is mainly left, as we

hold, to the wisdom and discretion of the Legislature, the doctrine that some great end of public policy is to be subserved by constitutional inhibition is greatly weakened if not entirely destroyed. But whether it be regarded as a constitutional policy or not, we are unable to see how, although it rests upon a surer foundation, it is better sustained by sound reason and principle than it is when considered as the offspring of statutory regulation. A question of public policy is but a question of public policy, from whatever source it may take its origin; and whether it is such or not is to be ascertained by the same general rules. How the individual liability of a stockholder of a corporation can be a matter of public concern any more than the liability of a co-partner, we are unable to perceive; and we are not aware that it has ever been claimed that the latter liability has its foundation in public policy. It is merely a liability created by law, as it might be by contract, and is intended only for the benefit of those who may deal with corporations. It is but another fund to which the creditor may look when the social fund has been exhausted, and whether he chooses to look to it or not is a matter of no concern to the public. If the thirty-sixth section of Article IV of the Constitution establishes a policy which none, not even the party directly concerned, can contravene or waive, and by which we are all bound, *volens volens*, so does that clause of the Constitution which secures to all the right of a trial by jury; and the same may be said of the clause designed to secure a homestead to each head of a family. Nor is there a clause of constitutional or statutory law of which the same might not with equal reason be predicated.

There being, then, only a question of private right involved, there can be no question but that the party interested in the enforcement of that right may contract to waive it. Upon this question Mr. Sedgwick says: "The general rule holds good, as well in regard to Constitutions as to statutes. A party may waive a constitutional as well as a statutory provision made for his benefit. So it has been repeatedly decided that a party may waive the right to a trial by jury, although that mode of

French v. Teschemaker et al.

proceeding be guaranteed to him by the Constitution. So, if a private road is laid out in an unconstitutional manner, if the owner consent, the proceeding will be held valid. It is on this same doctrine of waiver that it has been frequently held that the acts of a public officer exceeding his legal authority may be adopted by the party for whose benefit the illegal act is done. So where a Sheriff had arrested a defendant on a *ca. sa.*, and discharged the debtor on receiving his promissory note; though the act of the Sheriff was illegal and the note void in his hands, it was held that the plaintiff might affirm the Sheriff's act and claim the note." (Sedgwick on Constitutional and Statutory Law, 111.) If public policy can be predicated of the constitutional liability of a stockholder of a corporation *a fortiori* it may of the constitutional homestead right, and yet, can it be pretended that the homestead right may not be waived and the property voluntarily surrendered for the benefit of creditors? We think the liability in question may be waived by express contract without the violation of any principle of public policy or constitutional law.

Our conclusions are that the thirty-sixth section of Article IV of the Constitution is not self-executing, and that therefore the Legislature may constitutionally say what shall be the extent of the individual liability of a stockholder of a corporation or joint stock association. Second, that the provisions of the seventeenth section of the Act in question, providing indemnity against constitutional liability, are not independent provisions which may be disregarded, but that there is nothing in those provisions, when legally construed, which is obnoxious to constitutional objection.

Judgment affirmed.

SAWYER, J., concurring specially:

I concur in the judgment, for the reasons, among others, stated in subdivision "2" of the second point; and in the third point of the opinion of the Chief Justice, without expressing any opinion upon the other questions discussed.

Harlan v. Rackeby.

JOSEPH HARLAN v. CYNTHIA A. RACKERBY.

WRIT OF ASSISTANCE.—A writ of assistance will not be issued against a purchaser of the mortgaged premises who buys during the pendency of a suit to foreclose, and who is not a party to the suit, without actual or constructive notice of its pendency.

APPEAL from the District Court, Tenth Judicial District, Colusa County.

The facts are stated in the opinion of the Court.

Geo. Cadwalader, for Appellants, cited *Richardson v. White*, 18 Cal. 120; *Ault v. Gassaway*, 18 Cal. 205.

W. C. Balcher, for Respondent.

By the Court, CURREY, J.

The suit to foreclose the mortgage in this case was commenced on the first of April, 1862, against Cynthia A. Rackeby as sole defendant, and a *lis pendens* was filed in the cause, in the proper Recorder's office, on the sixth of May following. In the meantime, the defendant conveyed the mortgaged premises to J. J. Hicok, who entered into the possession thereof. Hicok's deed was filed for record on the 16th of October, 1862. The decree of foreclosure was entered on the 11th of September of that year, and the mortgaged property was sold by the Sheriff to the plaintiff on the 25th of October; and no redemption having been made, the Sheriff, on the 18th of December, 1863, executed a deed in due form to the purchaser. At that time, Mathison Davis was in the possession of the premises under Hicok, and to him the plaintiff exhibited the Sheriff's deed, and demanded from him the possession of the land. Davis refused to comply with the demand. The plaintiff then applied, upon due notice, for a writ of assistance against Hicok and Davis, and the Court ordered the same to be issued. From this order Hicok and Davis have appealed.

When the decree of foreclosure was entered, the defendant had no interest in the premises. Whatever interest she had

Ah Yew v. Choate.

therein when the suit was commenced she conveyed to Hick on the 29th of April, 1862, who purchased, for aught that appears, without actual or constructive notice of the commencement of the action, and therefore the decree of foreclosure could not affect Hick, who was entitled to be heard in his defense before he could be deprived of his property. (*Goodenow v. Ewer*, 16 Cal. 461; *Boggs v. Fowler and Hargrave*, Id. 562.)

The order must be reversed.

Ordered accordingly.

AH YEW v. D. CHOATE.

MINING LICENSES — PRIVATE LANDS.—That portion of the Revenue Act of 1861 which provides for the collection of licenses from foreign miners does not refer to mines contained in lands which are the private property of individuals, but only to mines in the public lands of the State or the United States.

Query?—What are mineral lands within the meaning of the eighth section of the Act of April 16th, 1859, to provide for the issue of patents for school lands located with State school land warrants?

PATENT FOR SCHOOL LANDS — EFFECT OF.—Where land is located under a State school land warrant, and a patent is issued after all the proceedings required by law have been taken, the patent is the record of the judgment of the State, by its officers duly appointed for that purpose, that the land embraced within the patent is not mineral land within the meaning of said section eight.

PATENT OF LAND CONTAINING GOLD.—The fact alone that sufficient gold has been found upon land conveyed by such patent to induce the patentee to mine for that metal, and to extract from twenty-five to thirty dollars per day, with seven or eight hands, is not sufficient to destroy the verity of such record and make the land mineral land within the meaning of said section eight.

APPEAL from the District Court, Eleventh Judicial District, Placer County.

Suit was commenced September 28th, 1863. The complaint averred that the plaintiff was a native of China, and had been for more than three months engaged in mining on a tract of land in Placer County, described, according to the official survey of the United States, as the northwest quarter of Section Number Four, Township Number Twelve North, Range Number Seven East, Mount Diablo base and meridian,

Ah Yew v. Choata.

the district of lands subject to sale in the Marysville and District; that defendant was the collector of foreign miner's licenses; that in accordance with the Act of April 1, 1858, entitled "An Act to provide for the location and sale of the unsold portion of the five hundred thousand acres of land donated to the State for school purposes, and the seventy-two sections donated to this State for the use of a Seminary of Learning," that the State of California, by its duly authorized agents, about the 28th day of January, 1859, selected said land as a portion of the seventy-two sections donated to this State for the use of a Seminary of Learning, and that said location was, before the patent was issued, approved by the Government of the United States; that afterwards the State sold said land to Stephen B. Burdge, and gave him a certificate of purchase; that Burdge paid the State for the land, and duly advertised that he would apply for a patent; and that afterwards, T. L. & L. R. Chamberlain, became the assignees of said Burdge's interest in the land, and the State of California, on the 2d day of June, 1863, issued to them a patent for the same; that plaintiff is and for more than two months has been in the possession of a portion of said land, as the lessee of said Chamberlain, and has been engaged in mining on the same, and working several claims, and taking out from fifteen to twenty-five dollars per day in gold dust, and can continue to do so until his lease expires, which will be December 21st, 1863; that the defendant, on the 23d day of September, 1863, demanded of plaintiff the sum of four dollars for a mining license or tax for September, 1863; that plaintiff refused to pay, and defendant seized and levied upon the leased premises, and has advertised the same for sale for non payment of the mining license, and fixed the day of sale for September 30th, 1863, at two o'clock P. M.; that the sale will create a cloud upon plaintiff's title, etc., etc.

The complaint prayed for an injunction restraining the defendant, etc.

The defendant demurred to the complaint; the demurrer

Ah Yew v. Choate.

was overruled, and judgment rendered for plaintiff as prayed for.

Defendant appealed.

Jo Hamilton, for Appellant.

In looking at the merits of plaintiff's suit, can he, under any circumstances, maintain it? We think it will be found that he cannot.

Respondent's attorneys rely strongly on the decision of the Court in the case of *Ah Hee v. Crippen*, 19 Cal. 491, which they say is conclusive of this case. And that in *Doll v. Meador*, 16 Cal. 295, it is held the patent is conclusive, and cannot be attacked by any one not claiming from the same source. They seem to forget that the State of California, by her officers, is really the defendant sued, and the very party from whom plaintiff claims his rights. They forget another thing, that even if the rule they invoke should preclude us from changing the effect and exclusiveness of the patent, yet they themselves have to all intents and purposes removed the burden from us by doing it themselves. Whatever may be the effect of this patent, we must say that it never intended conveying mineral lands upon which plaintiff can mine from twenty-five, fifteen, and thirty dollars per day.

The very Act recited in plaintiff's patent—the very Act under which the patent was issued, excludes mineral lands from its operation. In *Doll v. Meador*, 16 Cal. 324, the Court say “that if the patent be void upon its face, or issue without authority, or were prohibited by statute, it may be impeached collaterally,” etc.

We hold that plaintiff's own complaint impeaches his patent and destroys his case, and shows very clearly not only that the State never intended to patent or deed away her mines, but that the statute precludes it, and that there was no authority in any person so to make it. The answer of plaintiff that we had a right to contest the issue of the patent, and that the issue of the patent is a determination of the question as to whether the lands were mineral or not, and that by them hav-

been patented they are declared *not to be mineral lands*, is merely begging the question. He avers that he will be in all probability injured if prevented from working his mining claim in one sentence, and then asserts that the Courts have determined that he has no mining claim. In the next he invokes the aid of the Court to protect him in that which by his own avowing does not exist — an anomaly in pleading, a contradiction in terms, a conflict in ideas.

There certainly is a very wide difference between this case and the case of *Ah Hee v. Crippen*, and the reasoning of the Court in the one case will not apply and was not intended to apply to the like class of cases as the other.

The Court, in the one case, set out to construe the Act of 1860, with its provisions to lands patented to the United States. In that suit, the plaintiff sued in replevin for property, wherein the power of the officer to seize and hold the resumed property sued for is brought directly in question.

In this suit, it asks injunction to restrain the beclouding title two months tenancy upon mining ground which is not a mining claim, and to prevent irreparable injury from resulting plaintiff from being prevented from mining upon lands that contain no minerals.

It is suggested that the rule as laid down in the case of *Ah Hee v. Crippen* is too broad; that under the Act of 1861 this Court will not sustain the grounds taken by the Court in construing the Act of 1860.

The spirit of the Act of 1861, we think, was clearly laid down years before in the case of *The People v. Naglee*, 1 Cal. 22, which has always been considered as the true doctrine, and the decision in the case of *Ah Hee v. Crippen* is not in contact with that case.

The business or vocation of mining in the hands of certain persons was the thing taxed; and the property of the person taxed was subject to its payment. And we can see no difference; and that the patentee of lands from the State could with just as much reason say that his tenants on patented land following the business of merchandise, selling groceries,

Ah Yew v. Choata.

etc., should pay no tax or license, because it detracted from his fee in the lands, as to say that plaintiff could maintain this suit.

The fee in the land is not brought in question; the plaintiff, doing a certain business, must pay so much to the State for the privilege.

George Cadwalader, for Respondent.

The land was private property, and the State could not collect the tax from the plaintiff. This was decided by the case of *Ah Hee v. Crippen*, 19 Cal. 491.

The State cannot deny the legitimate effect of her own patent, nor complain of the sale upon any ground. (*Doll v. Meador*, 16 Cal. 295; *Cooper v. Roberts*, 18 How. 173.)

By the Court, SAWYER, J.

It was held in *Ah Hee v. Crippen*, 19 Cal. 497, and we think correctly, that the sixty-fourth section of the Revenue Act of 1860 does not refer to mines contained in lands which are the private property of individuals, but only to mines in the public lands of the State or United States. The provisions of the Revenue Act of 1861 are substantially the same upon this point as those of the Act of 1860, and must receive the same construction. If, then, the fee of the land upon which the plaintiff was mining was in his landlord, that decision is decisive of this case, and the plaintiff is not liable to pay the license sought to be collected.

The plaintiff is mining upon lands patented to his lessors as school lands, under the Act of April 16, 1859. Section eight provides that "nothing in this Act shall be construed so as to authorize or confirm the location or purchase of any of the mineral, swamp, or overflowed lands in this State as school lands." (Laws 1859, p. 340.) The question is, do the allegations of the complaint show a title in fee in the plaintiff's lessors? It appears from the averments of the complaint, that under a lease from the patentees, and with their permission, the plaintiff is working several men, and taking out gold

the value of from twenty-five to thirty dollars per day. The defendant, a collector of the foreign miners' license tax, insists that it appears from the foregoing allegations of the complaint that the lands referred to are mineral lands, and that the patent is therefore void. All lands containing gold are not necessarily mineral lands within the meaning of the question under consideration. Probably there is very little gold within the basin formed by the Sierra Nevada and Contra Costa ranges of mountains that does not contain more or less of the precious metals. It may turn out that much of the land now regarded as suitable only for pasturage and agricultural purposes contains sufficient quantities of gold to justify the expense of extracting it by mining; yet, in the present state of our knowledge upon the subject, it could not be called mineral lands. It is not easy in all cases to determine whether any given piece of land should be classed as mineral lands or otherwise. The question may depend upon many circumstances such as whether it is located in those regions generally recognized as mineral lands, or in a locality ordinarily regarded as agricultural in its character. Lands may contain the precious metals, but not in sufficient quantities to justify working them as mines, or make the locality generally valuable for mining purposes, while they are well adapted to agricultural or grazing pursuits; or they may be but poorly adapted to agricultural purposes, but rich in minerals; and there may be every gradation between the two extremes. There is, however, no certain, well defined, obvious boundary between the mineral lands and those that cannot be classed in that category. Perhaps the true criterion would be to consider whether upon the whole the lands appear to be better adapted to mining or other purposes. However that may be, in order to determine the question, it would, at all events, be necessary to know the condition and circumstances of the land itself, and of the immediate locality in which it is situated. It is the duty of the officers of the Government having the matter in charge, before making a grant, to ascertain these facts, and to determine the problem whether the lands are

mineral or not. In this instance the lands appear to have been surveyed with a view of bringing them into market, for they are described by range, township, and section, "according to the official survey of the United States." It is alleged that the location was approved by the Government of the United States; that the purchase money was paid to the State of California; that the notice of intention to apply for a patent was published, as required by law, and that the patent set out in the record was duly issued by the State. The regular proceedings prescribed by law, then, have been taken, and the officers of the Government have ascertained these facts, and adjudged the lands to be subject to be granted. In the language of Mr. Chief Justice Field, in *Doll v. Meador*, 16 Cal. 324, the patent "is the record of the State that the land was subject to location under the grant of the United States, and has been located through its officers in pursuance of the terms of the donation;" and we may add in this case, that it is also a record of the judgment of the State, by its officers duly appointed for that purpose, that the conditions and characteristics of the land were not such as to constitute it mineral lands within the meaning of the provisions of the statute, and the verity of this record is not overthrown by the mere fact appearing in the complaint that the land patented has been ascertained to contain a sufficient amount of gold to induce the plaintiff to mine it for that metal. *Prima facie*, the complaint shows a title in fee in the patentees, the parties under whom the plaintiff holds. The patent is valid upon its face, and it is only upon matters *dehors* the instrument that it is attacked. And these matters relied on appearing in the complaint are insufficient to justify the Court in holding—in the face of the patent, and the solemn record of the action of the State to the contrary—that the lands granted by it are mineral lands within the meaning of the statute.

This view of the case renders it unnecessary to consider the question whether this is one of the cases in which the patent can be attacked collaterally, or in any mode other than

Thornton v. Mahoney et al.

a direct proceeding on the part of the State to vacate it, if so, whether the defendant stands in such a relation to State as would enable him to assail it. The judgment is affirmed.

BERT S. THORNTON v. DAVID MAHONEY, GEORGE BLISS, JOHN O'CONNOR, AND SOLOMON A. SHARPE.

PRESUMPTION AS TO CHARACTER OF MEXICAN GRANT.—Where a specific quantity of land has been confirmed to a grantee claiming under a Mexican or Spanish grant or to his assigns, and a survey has been made of the quantity confirmed, which survey has been set aside by the United States District Court, the presumption is that the grant was of a specific quantity to be selected and segregated within the area of a larger tract.

RIGHT TO POSSESSION OF MEXICAN GRANT.—A grant by the Mexican or Spanish Government of a specific quantity of land within the area of a larger tract, gave to the grantee such an interest in the entire tract as entitled him to the right to its exclusive possession, as against all persons except those having an interest in or right to the possession of the same, or some part of it, under the Government, until such time as the Government segregated the quantity granted from the general tract.

—Until the Government of the United States restricts the possession of those claiming under a Mexican or Spanish grant, by a segregation and location of the quantity granted, the grantee or his successor in interest is entitled as against third persons without title to the possession of all of the land within the exterior boundaries described in the grant.

PENDING APPEAL FROM ORDER CONFIRMING SURVEY.—If a grant has been confirmed, and a survey of the quantity confirmed has been made by which it has been located within the exterior boundaries of the larger tract mentioned in the grant, and an appeal has been taken from an order confirming the survey, the grantee or his assignee is entitled to the possession of all the land within the exterior boundaries of the grant until the final determination of the appeal.

BOND OF PROCEEDINGS PENDING SUCH APPEAL.—A bond to stay proceedings is not necessary in order to perfect an appeal from a decree of the District Court of the United States approving of a survey of a Mexican or Spanish grant.

ENFORCEMENT OF DECREE PENDING APPEAL.—One who appeals from a decree in his favor in order to obtain a decree for a larger sum, cannot, pending the appeal, carry into execution the decree.

—An appeal duly taken to the Court of last resort suspends all proceedings in the Court below.

APPEAL from the District Court, Twelfth Judicial District, and County of San Francisco.

The facts are stated in the opinion of the Court.

J. B. Crockett, for Appellant.

In support of the appeal I rely on the following propositions, to wit:

1. That the approved survey is a *final location* of the respondents' claim in the sense contemplated by the Act of April 26th, 1858. (Wood's Dig. 1047.)

2. That the said Act is not unconstitutional and void.

If these propositions can be maintained, the appellant is entitled to recover.

The first proposition renders it necessary to consider the Act of Congress of June 14th, 1860. (12 Statutes at Large, 38.) By the fifth section of that Act it is provided in substance, that the survey, when determined by the District Court by its decree, shall have the same effect and validity in law as if a patent for the land had been issued by the United States. The fair and just construction of the entire Act is, that after the survey has progressed to the point when it is approved by a final decree of the District Court, it is thenceforth to be deemed a final location and to have the force of a patent. The policy of the Act is obvious. It authorized the District Court to review all surveys made by the Surveyor-General, and for the first time provided a method by which adverse claimants, and even settlers claiming under the Government, could be heard in respect to the survey. Before then, the proceedings were entirely *ex parte*. When the survey was approved by the Surveyor-General, it was forwarded to the Land Office, and the patent issued. But, by this Act, the survey could be ordered into the District Court on the motion of the Government or of any adverse claimant, proofs were to be taken, and the Court was to enter its decree rejecting, modifying, or approving the survey. When all this was done, and the Court by its final decree approved the survey, the obvious intention was, to give to the decree the effect of a patent, so long as it remained in force. The very language of the Act admits of no other interpretation, when it declares "the said plat and

vey so finally determined by publication, order, or decree, the case may be, shall have the same effect and validity in as if a patent for the land so surveyed had been issued by United States."

For is the decree any the less final, in the sense of the Act, because it is subject to appeal. The precise object of the Act to avoid the delay arising from appeals and from other causes which might retard the issuance of the patent. Hence, it provides that after all parties have had a chance to be heard in the District Court, its decree approving a survey shall be equivalent to a patent. As long as that decree remains in force it is to be accepted as final by all parties in interest. The claimant is concluded by it until reversed; and, on the other hand, he is protected by it as fully as by a patent. The fact that it is subject to appeal does not impair its effect as a final decree, so long as it remains in force. This branch of the case resolves itself into a simple question of construction, to be deduced from the face of the Act. When the Act provides that a final decree approving the survey shall have the force of a patent, does it mean a decree of the District Court, from the time it was rendered, or does it mean a decree which has become absolutely conclusive, because no appeal has been taken within the prescribed term. I insist that the former is the correct interpretation, and that the decree is final, in the sense of the Act, from the time it is rendered until it is reversed or set aside.

If I am right in this, the next question which arises is, whether or not such a decree is a final location of the land in the sense of the Act of the Legislature of April 26th, 1858. (Wood's Dig. 1047.) If the decree so long as it remains in force has the effect of a patent, then it is a final location in the sense of our statute. The claimant is under a bar from claiming or asserting title to any lands outside of the survey so long as the decree remains in force. As to him, it is conclusive until reversed. The policy of our Act is to limit the claimant to the precise land which has been set apart to him by a final survey, and to conclude him by any survey which,

as between himself and the Government, has the force of a patent. If, therefore, the survey in this case is so far conclusive in favor of the claimant as that he could maintain ejectment upon it, treating it as a segregation of his land, it must follow, on the other hand, that he is concluded by it, and could not maintain ejectment for any land outside of it. If Mahoney were not in possession and was prosecuting an ejectment to recover all the lands within the exterior boundaries of his grant, would not the decree of the District Court, approving the survey of his half league, be a valid defense as to all the lands not included in the survey? In other words, is the Court prepared to hold that a party entitled to a smaller quantity, to be located within a larger area, can maintain ejectment to recover all the land within the exterior limits, notwithstanding that the quantity confirmed has been located by an official survey approved by the District Court? The Court has pushed the doctrine in favor of the claimant to the utmost verge in holding that in *advance* of a final survey he can recover all the lands within the exterior limits of the grant. But I apprehend that the Court would hesitate long before holding that after an official survey, approved by the District Court, the claimant could nevertheless recover in ejectment the lands outside of the survey.

On the same principle I claim that Mahoney is estopped by the survey in this action. As to *him* the survey is conclusive of the extent and location of his claim, so long as it remains in force. Until the decree approving the survey is set aside, he is under a bar in respect to all lands not included in it. He is absolutely estopped by it whilst the decree remains in force. I insist, therefore, that, in the sense of our statute, Mahoney's claim has been "finally located" so as not to include the land in contest.

If, on the appeal, the survey shall be set aside and a new survey ordered, so as to include the lands in dispute, Mahoney's right will attach to the new location. But so long as the decree approving the survey remains in force, he can claim no lands outside of it; and having evicted the appellant under

Thornton v. Mahoney et al.

judgment in ejectment, he should restore him to the possession.

T. J. Bergin, for Respondents.

A correct conclusion upon the question of construction involves the consideration of the nature of the several Acts of Congress in relation to Mexican land claims in California. (Act of March 3, 1851 — Bright's Dig. 111 — and the Acts amendatory thereof; Act of June 14, 1860 — 12 U. S. Stat. at Large, 33.) These Acts were passed in discharge of the treaty obligations the Government had assumed. (Wood's Dig. 20, Art. VIII.) They are to be largely and liberally construed in furtherance thereof. The duty in performance of which they were enacted, was one binding upon the United States independently of all treaty; the treaty simply superadds to such obligation the pledge of the faith and honor of the Government to the sacred discharge thereof.

Nor should the subsequent changes that have supervened in the ownership of these lands induce any different construction thereof from that which these Acts would have received at the time the title to the lands remained still vested in the original claimants. (*Wilson v. State of New Jersey*, 7 Cr. 164.)

The final decree of the District Court is final *quoad* that court, but certainly not absolutely and in all events final, else an appeal therefrom expressly allowed would not lie. The final decree, therefore, of the District Court in this case, as contemplated by the law, is simply and only final *sub modo*. There can be no absolute finality until all legal means of reversal are exhausted; it is only when there no longer remains any power to either party to the proceeding to question the same, that it can, strictly and properly, be said to be absolutely final. This can only be upon the issuance of the patent. (*Johnson v. Van Dyke*, 20 Cal. 225; *Castro v. Hendricks*, 23 How. 30; *United States v. Sempeyerac*, 7 Pet. 222; *Davis v. Ballard*, 1 J. J. Marsh. Ky. 564.)

In *The United States v. Sempeyerac*, already cited, a case of

Thornton v. Mahoney et al.

confirmation of land claim, upon proceedings analogous to those had in regard to California land claims, the claim was finally confirmed by the decree of the Court; yet, three years thereafter, Congress passed an Act to re-open the case on the part of the United States, and upon the proceedings thereupon had the claim was rejected. An appeal therefrom was taken to the United States Supreme Court, and that Court sustained the action of Congress and the inferior Court, and affirmed the decree finally rejecting the claim.

In *Davis v. Ballard*, cited above, the time for suing out a writ of error, according to the law in force when the judgment was rendered, had elapsed, and the judgment thus become final. Davis, after lapse of the statutory time, sued out a writ of error to reverse the judgment. Ballard pleaded in bar thereto, that it was brought and sued out after the expiration of and not within three years next after the judgment was rendered in the inferior Court. In answer to this, Davis set up a certain Act of the Legislature of Kentucky, the second section of which declared "that in writs of error already sued out, or that may hereafter be sued out, that the period between the thirty-first day of November, 1824, and the first day of April, 1827, shall be deducted from the time allowed by law in any plea, motion, or suit in which the plea of the Statutes of Limitations of writs of error may be plead or relied;" under which provision the writ was, of course, brought in time, if the Act thus making the deduction were valid. The Court, after elaborately examining the question, sustained the Act, and held the writ of error well brought.

These authorities clearly show the power of the United States over these proceedings in regard to these land claims, and it is absurd to contend, while the United States have such ample powers in the control thereof, that they are or can be finally and absolutely conclusive on them; and it is equally absurd and unjust to hold the claimant bound where the United States are not. These authorities, it is apprehended, abundantly prove, independently of all reasoning *a priori*, that there can be no final location, within the true intent and

Thornton v. Mahoney et al.

ning of the legislation of Congress and of the State of California, until the issuance of a patent. The error and justice of any other construction will at once be manifest if we consider that the final decree of the United States District Court already rendered in the matter of the survey of these lands may, upon the pending cross appeals to the United States Supreme Court, be reversed, and a new survey ordered in which the premises here sued for may be included; must the respondents again sue for the recovery thereof, in the meantime submit to be deprived of their lands, pay enormous damages, and be harassed with incessant litigation? The same course of proceedings may have to be repeated an indefinite number of times. How will such a course comport with the solemn pledge of the faith and honor of the United States to the protection of the claimants to these lands? Will the Government itself to do such a thing directly, it could meet with the reprobation of all men, and must forever dishonor its faith and honor. Yet, the result is practically the same to the claimants, if by misconstruction of the legislation of Congress, they are to be thus stripped of their property and condemned to interminable litigation? It would, too, be clearly in conflict with the repeated and uniform decisions of this court as to these claimants' rights under Mexican grants. (*Mahoney v. Van Winkle*, 21 Cal. 527; *Lambertson v. Hogan*, 11 Cal. 100; *Warr*, Penn. 22; *Norman v. Heist*, 5 Watts & Sergt. 171.) There is, therefore, no final location, within the true intent and meaning of the statute. This is one of the primary and essential elements of the appellant's right to recover herein. The right to recover is derived solely from the statute, and the damages, therefore, only arise upon the contingency therein provided.

By the Court, CURREY, J.

In May, 1861, David Mahoney commenced an action of ejectment in the District Court of the Twelfth Judicial District against Robert S. Thornton and others, for the recovery of the possession of a certain tract of land situated in part

Thornton v. Mahoney et al.

in the County of San Francisco, and part in the County of San Mateo, called "Laguna de la Merced." In June, 1862, Mahoney obtained a judgment in that action against certain of the defendants therein, among whom was the said Thornton, and subsequently, in June, 1863, Thornton was ejected from the land in controversy in this action and Mahoney was placed in possession thereof by the Sheriff, acting under and by virtue of an execution issued on said judgment.

This is an action of ejectment by said Thornton as plaintiff against said Mahoney and George Bliss, John O'Connor, and Solomon A. Sharpe, as defendants, commenced in August, 1863, for the recovery of the possession of the parcel of land, consisting of about one hundred and twenty acres, from which the plaintiff was ejected under Mahoney's judgment, and for the recovery also of damages which he sustained by reason of being put out and deprived of such premises.

The plaintiff bases his right to recover on the Act of the Legislature of this State, passed in 1858, entitled "An Act for the better protection of settlers on public lands in this State, and to secure the rights of parties in certain cases," (Laws of 1858, p. 345); and to show that his case comes within the provisions of this Act, the plaintiff, by his complaint, states the facts essential to the maintenance of his action under it. The most of these facts are admitted by the defendants in their answer. The defendants further answer, stating affirmatively facts in avoidance of the effect of the matters alleged by the complaint. The plaintiff, by stipulation, admitted certain of the matters so pleaded by the defendants, and the cause was submitted to the Court upon the pleadings and this stipulation for judgment.

The facts of the case, as submitted, are briefly and substantially as follows: In 1835, a grant of half a league of land, called the "Rancho Laguna de la Merced," was made by the Mexican Government to one Antonio Galindo, who immediately thereupon entered upon the land and built a house and corral thereon, and with his family lived upon the same, using it for the purposes of cultivation and grazing. Afterwards

Thornton v. Mahoney et al.

ando conveyed the property to Francisco de Haro, who entered into the house already erected, and while in possession of several houses on the rancho, and there resided, using the land for cultivation and grazing, until he died in 1848 or 1849. The heirs of De Haro presented their claim for the half league of land to the Board of Land Commissioners, appointed under an Act of Congress passed in 1851, entitled "An Act to ascertain and settle the private land claims in the State of California," for confirmation, and their claim was afterwards finally confirmed to them. Some time since the confirmation, the defendant Mahoney and one James G. Denniston acquired the title, and interest of the confirmees in said rancho. The premises demanded in this action are a portion of the rancho de la Merced.

At the time Mahoney commenced his action against Thornton and others, an official survey of the land confirmed to De Haro's heirs had been made by the United States Surveyor-General for California, and had been approved by him at the time of the trial of that action, and was then pending in the United States District Court on exceptions filed against the survey and location on behalf of the Government. After Thornton had been ejected and removed from the parcel of land in controversy, the United States District Court rejected the survey, set aside the said survey, and ordered a new survey of the lands to be made. Accordingly, another official survey was made and approved by the Surveyor-General, and by him returned to the United States District Court for its approval. The survey, which excluded the premises now in dispute, was afterwards, and before this action was commenced, approved by the same Court. After this, the United States party, and Mahoney and Denniston as claimants of the land, respectively appealed from the decree approving the second named survey to the Supreme Court of the United States, and both appeals, at the time of the trial, were pending and undetermined.

When the plaintiff was ejected from the premises, he had been growing crops on the land of the value of two thousand five

Thornton v. Mahoney et al.

hundred dollars, which Mahoney converted to his own use. In his defense to the action of Mahoney against him, the plaintiff herein expended nearly nine hundred dollars, and by reason of being ousted sustained other loss and damage to the amount of five hundred dollars, besides the loss of the use of the property, which was of the value of one hundred dollars a month. Mahoney has remained in possession of the demanded premises since the plaintiff Thornton was ejected therefrom.

To the answer of the defendants, the plaintiff demurred on several grounds. The demurrer was overruled, when the parties submitted the case upon the pleadings and the stipulation to the Court for its judgment, and the Court rendered a judgment in favor of defendants, and from this judgment the plaintiff has appealed.

The appellant by his counsel alleges that upon the facts admitted by the pleadings and stipulation, the plaintiff was entitled to judgment for the restitution to him of the demanded premises, and for the damages sustained by him by reason of his removal therefrom, and therefore he says the Court erred in giving judgment in favor of respondents against appellant.

The position thus taken on behalf of the appellant presents for consideration the effect of the survey in question as a final segregation of the half league of land to which Mahoney and Denniston became entitled as successors in interest of the confirmees of the Rancho Laguna de la Merced.

From the facts of the case it is to be inferred that the half league granted to Galindo was not so located by the grant itself as to render it entirely certain as to the limits and boundaries of the quantity designated, though the Court, in *Mahoney v. Van Winkle*, 21 Cal. 576, speaks of this particular grant as one for a specific tract of land, and distinguishes it from that class of grants which are "of mere quantity within vague and undefined boundaries." But from the record before us we are compelled to consider it a grant of a half league of land, the boundaries of which it was necessary to ascertain

Thornton v. Mahoney et al.

official measurement or segregation before the quantity granted could become located, and the grant itself could be attached to a specific tract of land. For this purpose may be presumed the survey was made, and it may also be presumed that the parties contesting by appeal the correctness of the survey and its approval by the District Court, deemed it within the power of the Government to confirm it or set it aside and require the land to be otherwise surveyed and located. If the grant had been of a defined tract, the survey might not have been necessary, except for the purpose of ascertaining the courses and distances of its boundaries, with a view of furnishing a description of it to be embodied in the grant to be issued; and in such case it can hardly be supposed any controversy could have arisen respecting the location made by the Government surveyor. We shall therefore regard the grant as of a half league of land within an area larger in extent than this designated quantity.

By the laws and customs of the former Government the segregation and location of the specified quantity granted was required to be made by an officer of the Government. The setting off and segregation of the land from the general area was a part and perhaps the most important part of the ceremony of the judicial delivery of possession to the grantee; where the quantity designated was to be carved out of a larger tract, the judicial measurement and location of such quantity was necessary in order to invest the grantee with a perfect title to a specific portion of the general tract. Until this duty was performed by the Government, the title of the grantee was inchoate and imperfect, consisting of a mere right and interest existing in solemn contract or obligation on the part of the Government to set apart to the grantee so much of the land within the general description as the Government designated by the terms of the grant to cede to him. (*United States v. Foshat*, 20 Howard, 426; *Fremont v. United States*, 20 Howard, 558.)

Though the grant of a specified quantity within a territory of a larger extent did not confer upon the grantee a title to any

particular and defined portion of the land, still he became invested with such an interest in all the lands of the entire area as conferred upon him the right to its possession, to the exclusion of all persons except those claiming an interest in or right to the possession of the land, or some part of it, under the Government. (*Waterman v. Smith*, 13 Cal. 410; *Cornwall v. Culver*, 16 Cal. 429; *Riley v. Heisch*, 18 Cal. 200-202; *Mahoney v. Van Winkle*, 21 Cal. 576, 577.)

Such, undoubtedly, was the right of a grantee under the Mexican Government at the time the grant was made. This seems to accord with the practice of the Mexican authorities in California, and is a logical necessity, if it be admitted that a grantee of a specified quantity within an area of larger extent had the right of entry upon the land before the quantity granted was segregated from the general tract; otherwise, as has been often said by the highest Court in this State, the grantee might and probably would, by continual encroachments, be deprived of every portion of the entire tract.

In *Mahoney v. Van Winkle*, 21 Cal. 577, 578, the learned Chief Justice used the following appropriate language on this subject: "If there be a surplus within the designated boundaries of the tract over the specific quantity alleged by the grantee in his petition, or intended to be ceded by the grant, the Government can at any time, by directing its measurement and segregation, restrict the grantee's possession."

"The grantee cannot himself make the measurement and segregation so as to bind Government. He cannot know what particular part of the general tract the Government may assign to him, or what part it may reserve for its own use or offer for sale or settlement. He is, therefore, directly interested, until the official segregation, to protect the entire tract from waste and injury, and to improve it; and until then third persons cannot question his right to the possession of the whole. They have no authority to fix the limits of his possession, under any pretense of a desire or intention to make a settlement upon the surplus which the tract may contain over the specific quantity designated. Lands thus situated are not open

Thornton v. Mahoney et al.

settlement by the legislation of Congress, but, on the contrary, are expressly exempted therefrom. The determination, therefore, of the limits of the grantee's possession is a matter resting solely between himself and the Government."

The doctrine thus declared is in consonance with the principles of reason and justice, and meets with our approval. It preserves to the party who can justly demand of the Government the fulfillment of its treaty obligations, the right granted to him by the old Government. It cannot be presumed that the Congress of the United States would intentionally do anything to impair the right of the party who may hold an interest in lands thus situated under a grant of the Mexican nation. To deprive him of the use and enjoyment of any portion of it until a segregation of the proper quantity might be made, would subject him to the mercy of every intruder, and consequently would greatly impair, if not entirely destroy, all beneficial use whatever of the portion of the land designed for his benefit. That it was intended in such cases to protect the possessor of a valid claim to a given quantity of land comprehended within limits of a larger extent, which remained to be measured and segregated, the legislation of Congress has sufficiently indicated by withholding lands claimed under a Mexican or Spanish grant from settlement under the pre-emption laws of the Government. Then, until the Government, which alone has the authority to do so, restricts the grantee's possession by a segregation and location of the quantity granted, the grantee, or his successor in interest, must be held entitled, as against third persons without title, to all the lands within the general description of the grant. This rule may be attended with some inconveniences in cases where the amount of land embraced within the general description greatly exceeds the quantity designed to be granted; but notwithstanding all this, the claimant is entitled to the protection of the law, and as the authority to measure and locate the exact quantity to which he may be entitled under his grant rests wholly with the Government, third parties must abide the law, and wait for the surplus until the

Thornton v. Mahoney et al.

Government shall have performed its duty to the party interested.

Then, has the Government limited and restricted the owners of the Rancho "Laguna de la Merced" to the area described by the survey now before the Supreme Court of the United States, on the appeals of the Government and the owners of the rancho, respectively? To answer this question, it is necessary to ascertain and determine the effect of the survey in the condition in which we find it at the time this action was commenced. The survey had then been made and approved by the proper Court, and was subject to examination and review by the Supreme Court of the United States, and to be disapproved and set aside by that tribunal. Whether or not appeals from the approval of the District Court had then been taken does not distinctly appear; and perhaps it is of no especial importance to know this fact; the parties agree that appeals had been duly taken by the respondents Mahoney and Denniston, and also on behalf of the Government, at the time the cause was tried, and were then pending and undetermined: and the counsel have argued the case upon the hypothesis that the appeals had been duly taken when the action was commenced—the one insisting that the decree of the District Court approving the survey is final in the sense of the Act of Congress of June 14, 1860, from the time it was pronounced until it shall be reversed or set aside; and the other as earnestly insisting that the decree is only final as to the Court which rendered it, and cannot be considered as absolutely final until after the Court of last resort shall have disposed of it, or the matter is no longer subject to the contingency of change.

The Act of Congress (12 Statutes at Large, 83) authorizes the District Court of the United States of the districts of California to order, on proper application, any survey of a private land claim within their respective districts to be returned into the District Court for examination and adjudication; and the same Act provides for the taking of testimony as to any matters necessary to show the true and proper location of the

Thornton v. Mahoney et als.

him, and requires the Court on hearing the allegations and proofs of the parties interested, to render judgment thereon; and if, in its opinion, the location and survey be erroneous, the Court is authorized to set aside and annul the same, or to correct and modify it; whereupon it is made the duty of the Surveyor-General, on being served with a certified copy of the decree of the Court, forthwith to cause a new survey and location to be made, or to correct and reform the survey and location already made so as to conform to the decree of the District Court, to which it shall be returned for confirmation and approval. And by the fifth section of the Act it is provided, that when, after publication as aforesaid, no application shall be made to the said Court for the said order, or when said order has been refused, or when an order shall have been obtained as aforesaid, and when the District Court, by its decree, shall have finally approved said survey and location, shall have reformed or modified the same, and determined the true location of the claim, it shall be the duty of the Surveyor-General to transmit, without delay, the plat or survey of the said claim to the General Land Office, and the patent for the land as surveyed shall forthwith be issued therefor, and no appeal shall be allowed from the order or decree as aforesaid of the said District Court, unless applied for within six months from the date of the decree of said District Court, but not afterwards; and the said plat and survey so finally determined by publication, order, or decree, as the case may be, shall have the same effect and validity in law as if a patent for the land so surveyed had been issued by the United States."

By implication, at least, any party interested has the right to appeal to the Supreme Court from the order or decree of approval made by the District Court at any time within six months thereafter; and it appears in this case that the parties in interest have only availed themselves of this right.

The appeals having been perfected, all further proceedings upon the survey and the decree approving it became suspended. A patent cannot be issued for the land surveyed

Thornton v. Mahoney et als.

until the appeals are disposed of, otherwise the appeals might be wholly ineffectual. It is not the practice for the United States when appellant in cases of appeals from the decree of the District Court approving a survey made under the Act of Congress mentioned, to execute a bond in order to stay proceedings upon the decree, and we apprehend no such bond is necessary for the purpose.

In the time of Mr. Chief Justice Hale it was the law of the House of Lords in England, that the presenting of an appeal to that Court of dernier resort suspended all proceedings in the Court below. It is true their jurisdiction was for a long time questioned by the House of Commons, and also by several distinguished Judges, among whom was Mr. Chief Justice Hale himself; but notwithstanding, the jurisdiction of the House of Lords finally became established, and so remained until nearly the beginning of the present century. (Palmer's Practice of the House of Lords, 8 Paige, 381.)

In the case of *The United States v. Pacheco*, 20 How. 263, which was a California land case, an application was made on behalf of the defendants to docket and dismiss the appeal under a rule of the Court; and in respect to it, the Court said: "The only effect of docketing and dismissing a case under this rule is to enable a party to proceed to execute his judgment in the Court below. It removes the bar to further proceedings in that Court which the appeal created, and does nothing more." The converse of the rule here laid down is, that while the appeal remained pending it was a bar to further proceedings in the Court below.

In *Taylor v. Savage*, 1 How. 285, the Court say: "We are by no means prepared to say that a complainant, after having appealed from a decree in his favor, can be permitted, pending the appeal, to carry into execution the decree which he is seeking to reverse in the appellate Court in order to obtain a decree for a larger sum."

The parties who have appealed from the decree approving the survey, respectively seek to reverse it in the appellate Court, in order to obtain a different survey and location of the

Branham et al. v. Mayor and Common Council of San José et al.

to which the assignees of the confirmees are entitled by grant. The appellate tribunal may reverse this decree set aside the survey which has been approved by the District Court, and the result may be that the land in controversy eventually be selected by the Government as a portion of the quantity to be assigned to the claimants and granted by patent yet to be issued. Until this question be disposed of the plaintiff's action must be considered as premature. Judgment affirmed.

AC BRANHAM AND WILLIAM L. SMITH, TRUSTEES FOR JAMES F. REED, *et al.* v. THE MAYOR AND COMMON COUNCIL OF THE CITY OF SAN JOSE, AND WILLIAM DANIELS, JAMES C. COBB, AND S. O. HOUGHTON, COMMISSIONERS OF THE FUNDED DEBT.

OF AYUNTAMIENTO.—An Ayuntamiento was a municipal body, and could take and exercise only such powers as were conferred upon it by the will of the sovereign, as expressed in the laws creating it.

COMPLAINT—AVERMENT OF CONCLUSION OF LAW.—An averment in a complaint that an Ayuntamiento had full power and lawful authority to do a particular act, is an averment of a conclusion of law, and does not tender an issue of fact.

VERBEE—WHAT IT ADMITS.—A demurrer to a complaint containing such allegation does not admit its truth.

—A demurrer admits the truth of such facts only as are issuable and well pleaded.

LO LANDS—MORTGAGE OF.—An Ayuntamiento had no power to mortgage the lands of the pueblo, and a mortgage on such lands given by it was a nullity, and vested in the mortgagee no interest in the lands.

MORTGAGE—DECREE FORECLOSING.—A decree foreclosing a mortgage made by the Ayuntamiento of San José on the pueblo lands, in an action in which the City of San José, the successor of the Ayuntamiento, was a party defendant, did not affect the city, nor estop it from setting up its title to the lands.

SHERIFF'S SALE UNDER VOID DECREE.—A judicial sale under such decree, and the execution of a Sheriff's deed to the purchaser, did not vest in him any title to the lands, but all proceedings, including the decree sale and Sheriff's deed, were utterly void.

SHERIFF'S DEED—WHAT IT CONVEYS.—A decree foreclosing a mortgage, and directing a sale of the mortgaged premises, and the execution of a Sheriff's deed under the decree, transfers to the purchaser whatever interest the mortgage created and vested in the mortgagee, and nothing more.

DEALING WITH MUNICIPAL CORPORATION.—Parties dealing with a

Branham et al. v. Mayor and Common Council of San José et al.

municipal corporation are chargeable with full knowledge of its powers, and act at their peril.

SAME — CONFIRMING VOID SALE.—An agreement made between the municipal authorities of San José on the one part, and the purchasers of the pueblo land at a judicial sale made under a decree foreclosing a mortgage executed by the municipality on those lands on the other part, confirming unto said purchasers all the rights and interests in such lands which they acquired by their purchase at the Sheriff's sale, and releasing unto them all the right and title which the city then had, or might afterwards have therein, was void, and conferred upon said purchasers no new right.

CONFIRMATION — EFFECT OF.—A confirmation may make good a voidable or defeasible estate, but cannot operate upon or aid an estate which is void in law.

RELEASE — EFFECT OF.—Where there is no estate in a releasee to support a release, or upon which it can operate, a release is void.

SAME — WHEN VOID.—A release, unless the releasee is in possession, is void.

SETTING ASIDE SALE.—A naked purchaser at a judicial sale made under a decree foreclosing a mortgage, is not entitled to have the satisfaction of the judgment under which the sale was made set aside and to be subrogated to the rights of the plaintiff in the judgment, because the sale was void, and he acquired no title to the property purchased.

SAME.—A purchaser at a judicial sale made under such decree cannot maintain an action to recover back the purchase money. His mistake was one of law as to the validity of the sale, and from such mistake no relief can be granted.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

The demurrer to the complaint was sustained, and judgment rendered for defendant in the Court below, and plaintiff appealed.

The other facts are stated in the opinion of the Court.

J. B. Crockett, for Appellant.

The city is precluded by the proceedings on the foreclosure from raising this point. The respondent was a party to the foreclosure suit, was served with process, and appeared to the action.

If the mortgage was void for any reason, that defense should then have been made; and having failed to make it, the respondent is estopped, by the decree of foreclosure, from impeaching the validity of the mortgage. It has become *res judicata*, and the validity of the mortgage is no longer open for discussion.

Branham et al. v. Mayor and Common Council of San José et al.

The principle which I invoke is stated as follows in a leading case decided by Chancellor Kent, then a Justice of the Court of Errors of New York: "The judgment or decree of Court possessing competent jurisdiction is not only final as to the subject matter thereby determined, but also as to every other matter which the parties *might* litigate in the cause and which they *might* have decided." (*Le Guen v. Gouverneur* *et al.*, 1 John Ca. 436.)

There is nothing new in this principle, and it is now too well established, perhaps, to need the citation of numerous authorities; nevertheless, to show how broadly it has been recognized in this State and elsewhere, I refer to the following cases: *Dewey v. Gray*, 2 Cal. 377; *Clary v. Hoagland*, 6 Cal. 37; *Gunter v. Laffan*, 7 Cal. 592; *Cal. St. Nav. Co. v. Wright*, 8 Cal. 592; *Cahoon v. Leavy*, 10 Cal. 216; *Davidson v. Dallas*, 11 Cal. 75.

The respondent, therefore, had the opportunity in the foreclosure suit to assail the mortgage as void, or fraudulent, or for any other reason invalid. But no such defense was made; if made, was overruled by the Court. If the final decree was erroneous, the respondent's remedy was by appeal. But no appeal was taken, and the judgment of foreclosure was perfected by a sale, at which the property was purchased by third parties at a large price. When these purchasers now set up the Sheriff's deed as a muniment of title, the respondent seeks to go behind the decree of foreclosure, and assails the mortgage as having been made without authority of law; and endeavors to impeach the foreclosure sale on the ground that the property could not be mortgaged or sold, and that, therefore, the sale was a nullity. These were proper defenses, if valid, in the foreclosure suit; but after a final decree in that case, the respondent is estopped by it, and cannot in this action re-try matters which might have been litigated in that case.

The counsel for respondents claim that the contract of June 2th, 1851, was void as a deed of confirmation, or as a release, because there was no title, or color of title, in Branham &

White to be confirmed, and no estate in them on which a release could operate. They assume that the Sheriff's sale was an absolute nullity, and therefore Branham & White had no title on which to predicate a release or deed of confirmation. If their premises be conceded, and if the contract of June 12th be treated only as a technical release or deed of confirmation, their conclusion may be correct. But the contract is not simply a technical release or confirmation. It is a *compromise* of doubtful rights, in which each of the parties concedes to the other a portion of his supposed right. The principle invoked by the counsel has no application to such a case, and applies only where a person holding a portion of the estate releases his interest to the holder of the remaining portion, or where a prior defective conveyance is confirmed by a new one. Compromises of doubtful rights rest upon a wholly different basis; for every compromise necessarily assumes that the right is with the one party or the other, but owing to a doubt as to which party is in the right, they make mutual concessions, in order to end the dispute; and hence, compromises fairly made are never disturbed, even though it afterwards appear that one of the parties was wholly without title. The contract in question purports to be, and is, simply a compromise, in which each party cedes to the other a portion of his supposed rights. The question, therefore, is entirely free from the technical difficulties suggested by the counsel.

I concede on this argument, as I did on the oral argument, that the mortgage was a nullity for want of power in the Ayuntamiento to make it. No title, therefore, passed at the foreclosure sale. It would be absurd, then, to issue a new order of sale and repeat the process of seeking to enforce a void mortgage. The counsel admit that the judgment was one of *foreclosure only*, and not a money judgment on which an execution could issue. The mortgage being void, the judgment founded on it was void.

The judgment as well as the mortgage being void, the original demand of Belden, Aram & Reed was not merged, and remained precisely as if no judgment had been rendered.

Branham et al. v. Mayor and Common Council of San José et al.

It remained simply a debt due from the city and Belden, Aram & Reed, and the debt was not satisfied, nor the evidence of indebtedness cancelled. The judgment being void, the proceedings of the Sheriff were void. His return on the order of sale, that the judgment was paid, was a nullity because there was no valid judgment or order of sale. He had no power whatever in the premises, and all his acts were void. The original debt, then, was not satisfied, and Branham & White, under a mistake of both law and fact, advanced to Belden, Aram & Reed the full amount of the demand which they held against the city. The principle involved is this, to wit: if a stranger, under a mistake of law and fact, pay the debt of a third person, is he entitled to be subrogated to the rights of the creditor, and particularly if the evidence of indebtedness be not cancelled? If a stranger, under the mistaken belief that he is liable as surety for the debtor, pay the debt, is he entitled to be subrogated? Or, if a surety who has been released pay the debt in ignorance of that fact, is he entitled to take the place of the creditor? If the innocent holder of a junior mortgage, which afterwards turns out to be forged, pay off a prior incumbrance, is he entitled to be subrogated to the rights of the creditor? If a junior mortgage be foreclosed, and at the sale a stranger purchases the equity of redemption and pays off the prior mortgage, and if it afterwards appear that the foreclosure sale was void for want of jurisdiction in the Court, would the purchaser be subrogated?

If, by means of fraudulent representations, a stranger be induced to pay the debt of another, he would be entitled to be subrogated on the ground that he acted upon a falsehood and would not otherwise have parted with his money. On the same principle, and for the same reason, he is entitled to like relief when he pays the debt of another under a mistake of law or fact. In this case, Branham & White acted upon a mistake, both of law and fact. They were mistaken in the law as to the power of the Ayuntamiento to mortgage the land, and as to the obligatory force of the mortgage.

Branham et al. v. Mayor and Common Council of San José et al.

They were mistaken, also, as to the fact that there was a valid decree of foreclosure. There was manifestly a mistake in the respects on the part of all concerned. It was a plain case of mutual mistake. They all supposed the mortgage and judgment to be valid. In cases of mutual mistake, the transaction ought not to stand, because it lacks the primary element of an obligatory contract, to wit: the assent of the united will and judgment of the parties.

"Equity will relieve against a mutual mistake, when the property which one party supposed himself purchasing and the other supposed himself selling, does not exist." (*Marr v. Bennett*, 8 Paige, 312.) The only difference between the case and this is, that though the property existed, the parties had no power to sell it as they supposed they had. They supposed the title would pass at the foreclosure sale. On that belief Branham & White advanced their money.

In a contract for the sale of lands, if both parties are mistaken as to the vendor's title, which was supposed to be perfect, but proves to be void, a Court of equity will relieve the vendee from the contract. (*Hadlock v. Williams*, 10 Ves. 570; *Champlain v. Layton*, 1 Edw. Ch. 467; Same case, reported 18 Wend. 407.)

And in a clear case, equity will relieve against a contract founded on a mistake of law alone. (*Lamott v. Bowly*, 6 B. & J. 500; *Garner v. Garner*, 1 Desau, 487; *Lowndes v. Cholm*, 2 McCh. 455.)

A vendee may rescind the contract, when it appears the parties supposed the vendor had the title, but in fact he had none. (*Bowlin v. Pollock*, 7 Monr. 26.)

If a contract of sale ought not in conscience to bind one of the parties, as if there had been mistake or fraud, a Court of equity will set aside the contract. (*Hepburn v. Dunlop*, Wheat. 179; *Dunlop v. Hepburn*, 2 Wheat. 281.)

If a judgment be supposed to be a lien on land when it is not, this is a mistake in law, which will be relieved against, the defendant can be placed in *statu quo*. (*Crosier v. Ager*, Paige Ch. R. 137; *Williams v. Champion*, 6 Ham. 10)

Branham et al. v. Mayor and Common Council of San José et al.

ring v. Harsen, 3 Jones Eq. N. C. 96; *Schermerhorn v. Rhedt*, 9 Paige, 28.)

The doctrine of subrogation does not depend on *privity*, nor is it confined to cases of suretyship; but it is a mode which the law adopts to compel the ultimate discharge of the debt by one who, in good conscience, ought to pay it. (*McCormick v. Irwin*, 35 Penn. State R. 111.)

So where the land is purchased in good faith at an administrator's sale, *which is void* because the requirements of the statute were not complied with, and the purchase money has been applied in extinguishment of a mortgage to which the land was subject, the purchaser will be subrogated to the rights of the mortgagee to the extent of the purchase money, and the owner will not be entitled to recover possession until he repays the purchase money. (*Valle v. Fleming*, 29 Mo.; 8 Mo. Rep., 152.)

In this case, Branham & Smith paid a large sum for the purchase money at the foreclosure sale, which was applied in extinguishment of a just debt due from the respondent to Belden, Aram & Reed; and I claim that if the sale was void and the mortgage a nullity, Branham & Smith should be subrogated, *pro tanto*, to the rights of the creditors Belden, Aram & Reed, under the original obligation, and are entitled to recover from the respondent the amount paid, with the same rate of interest to which Belden, Aram & Reed were entitled.

W. T. Wallace, and S. O. Houghton, for Respondents.

The counsel for appellant seeks to make the broad sweeping averment which he has chosen to insert in his complaint, that the Ayuntamiento *had the lawful power and authority to contract the debt and make the mortgage*, conclusive alike upon the law, this Court, and the rights of these defendants.

We might answer this by saying that the question as to the existence of this asserted power in the Ayuntamiento is *itself a question of law*, and that the opinion in *Hart v. Burnett* announces the law to be *directly contrary* to what it is *averred* to be in the *complaint*. The effect of a demurrer is to admit

Branham et al. v. Mayor and Common Council of San José et al.

the truth of the *facts only which are well pleaded*, in order the law, as contradistinguished from but arising upon facts, may be determined — nothing more. The averment in the complaint, that the instrument of mortgage was “*in respects binding and obligatory* upon said pueblo, and that the Town Council or Ayuntamiento had *due and lawful authority and power* to enter into said contract. * * * and the contract and mortgage were in *law obligatory* on said pueblo” are not averments of matters of *fact*, but are only averments of *conclusions of law*, and are therefore *not admitted by demurrer*.

In *Thomas v. Desmond*, 12 Howard’s Practice Report: the allegation of the complaint was, “that the said plaintiff is the sole *owner* of the said demand against the said defendants.” The Court said that “is merely an allegation of a *conclusion of law*.”

In *Adams v. Holley, Admr.*, 12 Howard’s Practice Report 321, the allegation was, “the plaintiff became and was the *owner* of all the interests, rights, and claims, * * * *owner* of all accounts; and that the moneys due from the said Holley, at the time of his death, to all the said proprietors became and were and still are the property of the plaintiff.” The Court said, in relation to this averment: “Here is no alleged showing the plaintiff’s title to the rights and interests of other proprietors, of which he claims to be the *owner*. * * *. The plaintiff only alleges that he is the *owner* of the said moneys, which is only a *legal conclusion*.” (*McMurray v. Gifford*, 12 How. P. R. 14; *Bentley v. Jones*, 4 How. P. R. 204.)

It will be seen by reference to the complaint, that in the contract of June 12th, 1851, the city authorities undertook to *confirm* unto Branham & White all the rights and interest which Branham & White had acquired at the said sale; and before entering upon the examination of the nature and extent of the powers of the municipality of San José in relation to the pueblo lands, we desire to submit the proposition that insofar as this is an instrument of *confirmation merely*, it does not aid or strengthen the title of the confirmees named therein.

Branham et al. v. Mayor and Common Council of San José et al.

in the very nature of things *could not do so*, because of
utter nullity of the estate attempted to be confirmed.

In the case at bar the releasees had no estate in law in the
 land; they had no possession of any part of it; there was, of
 course, no privity of estate between them and the releasers;
 and for these reasons *alone*, resting as they do simply upon the
 situation of the *confirmees* and *releasees* in relation to the land,
 and conceding, for the purpose of the consideration of this
 proposition, the most ample power in the city authorities to
 confirm, we submit that the confirmation and release were simply
void and inoperative, for reasons based *wholly* upon the *con-*
dition and situation of the supposed *releasees* and *confirmees* in
 relation to the property which is the subject of release and
 confirmation. That this is their condition *at law*, and that no
 fraud, accident, mistake of fact, or other matter of equity
 entitles them to equitable relief.

The plaintiffs are not entitled to be substituted or subro-
 gated to the rights of Belden, Aram & Reed, who claim to
 have recovered a judgment against the city for an indebted-
 ness contracted by the Ayuntamiento of the pueblo.

The plaintiffs claim that, although it be true that the instru-
 ment of mortgage made by the Ayuntamiento, and the sale
 made thereon by the Sheriff, were insufficient to pass the title
 in the land to the plaintiffs; and although it be true that the
 contract of June 12th, 1851, ought not, on the principles of
 equity jurisprudence, to be specially enforced by this Court,
 yet the plaintiffs are, at *all events*, entitled to be substituted to
 such rights as Belden *et al.* claimed upon their judgment
 against the city; and this asserted claim of the plaintiffs to
 be substituted, is made by their counsel, in his argument, to
 rest upon the *general doctrine of subrogation*, as understood in
 the law, and also upon the *circumstance that the money of the*
plaintiffs went to satisfy the Belden judgment, and that the title
 in the property they purchased at the Sheriff's sale has *failed*.
 We will consider these two positions of the counsel together.
 The bill discloses the fact that in the suit of *Belden v. The*
City, a mortgage made by the Ayuntamiento, on the 9th April,

Branham et al. v. Mayor and Common Council of San José et al.

1850, upon the pueblo lands, was pretended to be foreclosed and the premises ordered to be sold to satisfy judgment. judgment or decree *simply forecloses this supposed mortgage* and does not provide any relief over against the defendant *any residue or deficiency* remaining due after the sale of supposed mortgaged premises.

We are not indulging now in any criticism upon the verbiage of the complaint. An inspection of the record of the proceedings shows that the fact is really so.

The law in force at the time of these proceedings, (1850, p. 456,) provides that the judgment upon foreclosure might direct an execution for any deficiency remaining after the sale of the mortgaged premises; but in this case the complaint did not ask it, nor did the decree award it, although it provided that any *excess* in the *amount realized* by the sale over the amount of the debt, should be *paid over* to the defendant. The decree did not direct any execution for *any deficiency* that might remain. This was, no doubt, the intent and design of both parties, because the bill does not disclose to us that the Mayor and Common Council resisted the proceedings in any way.

Now, this prayer to be subrogated to the rights of the mortgagees in that decree simply amounts to a proposal to revise the decree to sell the pueblo lands under the invalid mortgage made by the Ayuntamiento on the 9th day of April, 1850, because the *only relief* awarded to the plaintiffs in that decree was a sale of these lands under that instrument of mortgage and a decree of subrogation of these plaintiffs in the suit to the rights of the other plaintiffs in the decree of *Belknap et al. v. The Mayor et al.* cannot *alter* the terms of that decree itself. If the Court were now appealed to in the first instance to decree a foreclosure of that instrument of mortgage, it would not do so with the light of the decision in *Hart v. Burnett* on the subject, and yet the proposed subrogation indirectly does *that very thing*.

Another consideration which is fatal to the claim of subrogation, is that the bill is not properly drawn for the purpose of such relief. It does not make the *necessary parties* d

Branham et al. v. Mayor and Common Council of San José et al.

to enable the Court to render such a decree. The claim that the plaintiffs be subrogated to the rights of Belden, Reed, and Reed, under their decree against the defendants; and would seem a clear proposition of law, even without the authority of the Court, that if the supposed rights of any man are taken from him and given to another by the judgment of the Court, he whose supposed rights are to be thus transferred should be a party before the Court.

If the decree is made without the presence of Belden, Reed, and Reed, the supposed owners of these rights, would such a decree bind them? Could they not resist it whenever any right is claimed against them? Would the defendants or any one else be protected by such a decree if they afterwards treated with the plaintiffs in this suit as the real owners of such supposed rights? How can a decree be made to reach the rights or title of *any kind*, unless such right or title is *brought before the Court to be bound by a decree*?

In Mitford's Chancery Pleadings (Note on Parties, 398) it is declared that "the general rule is that all are necessary parties who have an interest in the subject matter which may be affected by the decree. The rule is founded on the great principle of preventing future litigation, and taking away multiplicity of suits, by adjudicating upon the rights of all such parties upon whom a decree may or ought to operate."

In the cases of *Caldwell v. Taggart*, 4 Peters, 190, and *West v. Randall*, 2 Mason, 181, declare that the general rule is, that wherever numerous the persons interested in the subject of a suit, they must all be made parties plaintiff or defendant, in order that a *complete decree* may be made—it being the constant aim of a Court of equity to do complete justice, by embracing the *whole* subject, deciding and settling the rights of *all* persons interested in that subject, and thus make the performance of the order *perfectly safe* to those who have to obey it, and also prevent litigation in the future.

It will be borne in mind that at the time the plaintiff paid twenty-six thousand dollars there had been *no treaty or convention of any kind* between *them* and the city authorities;

there was no privity or connection between the city and plaintiff at all in making that purchase; they never made any relation to the matter of this purchase or sale until the month of June, 1851, and which was a period of about *one month* after the plaintiffs made their purchase at Sheriff's sale, *had paid all the money they ever paid.*

The plaintiffs were therefore strangers to the proceeding of bidding and purchasing at a judicial sale just as any one else had a right to do; there is then a total want of any feature as *inducements held out to plaintiffs to purchase, request or promises made, confidence reposed or abused*; and if plaintiffs may be subrogated to the rights of the plaintiff in execution, then it must be because the rule is that *any purchaser upon failure of the title to the property purchased at a judicial sale, may recover of the defendant in execution the purchase money that he may have expended*; in other words, *by a fiction of a Court of equity*, the defendant in execution is supposed, upon sale of his real estate by the Sheriff, to come into the *most ample covenants of seizin and general warranty with the purchaser, his heirs and assigns*, as to the title under which the property is held. To support this view, the inquiry of the plaintiff's counsel has presented for the consideration of the Court a *single case*: *McLaughlin's Adm'r v. Dana*, 8 Dana, Ky. 182. The property sold in that case was *real estate* — it was a negro boy; possession of the negro passed to the purchaser, Daniel, at the sale, but the negro was afterwards recovered from the vendee of Daniel in an action of detinue. The Court cites no authority, and does not enter into any elaborate reasoning in its decision. The decision itself might have been put upon the ground that as in the sale of a chattel by a party where possession is delivered there *is in law an implied warranty of title*, so the Sheriff making the sale for the party defendant under execution would be regarded as his agent for the purpose of this implied warranty, as that officer is unquestionably considered the *agent of the parties to an execution for many purposes*. But this rule of *implied warranty* does not apply to sales of real estate, and

Sanborn et al. v. Mayor and Common Council of San José et al.

significant that the research of the counsel has failed to produce a case where *substitution* was allowed in case of *real estate on failure of title*.

Next, as to the plaintiff's claim to be reimbursed by the defendants the twenty-six thousand dollars bid at the Sheriff's sale, by reason of the *failure of the title they purchased*, and their right to maintain this, *an independent action*, to be redressed touching their purchase at the sale under the decree of foreclosure, we cite the case of *Boggs v. Hargrave*, 16 Cal. 471. The facts were, that in 1857 Harbin executed a mortgage to Fowler and Hargrave upon certain premises, and after giving the mortgage, Harbin conveyed the whole of the mortgaged premises to Bristol. Fowler and Hargrave afterwards proceeded to foreclose their mortgage, but made *only Harbin* a defendant in the suit, and *did not bring Bristol before Court*. At the sale under the decree, Boggs purchased the premises and *paid the purchase money*. Finding that he had acquired *no title* to the land, he sued the mortgagees to recover back the money. It was held that he *could not recover*.

The Court say: "The doctrine of *caveat emptor* applies to sales made upon valid judgments, and is usually looked with reference to sales upon execution issued against the general property of a judgment debtor. In these latter cases, *a defect of title is no ground* for interference with the sale or a refusal to pay the price bid. The purchaser takes upon himself *all the risks*, and bids with *full knowledge* that in any event he only acquires *such interest* as the debtor possessed at the date of the levy or the lien of the judgment, and he may *possibly acquire nothing*."

Having thus announced the general rule as to sales upon execution, the Court proceeds to remark upon the law applicable to sales upon the foreclosure of a mortgage, thus:

But a somewhat different rule prevails in cases where particular property is the subject of sale by a specific adjudication, as where the interest of A. in a certain tract is decreed to be sold. To the validity of a decree of this character the

Branham et al. v. Mayer and Common Council of San José et al.

presence of A. is essential, and when present the decree binds him, and is effectual, by the sale it orders, to transfer the estate. A valid decree in a mortgage case operates upon the interest as the mortgagee possessed in the property at the execution of the mortgage. That interest *may not constitute valid title*; it may not, in fact, be of any value, and the purchaser *takes that risk*. To that extent the doctrine of *caveat emptor* applies even in those cases, and in all cases of adjudication upon specific interest, but no further. The interest is specifically subjected to sale, *whatever it may be worth*, and the purchaser is entitled to receive; it is for that interest he makes his bid and pays his money."

We submit that this reasoning is conclusive that the plaintiffs cannot maintain this suit upon the claim of subrogation. They purchased without any misrepresentation, undue influence, or misplaced confidence. They knew that they were purchasing upon a foreclosure of a mortgage upon pueblo lands. No fact that is known to them now was unknown to them at the time. If they made a mistake, it was a *mistake of law only*—just the mistake that Boggs made when he supposed that he would acquire the title to the lands he purchased, notwithstanding that the plaintiff was not made a party, and for this mistake of law the Supreme Court declare that *no relief can be had in an independent suit*. The Court concludes that the only relief that a party purchasing can have in such cases, is by an application made to the Court in the original foreclosure suit, and not by an independent action. Such application, too, the Court must be made in a *reasonable time*. (*Ten or eleven years* after the purchase would hardly be reasonable time, we suppose.) But the counsel complains that this remedy would not be available to the plaintiffs, because there could be no resale, the mortgage itself (and, we would add, the *debt, too*) being void, and there being therefore *nothing* to sell. That is our view, also, because of this view, we do not see that it follows that the settled rules of law and equity must be disregarded in order to create a remedy for the plaintiffs. The proposition may be stated thus: the *general rule* at law and in equity,

Branham et al. v. Mayor and Common Council of San José et als.

ning purchases such as plaintiffs made in this case, is that *caveat emptor*.

By the Court, SANDERSON, C. J.

The appeal in this case comes before us on demurrer to the complaint. The facts as alleged in the complaint are substantially as follows:

By the Constitution, the Pueblo of San José was declared the seat of government until removed by law. The first session of the Legislature was held at that place. There was then no building belonging to the State or the Pueblo of San José adapted to the purposes of the Legislature, and the citizens of the pueblo petitioned the Ayuntamiento, or Town Council, to procure one. This the Ayuntamiento endeavored to do, but failed for the want of means and credit. Thereupon, seventeen citizens of the pueblo purchased a lot and building, situated within the pueblo, for the accommodation of the Legislature. In accordance with an understanding to that effect, the deed was made to Aram, Belden & Reed, in trust for the purchasers, who were to convey the property to the pueblo whenever the pueblo could pay for the same. On the 14th day of April, 1850, the Ayuntamiento purchased the premises from Aram, Belden & Reed, at the price of thirty-four thousand dollars, payable within six months, with interest at six per cent per month; and to secure the payment of that sum, pledged the State scrip or temporary loan bonds in the treasury, and the revenues which might be raised that year by taxation, and mortgaged what is known as the pueblo lands. The first Legislature met in the building thus purchased by the Ayuntamiento, and on the 27th day of March, 1850, it passed an Act incorporating the City of San José. By the provisions of the Act the City of San José succeeded to all the legal rights and claims of the pueblo, and became subject to all the liabilities incurred and obligations created by the Ayuntamiento. The city government was limited in the exercise of its municipal powers to the geographical boundaries established by the Act; and over the pueblo lands situ-

Branham et al. v. Mayor and Common Council of San José et als.

ated outside of those limits the city government could exercise no authority, except to "rent, lease, or sell" the same. The City of San José thus became the successor in interest of the Pueblo of San José to the lot and building in question, which the purchase money, or a part of it, was still unpaid, and the pueblo lands mortgaged by the Ayuntamiento to secure its payment. The city authorities took possession of the lot and building, and afterwards sold them to the City of Santa Clara for the sum of thirty-eight thousand dollars, payable in three months, with interest at the rate of four and a half per cent per month, and directed the proceeds of the sale to be applied toward the payment of the debt due to the trustees, Aram, Belden and Reed; but the moneys, when collected from the county, were not so applied, but were expended by the city government for other purposes. Thereupon, the trustees sued the city, and in December, 1850, recovered judgment and a decree of foreclosure of the mortgage executed by the Ayuntamiento, under which the pueblo lands were sold by the Sheriff to Branham and White, trustees, plaintiffs in this action. The proceeds of this sale were more than sufficient to satisfy the judgment, and the same was duly satisfied of record, and the overplus was paid and received by the city. On the 26th of May, 1851, the Sheriff conveyed the pueblo lands to the purchasers.

After this purchase some dispute arose between the city and the purchasers concerning the lands in question, and the Council, by ordinance, authorized the Mayor to settle and arrange the dispute with the purchasers. Under this ordinance the Mayor entered into a contract with the purchasers on the 12th of June, 1851, whereby, after reciting the chase by the trustees at the Sheriff's sale, it was agreed that the trustees and the Mayor should conjointly sell the pueblo lands in such a manner as to realize to the trustees the amount of the purchase money paid by them and all costs and expenses. If the money thus realized should prove insufficient for that purpose, the city was not to be bound for the deficit. on the contrary, there should be a surplus, the same was to

Branham et al. v. Mayor and Common Council of San José et al.

vested for the benefit of the city and trustees in a railroad contemplated between San José and San Francisco, the land to be invested in the proportion of three to one in favor of the trustees. The contract also contained certain provisions respecting "town lots" and "five hundred acre lots," and the confirmation of the pueblo title to the land; and in consideration of the covenants of the contract the city ratified and confirmed the title acquired by the trustees at the Sheriff's sale, and released to them all the right and title which the city then or might thereafter acquire to the whole or any portion of the land.

This contract was duly ratified by the Common Council of the city, and the Mayor was directed to carry the same into effect. But the city afterwards refused to do so, and conveyed the right, title, and interest in the land to the Commissioners of the Funded Debt of the City of San José. Upon the state of facts the plaintiffs ask for various kinds of alternative relief: First — A decree setting aside the conveyance made in the city to the Commissioners of the Funded Debt; Sec-

— Or, if that cannot be done, a decree for the specific performance of the contract of the 12th of June, 1851, against the city and the Commissioners, and an injunction perpetually restraining them from making further sales or conveyances of the lands, except in the manner and on the conditions specified in said contract of the 12th of June, 1851, and also a decree requiring them to account with the plaintiffs for all the moneys received by them or either of them from sales of lands already made; Third — And inasmuch as the purchase money paid by said Branham and White liquidated the debt of the city to Aram, Belden and Reed, if for any reason it shall be adjudged that the Sheriff's deed and the contract of the 12th of June are invalid, plaintiffs ask that the satisfaction of the judgment in favor of Aram, Belden and Reed, and against the city, may be set aside, and the Sheriff's sale held for null and void, and that they be subrogated to all the rights which Aram, Belden and Reed had in and to said judgment and mortgage prior to the satisfaction thereof, and that they have

leave to proceed under said judgment, by execution or otherwise, to collect the whole of said judgment, both principal interest, with a prayer for general relief.

Several points are made on the demurrer, which we notice, so far as it may be necessary for the purposes of case, in the order in which they are presented in the brief counsel:

I. Had the Ayuntamiento power to mortgage the pueblo land to Aram, Belden and Reed, under the circumstances and for the purposes narrated in the complaint?

This question is not discussed by counsel for appellant, upon the pretense that it cannot be made upon demurrer; holding that, inasmuch as he has averred that the Ayuntamiento has full power and authority to make the mortgage, the power and authority is admitted by the demurrer. Ayuntamiento, being a municipal body, could take and exercise only such powers as were conferred by the will of the sovereign, as expressed in the laws creating it. Every question as to what power has been conferred by such laws is a question of law and not of fact; and the averment in the complaint that the Ayuntamiento had full power and lawful authority to do the act in question, is but an averment of a conclusion of law, and does not tender an issue of fact. A demurrer admits the truth of such facts as are issuable and pleaded; but it does not admit the conclusions which counsel may choose to draw therefrom, although they may be stated in the complaint. It is to the soundness of the conclusions, whether stated in the complaint or not, that a demurrer is directed, and to which it applies the proper test.

That the Ayuntamiento had the power to execute the mortgage to Aram, Belden and Reed, does not seem to be seriously claimed by the learned counsel for appellant. Obviously, a position could not be upheld without a complete overthrow of the law, as clearly and explicitly declared in the able learned opinion of Mr. Justice Baldwin, in *Hart v. Burnett*, Cal. 580. The opinion in that case is a monument to

Branham et al. v. Mayor and Common Council of San José et al.

ing and industrious research of the Justice by whom it delivered. It is a clear and explicit exposition of the law the powers of municipal bodies under the Spanish and Mexican *regime*, and of the tenure by which their lands were held and must now be regarded as a finality upon those subjects.

At page 590, Mr. Justice Baldwin says: "These lands were held for the inhabitants in perpetuity, for their use and benefit, to be used in building up, sustaining, and supporting the town, whose interests and rights are lodged in the hands of municipal agents, acting under defined and expressly limited powers, given for the carrying out of the objects and uses prescribed; but with no power to alienate or change, much less destroy the trust. That these agents were clothed with no power to make grants to settlers or others of limited portions of this land, or to dispose of portions of it for the benefit of the municipality, implies no power to sell it out in whole or even to mortgage it; for if this were the case, the prosperity, if not the existence of the town, would depend, not on the laws, but on the will of those agents, acting in violation of their spirit and letter."

Each being the law, it follows that the mortgage upon the lands made by the Ayuntamiento to Aram, Belden and others, was an absolute nullity, and vested in the latter no interest whatever in the lands. If the Ayuntamiento had no power to mortgage, it follows that all the subsequent proceedings up to and including the Sheriff's deed to Branham and others, were utterly void. Upon this point, also, at page 580, Justice Baldwin says: "If it be true, as seems clear from the citations we have given, that the municipal officers could not mortgage or sell these lands to pay a debt created by them, we do not see how it can be contended that they could accomplish the same result by borrowing money and then confessing judgment, or suffering it to be entered, or submitting to suit, thus indirectly doing through the Sheriff what they could not do by their direct action."

It is contended by counsel for appellant that the city is precluded from setting up the invalidity of the mortgage to

Aram, Belden and Reed, by the proceedings on the foreclosure. That inasmuch as the city was a party to those proceedings, duly served with process, and had an opportunity to contest the validity of the mortgage, but failed to do so, its failure has become *res adjudicata*, and the respondents are estopped by the decree of foreclosure from further question upon this point. In aid of this theory counsel invokes the general principle announced by Chancellor Kent in *La Guen v. Gouveneur et al.*, 1 John. Ca. 436, to the effect that: "The judgment and decree of a Court possessing competent jurisdiction is not final as to the subject matter thereby determined, but also as to every other matter which the parties might litigate in this cause, and which they might have decided." The soundness of this general doctrine, that a party cannot litigate his rights by piecemeal, is not doubted by us; but it does not reach the real question involved in this case. It is obvious that the Ayuntamiento, being merely the agents of the pueblo, in the language of Mr. Justice Baldwin, "acting under defined and expressly limited powers," could not bind the property in trust by them for community purposes by any act strictly within those powers, either by way of contract, or the mere sufferance of judicial proceedings. Were such the case, the law of corporate power would be made subservient to the adversary will of those in whose hands its temporary exercise is placed. The subsequent judicial proceedings impart no sanctity to the transaction, nor added thereto any validity in law which it did not previously possess. Whatever right or interest the mortgage created and vested in Aram, Belden and Reed, the decree of foreclosure operated upon and subjected to the payment of their debt, but nothing more. The pueblo's interest in the land was unaffected by the mortgage, and nothing passed, it was equally unaffected by the decree and subsequent sale. Parties dealing with the authorities of a municipal corporation are chargeable with full knowledge of their powers, and act at their peril. If the authorities transcend their powers, the act is a nullity, by which the municipality are as much unaffected as if it were the act

Branham et al. v. Mayor and Common Council of San José et als.

anger, and it cannot be transformed into a validity except by the will of the sovereign. In all such cases there is involved by a question of power, which lies at the foundation, and if it fails the superstructure must fall with it. We hold, therefore, that all the proceedings, up to and including the Sheriff's sale to Branham and White, were utterly void, and that the interest of the pueblo, and its successor, the city, in the lands in question, were wholly unaffected thereby.

II. We now come to the consideration of the question as to what rights, if any, the trustees, Branham and White, acquired as against the city by virtue of the contract of the 12th June, 1851, executed by and between them of the one part and the Mayor of the city of the other part. That contract, so far as its legal effect upon the title to the pueblo lands is concerned, is a contract of confirmation and release. In terms it confirms unto Branham and White all the rights and interests in said lands which they acquired by their purchase at the Sheriff's sale, and releases unto them all the right and interest which the city then had or might afterwards have there.

Aside from all questions of power in the city government to make the contract, it is ineffectual so far as it attempts to confirm unto Branham and White the rights and interests which they acquired at the Sheriff's sale, for the obvious reason that there was no estate in them upon which the confirmation could operate. *Qui confirmat nihil dat.* Confirmation may make good a voidable or defeasible estate, but cannot operate upon or aid an estate which is void in law, but only "confirms its invalidity." *Confirmatio est nulla, ubi donum precedens est invalidum, et ubi donatio nulla est, nec valebit confirmatio.* The only exception to this rule is where the confirmation is the act of the sovereign will. (Comyn's Digest, Vol. 3, p. 139; D. I. p. 10; *Blessing v. House*, 3 Gill and John. 290.) It was upon this view that the Act of 1858, confirming the so-called "Van Ness Ordinance" was passed, and the validity of that ordinance was upheld in *Hart v. Burnett*.

For much the same reasons, that part of the contract in which the city authorities attempt to release the title of the

city to Branham and White is ineffectual. There was no privity between the city on the one hand and Branham and White on the other; nor had the latter, as we have already seen, any estate or interest whatever in the land, nor had they the possession. There was, therefore, no estate to support the release, or upon which it could operate. "So a release to one who has no estate or right is void, though there may be privity between them" (which is not the case here); "and a tenant in fee makes a feoffment, and afterwards releases the land to another, his seigniorship is not extinct," (Cot. Digest, Vol. 7, p. 222,) because, at the time the release was made, the releasee, having parted with his estate by entering upon another, had no estate to support the release. So a release, unless the releasee is in possession, is void. (*Bennett v. Irwin*, 3 John. 363.) Under the contract in question, Branham and White occupy the position of confirmees and releasees. The instrument contains no terms of grant, and they acquired thereby no new or further interest or estate in the lands being ceding, as claimed by counsel for appellants, that the city authorities, by virtue of the provisions of the Act incorporating the city, acquired power of absolute disposition over the pueblo lands. Their rights to the lands were, in law, unaffected by the contract of the 12th of June, 1851, and remained the same after the execution of that instrument as they were before. Whether the city government acquired, by the incorporation, greater power of disposition over the pueblo lands lying outside of the city limits than was possessed by its predecessor, the Ayuntamiento—a question which has been ably argued by counsel upon both sides—becomes immaterial in the view which we have taken of the case.

III. Failing of any relief upon the contract of the 12th of June, 1851, plaintiffs next ask that the Sheriff's sale and judgment may be held for naught, and the satisfaction of the judgment against the city and in favor of Aram, Belden and Reed may be set aside, and that they may be subrogated to all the rights of Aram, Belden and Reed, with leave to proceed, by action or otherwise, to collect the judgment.

Branham et al. v. Mayor and Common Council of San José et als.

According to Bouvier, there are three kinds of subrogation: first — that made by the owner of a thing of his own free will; second, for example, when he voluntarily assigns it. Second — that which arises in consequence of the law, even without the consent of the owner; as, for example, when a man pays a debt which could not be properly called his own, but which, nevertheless, it was his interest to pay, or which he might have been compelled to pay for another, the law subrogates him to all the rights of the creditor. Third — that which arises by the act of law, joined to the act of the debtor; as for example, when the debtor borrows money expressly to pay off his debt and with the intention of substituting the lender in the place of the old creditor. It is not easy to perceive how the present case can be brought within either of these definitions.

Up to the time the plaintiffs purchased at the Sheriff's sale, and until the 12th day of June, 1851, about one month after the sale, there had been no treaty or negotiation between them and the city touching the foreclosure sale. There was, so far as appears from the complaint, no understanding between them and the city as to the purchase about to be made, nor were any representations whatever made by the city to induce them to purchase. On the contrary, they acted, so far as appears, entirely upon their own judgment, uninfluenced by any one. They were not asked to purchase by the city or any one else, and no promises were made to them in the way of inducement. They stand, therefore, in the attitude of naked purchasers at a judicial sale.

In the case of *Laws v. Thompson*, 4 Jones, N. O. 104, it was held that a purchaser at Sheriff's sale who acquired a defective title has no right to take the place of the creditor. In Maryland, it is held that Chancery sales are made subject to all incumbrances and defects, and the rule of *caveat emptor* applies. In the case of "*The Monte Allegre*," 9 Wheat. 615, the petitioner claimed to have refunded to him the purchase price of a quantity of tobacco, (which he had purchased at a judicial sale,) because it was rotten and worthless when he bought it, and the defect was unknown to him at the time he

Branham et al. v. Mayor and Common Council of San José et al.

purchased. The money which he had paid for the tobacco was still in the hands of the Court and undistributed; nevertheless, the relief was denied, the Court holding "that generally in all judicial sales the rule *caveat emptor* must necessarily apply from the nature of the transaction." In Arkansas, debts contracted by a steamboat for work, supplies, and materials furnished, are made by statute a lien on the boat to the exclusion of certain other enumerated claims; yet it was held in *White v. Levy*, 10 Ark. 411, that where a party loaned money to the boat, which was borrowed and actually used for the purpose of paying off such preferred debts, the lender was entitled to be substituted to the rights of the parties whose debts had been thus paid. And in *Gadsden v. Brown*, Speer Chan. 37, it was broadly declared that the doctrine of subrogation only applies to the case of a payment by a person who has previously holden for the debt. In *Sanford v. McLeane*, 3 Pa. 122, the Court said: "It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a Court of equity substitutes him in the place of the creditor, as a matter of course, without any agreement to that effect. In other cases, the demand of a creditor who is paid with the money of a third party, and without any agreement that the security shall be assigned or kept on for the benefit of such third person, is absolutely extinguished. Such is also the rule of the civil law, although by that law the surety paying the debt is subrogated to the rights of the creditor *ipso facto*."

Against the plaintiffs' claim to be reimbursed the amount paid by them at the Sheriff's sale, by reason of the failure to obtain the title which they purchased, and their right to maintain this, an independent action therefor, the case of *Boggs v. L. L. grave*, 16 Cal. 562, seems to be conclusive.

Judgment affirmed.

Mr. Justice Rhonms, having been interested in the matter involved, did not sit on the trial of this case.

Terry v. Megerle.

HORACE CARPENTIER v. WILLIAMSON *et als.*

ON UNDERTAKING ON APPEAL.—If an undertaking on appeal is filed before the notice of appeal is filed and served, the appeal will be dismissed on motion.

APPEAL from the District Court, Third Judicial District,ameda County.

The facts are stated in the opinion of the Court.

W. W. Crane, Jr., for Appellants.

Matterson, Wallace & Stow, for Respondent.

By the Court, SANDERSON, C. J.

The respondent moves to dismiss the appeal in this case upon ground that the same is irregular, and has not been perfected according to law.

It appears that the notice of appeal was filed on the 8th of February, 1864, and was served on the respondent on the 10th day of the same month, and that the undertaking on appeal was filed one day before the service of the notice. The court does not authorize or permit the filing of an undertaking before the service of notice, and hence, until the notice has been filed and served, the undertaking has no office to perform. The present case stands, therefore, as if no undertaking had been filed, and the appeal must be dismissed under the rule laid down in *Buffendeau v. Edmondson*, 24 Cal. 94.

Mr. Justice SHAFER, having been of counsel, did not sit on the trial of this case.

DAVID S. TERRY v. CHRISTIAN MEGERLE.

LAND GRANTED TO THE STATE—WHEN MAY BE SELECTED.—The State of California has no right to select or locate the five hundred thousand acres of land granted to her for purposes of internal improvement by the eighth section of the act of March 3, 1852, (Public Law No. 23, 30 Stat. 393.)

Terry v. Megerle.

tion of the Act of Congress of September 4th, 1841, until after the selected have been surveyed and sectionized by the proper officers Federal Government.

SAME—WHEN STATE ACQUIRES TITLE.—No title to any specific part of said grant can vest in the State unless the land has been surveyed, a selection is made of lands to which there is no subsisting valid claim exemption or otherwise, and the selection is made in parcels conforming to sectional divisions and subdivisions of not less than three hundred and twenty acres, and the selection has been approved by the Federal Government.

PRE-EMPTIONERS—RIGHTS OF.—The State can make no valid selection under said Act of land in the possession of a *bona fide* pre-emptioner under the laws of the United States, nor can it convey any valid title therefrom to another.

STATE PATENT—PRE-EMPTIONER MAY ATTACK.—If the State selects a part of said grant land in the possession of a *bona fide* pre-emptioner at the time of the selection, the pre-emptioner is in such privity with the source of title that he can attack a patent granted by the State for the land in an action of ejectment brought by the patentee or his assignee.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

The facts are stated in the opinion of the Court.

Hall & Scanlker, for Appellant.

The title in fee did not pass to the plaintiff by virtue of his patent from the State of California of January, 1862. The defendant is in privity with the Government of the United States, whose land it was, and thus his *status* with reference to the premises enables him to assail the patent. (*Doll v. Meador*, 16 Cal. 295.)

The State of California has not by her legislation manifested any disposition to defeat the wise policy of the Federal pre-emption system, but, on the contrary, in various provisions of her numerous laws affecting the sale or other disposition of land claimed as her own, and derived from the Federal Government, the rights of the Government and of the pre-emptioner under it are recognized and carefully guarded.

This characteristic of State legislation is noticed by the Court in *Doll v. Meador*, and is observable in the Act of 1852 for the issuance of school land warrants; and as having some bearing on the case in hand, this disposition is unmistakably shown in the positive inhibition of the section of that Act, against the *location of warrants* "upon

Terry v. Megerle.

lands at the time of such survey and location actually occupied and improved by actual settlers," with a mode of relief to the locator of such excepted land provided by means of floating his warrants. (Sec. 7.)

In the Act of 1857 for patenting of school lands, the patent postponed until a Government survey is had, and application to the *Federal* authorities, and an affidavit of the *non-existence of any adverse claim*, are made conditions *precedent* to the issuance.

By the Act of 1858, the consent and permission of the Register and Receiver must be procured, attended with full proof from the oath of the applicant and others, of the same fact, before the location is to be allowed by the State officers. This Act almost amounts to a legislative declaration, in so many words, of a want of power on the part of the State Government to prescribe any manner of selection of the lands donated under Act of Congress which could or might interfere with the *paramount right of adverse claimants under the Federal law*. For, what adverse claims can these be which it must be so satisfactorily shown not to exist, before the permission of the Government officers to locate is granted—unless they consist of the adverse claims resting on reservations of the proposed land by the Government or settlers—actual settlers—claiming under it?

Again: the Act of April, 1859, contains significant proofs of a similar deference to the law of the General Government. It provides for the issuance of patents for lands located by warrants under Act of 1852, or by selection, under Act of 1858. It carefully preserves the provision which runs through all its predecessors, of *pari materia*, and demands that the land shall be of the class "*subject to such location*," and affected by the Land Office of the United States, and *by and with the consent of the Register and Receiver thereof*.

But, in a further Act of the same year, authorizing the location of school land warrants on *unsurveyed land*, there is one express reservation "of the right of persons holding lands under the *pre-emption law of the State, or of the United States*,"

(Sec. 5,) and forbidding in section seven the location reserved lands of the United States.

This expression of legislative will should be considered fixing the *status* of the defendant in Court, and as furnishing an assurance of the favor with which Legislatures have always hitherto regarded and may be expected hereafter to regard concession to a beneficiary of the General Government in the Courts of the State of the most liberal rule in the ascertainment of his position in Court to enable him to fully assert and defend his right.

As between the defendant and the Government of the United States, and to the extent of the defendant's quarter section the question of defendant's right is "*res judicata*," by the decision, three times made, in favor of that right by the highest authorities having power to inquire into and to pass upon that question.

The United States, acting by their appointed officers, exercising final and plenary power over the subject, have recognized the defendant, as to his own land, to have been a lawful possessor from October 2d, 1853, and to have become fully invested with the right to a conveyance in fee, all pre-requisites having been met and price paid. (*Barnard's Heirs v. Ashley's Heirs*, 18 How. 44, 45; *Elliott v. Pearsol*, 1 Peters 340; *Bird v. Ward*, 1 Mo. 398; *Isaacs v. Steel*, 3 Seam. 9; *Perry v. O'Hanlon*, 11 Mo. 591.)

Congress has carefully legislated for the protection of the pre-emptor, excepting out of the operation of its patent to the State all lands not embraced by legislative grants, though, in fact, included in the lists. (Act Congress, Aug. 3d, 1859.)

If, then, the right of the defendant attached, it began with the settlement, which was, in both instances, in October, 1853, and the patent, when issued, relates to the date of entry. (*Taylor et al. v. Brown*, 5 Cranch, 234.)

The land was not subject to the plaintiff's location in 1853, neither by the Donation Act nor our State Act of 1853. These laws direct a selection "*of any vacant or unappropriated*

Terry v. Megerle.

lands" belonging to the United States and within their State subject to such location."

In determining this question, which is as to the priority of right as between the United States and California, two things should be borne in mind: First — That the State claims as a donee of the liberal Federal bounty, and not as a purchaser for value; and Second — That by the Constitution of the United States the power to regulate and dispose of the public domain rests with the General Government, as proprietor, and that the State has solemnly engaged not to interfere with the exercise of the Federal power of disposal, "*and shall pass no law and do no act whereby the title of the United States to and right to dispose of the same shall be impaired or questioned.*" (See Act of Admission of California, Sec. 3.)

In a contest between a pre-emption claimant on *unsurveyed public land*, and the locator of a State warrant of the same land, occurring in Louisiana, it was decided by the Department of the Interior that the location of the warrant was invalid, *not being upon public land*. By reason of the pre-emption claim, *the land was not of that public description to which the State is by law confined;* that the selection by the State was void, by reason of the *prior valid legal right of the pre-emptor*. (*Vester v. Dinkgrove*, Lester's Land Laws, 451-454; Pre-emption Act for California, 1853.)

The State cannot grant what she does not own, and the statutory declaration that the patent shall vest the fee, does not accomplish that result. (*Haye v. Swain's Lessee*, 5 Md. 247; *Vilcox v. Jackson*, 13 Peters, 498.)

The States to which five hundred thousand acres of land were given for internal improvements, are not entitled to take any land to which pre-emption rights exist. (Opinion of Attorney-General July 11th, 1842, Vol. 4, p. 71.)

The right to assail the patent for the reason that the land was not the property of the State, and so not subject to the laws authorizing the issuance thereof, is conceded in *Winter v. Crommelin*, 18 How. 87.

Terry v. Megerle.

Patterson, Wallace & Stow, for Respondent.

David S. Terry, in the location of the warrants in 1854, the agent of the State, and authorized to act for the State that behalf. By the letters patent to him in 1862, issued by the State, he became the vendee and grantee of the State, clothed with just such rights and title as the State has heretofore.

The title of the State of California to the land in controversy accrued to her on the *ninth day of September, 1850*, the day she was admitted into the Union.

In *Doll v. Meador*, 16 Cal. 315, Mr. Chief Justice Field speaking of the Act of 1841, says: "Its words are, 'shall be, and hereby is granted,' words which operate to the specific quantity in each new State *immediately upon admission into the Union.*" He proceeds then to enumerate the qualifications and clogs, to which *alone* this vested title of the new State is subjected, and they are *only*:

1. The necessity of conforming the location to the public surveys.
2. Reservation of the land by Act of Congress.
3. Reservation of the land by proclamation by the President.

As in the case at bar, it appears from the record that neither the lines of the *public surveys*, nor *Congress*, nor the President interfered with the location of the land patented to the respondent. "We do not perceive, either in the language of the patent or the object to be secured, any limitation upon the right of the State to proceed *at once to take possession and dispose of the quantity to which she is entitled by the grant.*" (Id. 315.)

And again, on page 320, the Chief Justice, after setting forth the form and recitals of the State patent to Doll, says: "It is under this patent that the plaintiff claims title to the premises in controversy, and it is clear that if the tract containing them were subject to location as part of the five hundred thousand acres *that were not reserved from sale by any law*

Congress or the proclamation of the President, his claim is good, and a valid title vested in him."

Again: The Statute of California declares (Acts of 1859, p. —, section four) "that such patent (as respondent has had) shall vest in the grantee therein named a good and valid title in fee simple to the lands therein described."

If, indeed, the respondent be not seized of this land, it must be because Acts of the State Legislature, Acts of Congress, and the most solemn and well considered adjudications of the highest judicial tribunal, have exhausted their united efforts in vain.

1. The grant to the State of California, September 9th, A. D. 1850;
2. The actual settlements of respondent's grantors, A. D. 1852;
3. The location of the State land warrants by respondent, A. D. 1854;
4. The filing of that location in the United States Land Office by respondent, A. D. 1856;
5. The patent of the State of California to respondent, A. D. 1862 — United, constitute a title in the respondent rather better than the average of titles upon which recoveries are accustomed to pass in this Court.

The view of this Court, as announced in *Doll v. Meador*, in reference to the construction of the Act of 1841, operating to vest a present interest in the State, is fully sustained in the case of *Richard F. Veeder et al. v. Joshua J. Guffey*, 3 Wisconsin, 202. That case involved the construction of an Act of Congress, passed August 8th, 1846, (9 U. S. Statutes at Large, 83,) to grant to the (then future) State of Wisconsin a quantity of land equal to one half of three sections in width, "to be selected under the direction of the Governor of said State, and such selections to be approved by the President of the United States." The State of Wisconsin was admitted into the Union on the 29th day of June, 1848.

The Court say: "At the time of the passage of the Act of the legislature for the disposal of their lands, none of the lands

Terry v. Meador.

had been selected by the Governor and approved by the President; but the title of the State was as complete as it ever been to the certain quantity of land granted." No further of the United States was necessary, nor was any other act done or performed to vest the fee in the State. The selection by the Governor and the approval by the President were acts of partition *only*, not of conveyance, applying the reasoning of the Wisconsin case.

The Supreme Court of California, in *Doll v. Meador*, say: "When the selections and locations are once made, pursuant to her directions, of lands not reserved but subject to location, the general gift of the quantity becomes a particular gift to the specific lands located, vesting in her a perfect absolute title to the same, and that title passes by her patent."

4. Against *this legal title* of the respondent, perfect vested in him, the appellant *confessedly sets up no legal title whatever.*

In the action of ejectment the *legal title must prevail.*

The appellant by his answer does not set up any equitable defense, nor pray any equitable relief. He demands judgment in his favor, and *is in this Court insisting upon such a judgment.* The claim of the appellant, such as it is, has its origin in a settlement made on the premises in October, 1853. The origin of the title of this State is at least as old as the year 1850. As we have also seen, at that time the State became a tenant in common with the United States Government of the public lands within her limits. The undivided but absolutely vested quantity of land was five hundred thousand acres. She had as early as 1850 a right to locate that quantity as she chose, subject only, as we have seen, to the form of its location, and to reservations by Congress, or by the proclamation of the President. When so located it took effect by relation to the time of the admission of the State into the Union. At that time the pre-emption laws of the United States under which the appellant asserts his acquisition of rights were not extended to California. Any rights which he possesses

Terry v. Meador

subsequently acquired, and must be subordinated to such location by the State.

The appellant's counsel urge upon the Court that the State never received a patent from the United States. She never did, for the Act of 1841 is itself a legislative grant to her as determined in *Doll v. Meador*. Suppose, then, that appellant has a right to attack the respondent's patent, of what avail would such an attack be?

Suppose that appellant has *title*; it is subordinated to the title of the State, which is older than appellant's asserted title. The counsel states that he seeks to attack this patent on the grounds that the *State had no title*, for the reason that the land had been reserved by the United States from selections by the State—how or where it was so reserved he does not inform us. But if the doctrine announced in *Doll v. Meador* be sustained, the appellant cannot attack respondent's patent. The Supreme Court of California in that case say, (page 325): "But if the authority to issue the patent depend upon the existence of particular facts in reference to the condition or location of the property or the performance of certain antecedent acts, and officers have been appointed for the determination of these matters in advance, who have passed upon them, and given their judgment, then the patent, though their judgment of the officers be, in fact, erroneous, cannot be collaterally attacked by parties showing title subsequently." By the Act of the Legislature of 1859, such proceedings are provided for in the State Land Office, and the patent is the result of those proceedings.

These proceedings, authorized by the Legislature, are in fact authorized by the Act of Congress of 1841, (Statutes at Large, 455, Sec. 8,) "the selections of all the said States to be made within their limits respectively, in such manner as the Legislature thereof shall direct."

Here, the Legislature of California made the necessary directions, appointed the officers to determine the facts, and upon termination, the patent is based. The appellant desires in her attack "upon this patent, to show that their officers *erred*

Terry v. Megerle.

in their judgment," i. e., that there were certain facts or matters which ought to have been differently determined by State authorities; this is the very thing which the case of *v. Meador*, as we have seen, *denies*. The appellant contends the condition of this land was such (by reason of his settlement upon it) that a patent ought not to have issued, but the authorities issuing the patent determined otherwise; it was their duty to consider that matter.

Admitting, for the purpose of the argument, that the determination was erroneous, it cannot be collaterally annulled. He says that the fact that all the land was not vacant was the reason why the patent should not issue; if so, the State officers have determined that it *was* vacant. By the provision of the Act of 1859, p. 339, all the world was made a party to the issuance of patent, and the determination of the facts upon which the patent should issue; process was served by ten and printed notices, "and all persons holding adverse claims may be entitled to appear before the Register and test the application for such patent." If the appellant held adversely and desired to prove that the land was not vacant but occupied by himself, and therefore not properly the subject of a patent, he might then have done so, but not having done so, then he will not be permitted to collaterally assail the patent on the same grounds now, because if the patent could be thus assailed, why did the law require process, etc., before its issuance? It seems, according to the position of the appellant, that everything is left open to inquiry notwithstanding.

But the counsel says that the State has no power to make this regulation providing for a hearing before the Register.

In *Doll v. Meador*, p. 319, this Court recites this very provision of the statute, and no intimation is given that it involves any excess of authority, and it is of this legislation that the Court say, p. 324: "On the contrary, her legislation on the subject has been eminently *beneficent* and just."

But the State, in making this regulation, was fixing the manner of making the selections of her five hundred thousand

res, which she was authorized to direct the manner of by the Act of Congress of 1841. Nor does the exercise of that power, thus conferred by the Act of 1841, make the State amenable to the charge of "interfering" in the disposal of the public lands, in defiance of the Act of September 9, 1850, admitting her into the Union.

George W. Tyler, for Appellant, in reply.

The counsel for respondent insists that the point argued has been decided in his favor in the cases of *Doll v. Meador* and *Van Valkenburg v. McCloud*. This virtually admits that if we are in a situation to attack a patent, then this case must be reversed.

I submit that the only question decided in the case of *Doll v. Meador* was, that the relation of the defendant in that suit to the title was not such as to allow him to question the validity and efficacy of the patent.

The Court, in speaking to this point, say: "The question here relates to the status of the parties who are permitted to assail the patent." "Can any one who has no other relation to the property sought to be recovered than that of mere possession" (that is to say, a naked trespasser upon the land without any claim of title) "take the position of assailant on that ground?"

It will thus be seen that this Court, in *Doll v. Meador*, virtually decides that if a party is "invested with the title of honor," or has "some claim of title," he may attack the patent in an action of ejectment.

If the learned counsel contends that a pre-emptioner who has paid for the land and got a certificate of purchase, which is conclusive proof that he has complied with all the requirements of the pre-emption laws, has no "claim of title" under the Government, then his proposition is too absurd to require an answer, and this point is not touched upon in *Van Valkenburg v. McCloud*.

The Registers and Receivers of districts, and the Commissioner of the General Land Office, and the Secretary of the

Terry v. Megerle.

Interior, are the persons selected by the Government to upon conflicting claims to land, and their decision is conclusive. (16 Ark. 25; 1 Pet. 340; 14 Ill. 343; 13 Ala. 13 Pet. 511; 9 Mo. 183; 16 How. 64; 16 How. 48.) especially is it conclusive when both parties have appeared had a fair hearing.

All the officers above mentioned have passed upon the conflicting claim of plaintiff (who claims under or through State) and defendant (who claims as a pre-emptioner) after hearing of both parties, and they have decided that the land belongs to defendant.

If we are in a condition to attack the patent, as I think has been conclusively shown we are, then it is perfectly competent for us to set up the defense in this suit under our term. (*Kittridge v. Breand*, 4 Rob. 83; 13 Pet. 436; 13 378, 486.)

The construction of the Act of April 16th, 1859, given it by the Attorney-General of the State, and acted upon the State Register, is this: that he will not allow a pre-emptioner claiming as a pre-emptioner to contest the right of a pre-emptioner claiming under the State in his office. He allows a contest only between parties each of whom claims under the State.

Under that construction, any one whose conscience is sufficiently pliable can get a patent from the State as against a pre-emptioner, no matter how good the latter claim may be.

A pre-emptioner is entitled to equal protection under our law with one who claims by virtue of a patent from the State.

By the Court, SANDESON, C. J.

This is an action of ejectment. The case was tried in the Court below without a jury. The plaintiff had judgment, the defendant appeals. The facts as found by the Court acquiesced in by both parties, and the question to be determined is whether the plaintiff, upon those facts, is entitled to recover the land in controversy.

The findings are as follows: "First—That in January, 1864, the plaintiff obtained from the State of California a pa

Terry v. Megerle.

for the land in controversy, pursuant to the several Acts for the disposal of the five hundred thousand acres of land granted by the United States to the State of California.

"Second—That the plaintiff and those under whom he claims have been in possession by inclosure and cultivation of all the land embraced in said patent, except the forty acres in controversy, since the year 1852, but neither he nor they have ever been in possession of any part of the land sued for.

"Third—That in 1854, after the public lands of which the premises are a part had been divided into townships, and before they had been sectionized, the plaintiff located two school land warrants under the Act of 1852. This location embraced the premises in controversy, and the lands for which the patent issued to him subsequently. The location was made by the County Surveyor of San Joaquin County, by actual survey, and the survey was duly recorded in the San Joaquin County Clerk's office, in November, 1854.

"Fourth—On the 14th day of May, 1856, plaintiff made the location and filed the warrants in the United States Land Office at Marysville.

"Fifth—The defendant, a citizen of the United States, settled upon that portion of the land in controversy, which is a part of the northwest quarter of section twenty-one, in October, 1853, and erected a dwelling house, with intent to secure a pre-emption right to a quarter section under the Acts of Congress of September, 1841, and March, 1853. The land at that time was unsurveyd, and ever since that time defendant has occupied and cultivated that portion of the northwest quarter of said section which is now in controversy.

"Sixth—In the month of May or June, 1855, the land was divided into sections and other legal subdivisions by the United States Government, and the defendant, on the 2d day of October, 1855, filed his declaratory statement for said quarter section in the Land Office at Benicia, to which district the land belonged, the plat or survey of the land not having been entered and filed in said office.

"Seventh—The land in controversy was afterwards trans-

Terry v. Megerle.

ferred to the Marysville District, and the defendant, after return of the approved plat or survey to the Marysville office, filed in that office his declaratory statement, in due form of law, on the 16th day of April, 1856.

"Eighth — In 1860, at the Land Office in Stockton, which district the land then belonged,) the defendant made proof of his settlement and pre-emption, and having made payment for said quarter section, received from the Register and Receiver a certificate of location and purchase of the same in due form of law.

"Ninth — One John H. Megerle, now deceased, and whose heir-at-law and representative is the defendant, in the month of October, 1853, settled upon that portion of the land in controversy embraced in the southwest quarter of said section twenty-one, and erected a house thereon, intending to pre-empt the same under the laws of Congress, the land being unsurveyed public land, and continued to reside on and cultivate the same until 1858, when he died.

"Tenth — The land being sectionized, and the plats returned to the Marysville Land Office, said John H. Megerle, who was yet in life, to wit: on the 16th day of April, 1856, filed at said Marysville office his declaratory statement for a quarter section of land embracing the west half of the south quarter of said section twenty-one, and in April, 1859, payment was made of the entry and settlement of the said John H. Megerle, and of his notice before the proper land officers. The defendant has been thence hitherto ready and willing to make payment therefor.

"Eleventh — The defendant was in possession of the land in controversy, adversely to the plaintiff, at the time this action was brought.

"Twelfth — That the plaintiff, claiming the quarter section of land on which the defendant settled by virtue of his location of said school warrants, did contest the right of the defendant before the officers of the Stockton Land Office to pre-empt the same, and thereupon such proceedings were instituted before the officers of the Government of the United States.

Terry v. Megerle.

the matter of said contest, as that the Secretary of the Interior, on the 9th day of December, 1859, and again on the 14th day of June, 1861, did adjudge and determine that the said defendant had a valid legal right to said quarter section under the pre-emption laws of the United States."

The eighth section of an Act of Congress passed September 8th, 1841, entitled "An Act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights," reads as follows:

"SEC. 8. There shall be granted to each State specified in the first section of this Act five hundred thousand acres of land, for purposes of internal improvements; *provided*, that to each of the said States which has already received grants for said purpose there is hereby granted no more than a quantity of land which shall, together with the amount such State has already received as aforesaid, make five hundred thousand acres; the selections in all of said States to be made within their limits, respectively, in such a manner as the Legislature thereof shall direct, and located in parcels conformably to sectional divisions and subdivisions, of not less than three hundred and twenty acres in any one location, on any public land except such as is or may be reserved from sale by any laws of Congress or proclamation of the President of the United States; which said location may be made at any time after the lands of the United States in said States respectively shall have been surveyed according to existing laws. And there shall be and hereby is granted to each new State that shall be hereafter admitted into the Union, upon such admission, so much land as, including such quantity as may have been granted to such State before its admission and while under a Territorial Government, for purposes of internal improvements, as aforesaid, as shall make five hundred thousand acres of land, *to be selected and located as aforesaid.*"

Under the last clause of the foregoing section, California, upon her admission into the Union, became vested with an interest in the public lands within her borders to the extent

Terry v. Megerle.

of five hundred thousand acres, (having never received any previous grants,) the same, however, to be selected and located in the manner and at the time specified in the immediately preceding part of the section, to which the words at the close of the section "to be selected and located as aforesaid," directly refer. The words "to be selected and located as aforesaid," in our judgment, include both the manner and the time of the selection and location, and not the manner merely, as was held in *Doll v. Meador*, 16 Cal. 315. The language is not that the land shall be selected in the manner as aforesaid, but "as aforesaid." That portion of the section to which the words "as aforesaid" refer, prescribes not only the manner of the selection, but the time also, and by no rule of construction can it be said that they refer to the one and not to the other. There is no ambiguity in the language used; on the contrary, the meaning is too plain and obvious to admit of doubt. The language is "located as aforesaid," that is to say, in parcels of not less than three hundred and twenty acres, conformably to sectional divisions and subdivisions, and after the survey has been made. This construction is not only justified by the natural and grammatical import and meaning of the language used, but is sustained by the necessities of the subject matter. The land must be located in parcels, conformably to sectional divisions and subdivisions, of not less than three hundred and twenty acres. How can this be done until after the lands have been surveyed by the proper officers of the Federal Government? The grant imposes conditions as to the quantity, manner of selection and location, and time of location, and until it no title to any specific land can vest in the State until all of those conditions have been complied with. The State has no more right to select and locate lands before the survey has been made, than she has to locate it in tracts of a hundred and sixty acres each, or without regard to the sectional divisions and subdivisions of the United States survey. The mode, time, and quantity of the selection and location are fixed by the Act. All else is left to the legislative wisdom of the State. Agents may be appointed by the State for the purpose of selecting

Terry v. Megerle.

g and locating the land granted to the State, and certifying the same by proper lists to the proper land officers of the Federal Government. But such selections and locations must be made upon lands to which there is no subsisting valid claim, by pre-emption or otherwise, or they cannot be recognized and held as valid by the Federal Government. The approval of the Federal Government must be had before the title of the State can attach to any specific land, and such approval ought to be had and cannot be had where there is a valid subsisting claim, under the laws of Congress, by pre-emption or otherwise, which is attached to the land before the selection is made by the State. This course is made necessary in order to preserve uniformity in the land system of the Federal Government, and enable it to preserve intact its policy toward actual settlers on the public lands. The uniform policy of the Federal Government has been to invite and encourage the settlement of the public lands by a judicious system of pre-emption laws, whereby settlers are enabled to secure the title to the land cultivated and improved by them in preference to all others. A pre-emptioner is as much the favored beneficiary of the Federal Government as a State, and equally entitled to her protection. The unoccupied land is as open to the settlement of the pre-emptioner as to the selection and location of a State, and when he has once placed his foot upon the spot of his choice he cannot be deprived of it by any system of State selection and location, provided he complies with the laws of Congress; nor need he look elsewhere than to the Federal Government for his title. Upon land in the possession of a *bona fide* pre-emptioner the State can make no valid selection and location, nor can it convey any valid title therein to another. Such land has a prior valid claim upon it and is not subject to State selection. Any other theory would lead to confusion and to Federal and State conflict. So careful is the Federal Government of the rights of pre-emptioners that it is provided that where any settlement, by the erection of a dwelling house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections

Terry v. Megerle.

granted for the purposes of public schools, other lands be selected by the proper officers of the State in lieu thereof (Act of March 3, 1853, Sec. 7, Wood's Digest, p. 749.)

The sixth section of the Act just cited provides, "that all public lands in the State of California, whether surveyed or unsurveyed, with the exceptions of sections sixteen and thirty-six, which shall be and are hereby granted to the State for the purposes of public schools, in each township, and with the exception of lands appropriated under the authority of the Act, or reserved by competent authority, and excepting the lands claimed under any foreign grant or title, and mineral lands, shall be subject to the pre-emption law of the 4th of September, 1841, with all the exceptions, conditions and limitations therein; except as herein otherwise provided, and shall, after the plats thereof are returned to the office of the Register, be offered for sale, after six months public notice in the State of the time and place of the sale, under the rules, and regulations now governing such sales, or such rules may be hereafter prescribed; *provided*, that where unsurveyed lands are claimed by pre-emption, the notice of such claim shall be filed within three months after the return of the plats of surveys to the land offices, and payment shall be made prior to the day appointed by the President's proclamation for the commencement of the survey, including the entry of such claims to be made by legal subdivisions, according to the United States survey, and in the compact form."

Under the provisions of this section the defendant proceeded to obtain the title of the United States to the land in controversy. He settled upon it in October, 1853, seven months after the passage of the Act, with the intent to secure the pre-emption right thereto. At that time the land was vacant and unoccupied. He erected a dwelling house thereon, and ever since that time has resided thereon and cultivated the same. In 1854 the land was surveyed and divided into townships, and in 1855 into sections and other legal subdivisions, by the Federal Government. The defendant, wi

Terry v. Mearls.

the time prescribed by the laws of Congress, to wit: on the 14th day of April, 1856, filed in the proper Land Office his declaratory statement, and within the time prescribed made proof of settlement and payment of the purchase money; and, in 1860, obtained from the proper officer a certificate of location and purchase, in due form of law, of the land in controversy.

The plaintiff, on the contrary, sought to obtain title through the State, and under its laws. In 1854, after the land was divided into townships, and before it was divided into sections and other legal subdivisions, and before the plats were returned to the proper office, the plaintiff took his first step toward obtaining his title, by locating two school land warrants pursuant to the provisions of the Act of the State Legislature of 1852. On the 14th day of May, 1856, the plaintiff made his location and filed his warrants in the United States Land Office, and in January, 1862, he obtained a patent from the State for the same land.

Thus it appears that the defendant was in possession as a pre-emptioner before and at the time at which the plaintiff located his warrants; and the declaratory statement of the defendant was on file in the proper Land Office before and at the time the plaintiff entered his location and filed his warrants. It further appears that under these circumstances the plaintiff contested the right and claim of the defendant before the officers of the proper Land Office, and, on appeal to the Secretary of the Interior, a decision was twice rendered against him, and establishing the validity of the defendant's claim; yet, by some means which do not appear, he afterwards, and after the defendant had obtained his certificate of location and purchase from the proper officers of the Federal Government, obtained his patent from the State of California.

Regarding the plaintiff as the agent of the State for the purpose of selecting and locating the land in question, as is claimed by his counsel, and which we concede, he made his selection and location upon land to which the defendant's pre-

Terry v. Megerle.

emption right had already attached. This, as we have already seen, he could not do, and by his acts the State acquires title whatever to the land in controversy, and of course cannot pass none to him by her patent. When two or more persons have settled upon the same quarter sections of land, the right of pre-emption is in him who made the first settlement. (Act of Sept. 4, 1841, Sec. 11.) The State occupies no better position than a *bona fide* pre-emptioner; and if her selection be subsequent to that of a *bona fide* pre-emptioner, her right must yield to his.

The only question remaining is, whether under the circumstances of this case the defendant can attack the plaintiff's patent; and upon this point there can be no doubt, if the previous reasoning be correct. By his certificate of location and purchase, the defendant became vested with the title to the land in question, upon which he could maintain and defend an action of ejectment under the laws of this State. (Wood's Dig. p. 1044.) We have also shown that the State acquired no title to the land in question by the acts of her agent, the plaintiff in this case, because, at the time of his location, the land was reserved from selection by the pre-emption laws of the United States, and that therefore the title of the State did not attach to the land in question, and not pass to plaintiff by her patent.

The third section of the Act of the Legislature which authorizes the location of school land warrants, and under which the plaintiff made his location, provides as follows:

"SEC. 3. The parties purchasing such warrants, and their assigns, are hereby authorized in behalf of this State to locate the same upon any *vacant* and *unappropriated* lands belonging to the United States within the State of California, *subject to such location*; but no such location shall be made unless made in conformity to the law of Congress, which law provides that not less than three hundred and twenty acres shall be located in one body."

By necessary implication, the purchaser and his assigns

hibited from locating the warrants upon land which is already occupied. We have, therefore, a case where the State issued a patent without having any title to the land, and contrary to the provisions of one of its own statutes.

In *Patterson v. Winn*, 11 Wheat. 380, the Supreme Court of the United States said: "We may, therefore, assume, as the settled doctrine of this Court, that if a patent is absolutely void upon its face, or the issuing thereof was without authority or was prohibited by statute, *or the State had no title*, it may be impeached collaterally in a Court of law in an action of ejectment."

The doctrine of *Patterson v. Winn* is expressly recognized and approved in *Doll v. Meador*, 16 Cal. 324, and Mr. Chief Justice Field there said: "We admit, in general terms, the correctness of the doctrine declared in *Patterson v. Winn* to be the settled doctrine of the Supreme Court of the United States, that if a patent be absolutely void upon its face, or be issued without authority, or were prohibited by statute, *or the State had no title*, it may be impeached collaterally in an action of ejectment." Subsequently, in the same opinion, Mr. Chief Justice Field declares by whom, in such cases, a patent may be impeached, and by whom not, in the following language: "Nor do we question the further proposition, that a defendant might have disproved the evidence of title furnished by the patent, by showing that the land in question was not included in the Act of Congress, or was within the exceptions contained in the Act of this State. We only annex to the proposition the qualification that to do this he must first have brought himself in some privity with the common source of title. If he were a mere intruder, not possessing any claim of title either from the General or State Government, he would not be in a position to question the regularity and correctness of the action of the officers of the State in the selection of the lands and the issuance of the patent."

In the present case, as we have endeavored to show, we have two grounds upon which a patent may be impeached collaterally in an action of ejectment; and a party who, by

People v. Jackson et al.

reason of his privity with the common source of title, *status* in Court which enables him to question its validity.

The judgment is reversed, and the Court below directed to enter a judgment upon the findings in favor of the defendant.

SHAFTER, J., and SAWYER, J., concurring specially:

We concur in the judgment, and in the opinion except so far as it questions that portion of the opinion in *Doll v. M.* relating to the time when a location can be made by the State. Upon that question we express no opinion, for the reason that we do not regard it necessary to the decision in this case.

THE PEOPLE *ex rel.* S. C. HASTINGS *v.* ANDREW JACKSON AND JOHN DEVLIN.

COMPLAINT—CANCELLATION OF PATENT.—A complaint in an action in the name of The People on the relation of a private individual, to cancel a patent for a tract of land issued by the State to the defendant, which avers that the relator is seized and possessed of the land, and that he was derived from the State of California under and by virtue of the execution of a school warrant made under and in accordance with the provisions of an Act of the Legislature, that said location was duly and properly made, and in all respects according to the provisions of said Act, does not state facts sufficient to constitute a cause of action.

PLEADING—CONDITIONS PRECEDENT.—In pleading title to land, under an Act of the Legislature which prescribes conditions upon the performance of which the title may be secured, it is necessary to aver a performance of the acts required by the statute.

SAME.—A general averment of the performance of conditions precedent is sufficient in cases of contract, but, in all other cases, the facts showing performance must be specially pleaded.

AFFIRMANCE OF JUDGMENT—EFFECT OF.—Where a demurrer to a complaint is sustained in the Court below, and plaintiff declines to amend, and the Court from the judgment and the order sustaining the demurrer, the Supreme Court, if it affirm the judgment, cannot grant plaintiff leave to amend the complaint.

APPEAL from the District Court, Seventh Judicial District, Solano County.

The complaint, besides averring plaintiff's claim of title under a school warrant, also alleged that defendant Jackson claimed under a patent from the State, and the defendant

People v. Jackson et al.

evlin has purchased under him with full notice and knowledge of relator's rights. That defendant Jackson acquired his rights subsequent to the location under which plaintiff claims, and in fraud of relator procured a patent to be issued clandestinely in this, that no notice was given of the application to the State Register for the certificate on which the patent was issued.

The other facts are stated in the opinion of the Court.

Whitman & Wells, for Appellant.

M. A. Wheaton, for Respondent.

By the Court, SANDERSON, C. J.

This is an action in the name of The People of the State of California, on the relation of S. C. Hastings, to set aside and cancel a patent issued by the State of California to the defendant Jackson, for certain lands described in the complaint, under the provisions of the Act of April 16, 1859, entitled "An Act to provide for the issuance of patents to lands located with state school land warrants, and for lands purchased under the act of April 23, A. D. 1858." A demurrer was interposed to the complaint, which was sustained by the Court. The plaintiff having declined to amend his complaint, a final judgment was rendered in favor of the defendants, from which the plaintiff appeals, and assigns as error the ruling of the Court upon the demurrer.

Several grounds of demurrer were alleged in the Court below, but they were all abandoned on the argument in this Court, except the ground that the complaint does not state facts sufficient to constitute a cause of action.

The complaint alleges, in substance, that the relator is seized and possessed, and for ten years last past has been seized and possessed and entitled to the possession of the tract of land described in the complaint. That his title to said land was derived from the State of California, through some grantor not named, under and by virtue of the location of a school war-

People v. Jackson et al.

rant made under and in accordance with the provisions of Act of the 3d of May, 1852, entitled "An Act to provide the disposal of the five hundred thousand acres of land granted to this State by Act of Congress, that the people of the State of California may avail themselves of the benefit of the eighth section of the Act of Congress, approved April 4, A. D. 1850, Chapter Sixteen, entitled 'An Act to appropriate the proceeds of the sales of the public lands and to grant pre-emptive rights,' the following provisions are hereby enacted." That said location was duly and properly made, and in all respects according to the provisions of said Act. That the relator by proper conveyance duly executed by the party making said location, succeeded to all the rights of said party in the land in question.

Having alleged title derived from the State under and in virtue of certain statutes, it is necessary for the plaintiff to allege specially a performance by him or his grantor of all the acts required by the provisions of those statutes. An averment that "the location was duly and properly made, and in all respects according to the provisions of said Act," is insufficient. The Act prescribes the conditions upon which the title of the State to the five hundred thousand acres of public lands donated to her by the General Government may be secured. These conditions are conditions precedent, and their performance must be specially averred. It is for the Court, and not the pleader, to say whether those conditions have been complied with. The facts showing such performance must be specially pleaded. The sixtieth section of the Practice Act excuses a statement of the facts showing the performance of conditions precedent in cases of contract, and makes a general averment of performance sufficient. But this rule cannot be extended beyond the cases mentioned in the section. *Expressio unius exclusio alterius est*. In all cases except contracts, the performance of conditions precedent must be specially pleaded.

This disposes of the appeal, and renders it unnecessary to pass upon the other points made upon the demurrer.

Judgment affirmed.

People v. Jackson et al.

By the Court, SANDERSON, C. J., on petition for rehearing.

A rehearing must be denied. Counsel for appellant seem to apprehend the opinion which has been rendered in this case. They have not passed upon the merits, but merely upon a question of pleading, holding that a general averment of performance of conditions precedent in a complaint is insufficient, except in cases arising out of contract. What must be the *status* of the relator in order to enable him to attack the defendant's pleading, we have not decided, but we have decided that a general averment that he has such a *status* is insufficient, and that the *facts* upon which he bases his right to attack the pleading must be stated. Whether the relator has such a *status* or not, is a conclusion of law to be drawn from the facts, and is a question for the Court and not the pleader. It will be in error to pass upon the relator's right to attack the defendants' pleading when the facts upon which that right is founded are properly presented.

We are asked to modify our judgment so as to grant the relator leave to amend his complaint. However much we might be disposed to grant the petition in this respect, we are precluded from doing so by the course which counsel saw fit to pursue in the Court below. We can only review the action of the Court below, and if that be found right, the only judgment which we can render is one of affirmance. The relator had leave to amend his complaint in the Court below, but declined to do so—electing to stake his fortune upon the complaint as then stood. Had he asked leave to amend, and had leave to amend been refused, there would have been action on the part of the Court which we could review. As it is, there has been no action in the Court below adverse to the relator's right to amend, and it follows that no action can be had upon the question in this Court.

The application for a rehearing and for a modification of the judgment must be denied.

Mr. Justice CUNRY, having been of counsel, did not sit on the trial of this case.

Crary v. Campbell et al.

MILTON W. CRARY v. THOMAS CAMPBELL, PEYTON POWELL, WILLIAM McCLANAHAN, AND WILLIAM WEED.

SALE OF MINING CLAIM.—Where a mining claim is conveyed by a written bill of sale, the bill of sale is the best evidence of the transfer, and parol evidence of the conveyance is inadmissible.

PAROL EVIDENCE OF SALE.—Where a witness, in his direct examination, testifies to a sale of a mining claim, and on cross examination states that the sale was in writing, it is error for the Court to refuse, on motion, to exclude the parol evidence of the transfer.

JOINT OWNERS — ACT OF ONE ACT OF ALL.—If one of two joint owners of a flume used for mining purposes consents to and directs the opening of a water ditch above the flume, by means whereof the water from the ditch flows over and injures the flume, the other joint owner cannot recover damages for such injury.

EVIDENCE OF DECLARATION OF ONE JOINT OWNER.—If one of two joint owners of a flume used for mining purposes brings an action to recover damages for an injury to the joint property caused by opening a water ditch above the flume, it is error for the Court to reject evidence that the other joint owner gave his consent to having the ditch opened.

APPEAL from the District Court, Eleventh Judicial District, Placer County.

The complaint averred that plaintiff was the owner of a mining claim which he worked by hydraulic process, situated at a short distance below a ditch called the Miner's Ditch; that plaintiff, for the conveyance of tailings and water from the claim, had constructed a flume about seven hundred feet long, leading therefrom; that in January, 1862, defendants William and McClanahan, as agents of defendants Campbell and Powell, who were the owners of the Miners' Ditch, cut the embankment of the ditch, and thereby caused seven hundred inches of water to flow down upon plaintiff's flume, by means whereof the flume was injured.

Plaintiff recovered judgment in the Court below, and defendants appealed.

The other facts are stated in the opinion of the Court.

Charles A. Tuttle, for Appellant.

Jo Hamilton, for Respondent.

Crary v. Campbell et al.

By the Court, CURREY, J.

This action was brought to recover damages alleged to have been caused by the defendants in the cutting away of a ditch called the Miners' Ditch, of which certain of the defendants were the owners, by means of which the waters therefrom were precipitated upon the plaintiff's mining property, causing great injury and damage thereto.

The defendants, after having controverted the material averments of the complaint, alleged in substance, that the Miners' Ditch was located and the right of way for it was acquired prior to the location of plaintiff's mining claim; and they urged that the plaintiff wrongfully and without the consent of the owners of the ditch had, before the time of the happening of the injury, excavated and washed away the soil from below the ditch up to and under it, so as to destroy the same, whereby the owners of the ditch were compelled to build a flume to carry the water over the place thus destroyed; that nevertheless this, the plaintiff continued to wash away the soil, and in consequence of it the earth settled and slid away from the defendants' flume, causing it to sink, when water flowed over upon the plaintiff's claim. The defendants also alleged that at the time the injury occurred and for several days before, there had been an unusually heavy fall of rain, and that to avert the injury threatened by the flood, the defendants, McClanahan and Weed, consulted with plaintiff's managing agents, one of whom was jointly interested with the plaintiff, in respect to the propriety of cutting the Miners' Ditch, and that by the consent and with the assistance of such agents, the ditch was cut at a point a few rods distant from the place where the flume had settled, by means whereof the water was turned down the cañon there; and the defendants averred that this was done to prevent the total ruin of the plaintiff's claim, and that, if it had not been for the previous excavations of the plaintiff, it would not have been necessary to have cut the ditch. This defence to the matters pleaded is necessary for the pur-

Crary v. Campbell et al.

pose of presenting to view the points on which the case appears by the records must be decided.

On the trial the plaintiff examined a witness who gave evidence to show that this mining claim was located by certain persons whom he named, before the ditch was constructed. The witness testified that he purchased the claim of those first located it, and took possession of it in the fall of 1861 and continued to hold it until he conveyed the same to the plaintiff and others, and that from that time the plaintiff held it in possession. On his cross-examination the witness testified that, when he purchased, he received a bill of sale for the claim from his vendors, and that when he conveyed to the plaintiff and others, he executed to them a bill of sale of the property. These facts appearing, the counsel for the defendants moved the Court to strike out the testimony of the witness as to his purchase, and also as to his sale and conveyance to plaintiff and others, on the ground that the transfers of property were in writing, which was the best evidence thereof. The Court denied the motion, and the defendants' counsel excepted. This ruling of the Court the appellants assigned as erroneous.

If the facts sought to be proved by this witness were material, as they seem to have been regarded by the parties before the Court, then the bills of sale, which were the best evidence of the transfers, should have been produced. The plaintiff deemed it necessary to connect himself with the right and title acquired by the original locators of his mining claim, and apprehend it was of some importance, at least, that he should do so. But, to do this, it was necessary for him to produce the conveyances or bills of sale, the existence of which was proved. The Court ought to have ordered the parol evidence of the sales and conveyances stricken out, when the application to that end was made.

O. J. Stone was examined as a witness upon the trial, and testified that he and the plaintiff were jointly the owners of the property injured by the opening of the ditch — the plaintiff's interest being seven twelfths and that of the witness

Crary v. Campbell et al.

remaining five twelfths. The defendants' counsel then offered to prove by him that before the ditch was cut he contacted to it. The evidence was objected to on the ground that it was irrelevant, and inadmissible on the cross-examination, and the objection was sustained, and the defendants excepted. When the plaintiff had rested his case, the defendants called the witness Stone, on their own behalf, and offered to prove by him that two days before the ditch was cut he told the defendant McClanahan "that the flume on the ditch would probably settle, and then to cut the ditch at the cañon where the ditch crosses it." The plaintiff objected to the testimony as irrelevant, and the Court sustained the objection, and the defendants excepted. The appellants also assign this ruling of the Court as erroneous.

If the witness had been permitted to testify, we must presume he would have proved the matters suggested by the offer; and from the circumstances proved it is manifest that the direction of the witness to McClanahan, if given, was dictated by a reasonable appreciation of the dangers that were imminent. The witness was interested in the preservation of the property which he and the plaintiff owned in common, and had the right to adopt such means for its protection from injuries by the flood as the exigencies of the time seemed to require. If the defendants, in compliance with his request, opened the ditch, they ought not to be and cannot on any principle be rendered liable in damages for the injuries that followed. We think the testimony offered was relevant, and that the Court erred by sustaining the objection made thereto.

The judgment is reversed and a new trial ordered.

Noble et al. v. Hook et al.

R. W. NOBLE, AND MARGARET NOBLE v. THOMAS K. HOOK, JOSEPH JONES, R. B. PARKER, CHARLES E. GORHAM.

DECLARATION OF HOMESTEAD.—Homesteads acquired under the Act of 1851, and occupied as such up to the 28th of April, 1860, lose the character of homesteads, and become liable to forced sale on execution, unless the declaration of homestead, provided for in the Act of April 28th, 1860, was made and filed for record on or before the first day of June, 1862.

CONSTITUTIONAL CONSTRUCTION.—The sixth section of the Act of 1862, which makes the failure to make and file for record the declaration of homestead a forfeiture of the homestead right, is not unconstitutional.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

The property claimed by plaintiff as a homestead was advertised by the Sheriff to be sold on the 15th day of July, 1863. This suit was brought on the 13th day of July, 1863.

The other facts are stated in the opinion of the Court.

J. B. Hall, for Appellants.

Cobb & Tyler, and *Jenkins*, for Respondents.

By the Court, SHAFER, J.

The complaint alleges that the plaintiffs intermarried in 1852, and that from that time to the filing of the complaint, July 13th, 1863, R. W. Noble was the owner of the lands described therein; and then proceeds to set forth all the facts necessary to establish a homestead right in said lands, under the Act of 1851. It is further alleged that on the 22d of June, 1862, Joseph Jones recovered a judgment against said R. W. Noble for one thousand eight hundred and sixty dollars and twenty-seven cents, for money lent in 1856 and 1857; that on the same day Parker & Co. also recovered a money judgment against said Noble, for goods sold and delivered in 1862; that executions, issued on said judgments respectively, were delivered to Hook, Sheriff, and that he has exhausted the personal property of said Noble, levied upon

the alleged homestead of the plaintiffs, and advertised the said lands for sale for the purpose of satisfying the balances due on the executions respectively. A temporary injunction upon the sale was asked and granted, and on motion made thereafter on the complaint alone the injunction was dissolved. From this order dissolving the injunction the plaintiffs appeal.

Two points are made by the appellants:

First—That the homestead asserted by them under the Act of 1851 has not been lost by their failure to file a homestead declaration under the Act of 1862, for the reason that that Act, when correctly construed, attaches no consequences to such omission prejudicial to the rights of the plaintiffs acquired under the Act of 1851.

Second—That if the Act of 1862 makes the rights of the plaintiffs acquired under the Act of 1851 to depend upon a filing of the declaration referred to, then the Act is unconstitutional and void.

1. The sixth section of the Act of 1862 provides in terms that the homesteads acquired under the Act of 1851, and held by such, by virtue of that Act, on the 28th of April, 1860, shall not be deemed homesteads, or be exempt from forced sale under execution or other legal process, unless the declaration provided for in said Act shall be made and filed for record on or before the first day of June, 1862. The language is so clear and explicit that no occasion for construction is presented. The only distinction between this case and that of *Bartholomew v. Hook et al.*, 23 Cal. 277, so far as the point now presented is concerned, is, that in that case the declaration was filed six days after the time for filing had expired, while in this case the parties have filed no declaration whatever. In *the Matter of the Estate of J. L. Reed*, 23 Cal. 410, it was held that property could not be deemed or held as homestead where no declaration had been filed within the time limited by the Act of 1862.

2. The objection that the sixth section of the Act of 1862 is unconstitutional and void, as impairing the obligation of contracts, or as divesting vested rights, does not appear to us

People v. Carkhuff.

to be well taken. The constitutional provision that "the Legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families" does not of itself create nor does it vest homestead rights in persons falling within the general description. The section is simply directory to the Legislature. The Legislature, by the Act of 1851, in the exercise of its discretion, determined the extent and value of the homestead, and the mode and manner of protecting it.

By the Acts of 1860 and 1862, the mode of protecting homestead rights created under the Act of 1851, and of creating like rights thereafter and of protecting them when acquired, was so varied as to afford more efficient protection to the rights and more efficient protection also to the community as against it. We consider that the position taken for the appellants in the arguments adduced in support of it are fully met by the decision in *Stafford v. Lick*, 7 Cal. 479.

The order dissolving the injunction is affirmed.

THE PEOPLE v. SAMUEL CARKHUFF.

EVIDENCE OF DECLARATION OF DECEASED.—C. was indicted for murder. The evidence against him was circumstantial, and to prove that he was a person who committed the murder, at the time of its commission, declarations of the deceased, made several hours previous, that C. expected at the house, were received in evidence. *Held*, to be erroneous. The declarations did not constitute a part of the *res gestæ* and as they were not made *in extremis*, and had no reference to the circumstances of the death.

APPEAL from the District Court, Eleventh Judicial District, Placer County.

S. D. Carkhuff resided about four miles from the City of Sacramento. He was a single man, and his house was situated about eighty rods from the nearest neighbor. The defendant, who was his nephew, lived with him, and there were no other inmates of the house. On the twenty-ninth of December, 1862, defendant went to Sacramento in the early part of

People v. Carkhuff.

v. About two o'clock p. m., deceased, while visiting at the house of Burns, his nearest neighbor, stated that defendant could be home that night. The next morning, about seven o'clock, defendant went to Burns' house and informed him that his uncle was murdered. Burns went with defendant to the house, and found the body of S. D. Carkhuff on the floor of the bedroom. His skull was broken and his throat cut. The weather was cold, and it appeared from the testimony of physicians that the murder must have been committed from seven to ten hours previous. Samuel Carkhuff was indicted for the murder, and in order to prove that he was at the house about the time the murder must have been committed, Burns was allowed to testify to the declarations of deceased made while at Burns' house.

Charles A. Tuttle, for Appellant.

J. G. McCullough, Attorney-General, for Respondent.

By the Court, RHODES, J.

The defendant was indicted and convicted of murder. He assigns several errors, but it will be unnecessary to consider more than one. Burns, a witness for the prosecution, testified, among other things, as follows: "Deceased and I lunched together, about two o'clock p. m.; my wife invited deceased to take supper with us; he declined, saying he must go home to attend to cooking apples; he said, Sam, meaning defendant, could be home that night; that he had gone to the Park to see a favorite officer and witness a review."

The defendant objected to the declarations and conversation of the deceased, because they were irrelevant, were not shown to have been made *in extremis*, and not made in the presence of the defendant.

All the evidence tending to connect the defendant with the commission of a murder was circumstantial. The deceased was last seen alive at about two o'clock p. m., on Sunday, and his corpse was found at his house between seven and eight

People v. Carkhuff.

o'clock A. M., on Monday, by witness Burns, who was informed of the death of the deceased by the defendant. Burns testified that the defendant, who lived with the deceased, left the house of the witness at eleven o'clock A. M., on Sunday, to return home to water his horses, and from that time till the following morning he was not seen at the house of the deceased. The condition of the body of the deceased, when first seen by Burns, indicated that his death had occurred several hours previously, and it became necessary for the prosecution to show by facts and circumstances, or by some competent person, that the defendant had been at his house some time during the night, and several hours previous to seven o'clock, A. M., on Monday morning. The defendant was shown to have been in Sacramento, about four miles from the house of the deceased, on Sunday evening.

The only object of the prosecution in offering in evidence the declaration of the deceased that the defendant would not return at home on Sunday night, was to enable the jury to presume from the fact that the deceased expected the defendant to return that night, that he did so return, and was there at the time of the commission of the murder. It is impossible to conceive upon what theory that declaration was admissible. If the declaration had been made to the witness by any other person it would not be contended that it was admissible in evidence, for evidently it would be obnoxious to the objection that it was hearsay testimony.

The fact that the declaration was made by the deceased does not tend to remove the objection, for the declaration of the deceased are permitted to be proven in the single instance when they are made *in extremis*, and have reference to the circumstances of the death, unless the declaration constitutes a part of the *res gestæ*, or can be classed with declarations against interest, etc. (1 Greenleaf Ev., Sec. 156.)

It was not admissible as a part of the *res gestæ*, for it does not constitute one of the circumstances surrounding the murder. The expectation of the deceased that the defendant would return, and that, too, unsupported by any evidence

the reasons for his expectations, did not even tend to prove any fact connected with the murder. The expectation may have been without any foundation; may have been merely a surmise arising from the defendant's usual habits. His expectation or declaration that the defendant would return at the time stated would possess no more legal value as evidence to prove the fact that he did return, than would the expectation of his neighbor, Burns, that the defendant would return at the given time.

Upon this question the Attorney-General cites *Kirby v. The State*, 7 Yerger, 259, in which it was proved by a witness that the deceased had told him that he and the defendant were going to Pine Mountain to look for a saltpetre cave; that afterwards he told him that they had searched for the cave, but had not found it, and that they (the deceased and the defendant) were soon going again in search of it. The last conversation took place shortly before the deceased was found murdered on Pine Mountain. The Court held that the Court below erred in admitting the testimony of the witness as to what the deceased said about the defendant's intention to accompany him to Pine Mountain; that it did not prove any act done by the defendant, but left the matter depending upon a mere contingency, and, at the most, expressed but an intention that was liable to be changed at any time; and that, as the defendant was not present at the conversation, the declaration did not constitute a part of the *res gestæ*, and was inadmissible.

It is unnecessary as well as improper to examine the testimony to ascertain whether there was sufficient evidence, aside from the declaration of the deceased, to warrant the jury in finding the defendant guilty; for the declaration of the deceased, upon its admission by the Court as legal and competent testimony, tended to prove the presence of the defendant at the house of the deceased on the night of the murder, and that may have been the evidence that mainly satisfied the jury that he was present at that time.

The judgment is reversed and the cause remanded for a new trial.

Minturn v. Brower et al.

EDWARD MINTURN v. JOHN D. BROWER AND JOHN HOWLETT.

TREATY OF GUADALUPE HIDALGO.—Mexicans, who, previous to the acquisition of California by the United States, were established in and had acquired from the Governments of either Spain or Mexico a perfect title to lands in California, and who chose to remain in California, were, by the treaty of Guadalupe Hidalgo, protected in the ownership and enjoyment of the land the same as though no change of sovereignty had taken place.

MEXICAN GRANTS — AS TO CONFIRMATION.—Mexicans, whose titles to lands by grant from Mexico or Spain were perfect at the time of the acquisition of California by the United States, were not compelled to submit them for confirmation to the Board of Commissioners appointed under the Act of Congress of March 8d, 1851, nor did they forfeit their lands to the Government by a failure to present their claims for confirmation.

PERFECT TITLES.—The titles of such persons to their lands, which were perfect at the time of the acquisition of California by the United States, remained as valid under the new Government as they were under the old; and without having been presented to the Board of Commissioners for confirmation, may be asserted and maintained in the Courts of the country.

INCHOATE TITLES.—Where the titles to lands in California were inchoate and imperfect at the date of the treaty, it was necessary to submit them to the Board of Commissioners for confirmation within the time prescribed by the Act of Congress of March 8d, 1851, otherwise they became forfeited; and from that time such lands were deemed, held, and considered as part of the public domain of the United States.

PERFECT TITLES MIGHT BE SUBMITTED OR NOT.—Holders of titles to lands which were perfect at the date of the treaty, could, if they so elected, submit them to be passed upon by the Commissioners, but were not bound to do so.

EFFECT OF TREATY ON TITLES.—The provisions of the treaty of Guadalupe Hidalgo operated as a confirmation *in present* of all perfect titles to lands in California held under Spanish or Mexican grants made prior to its ratification. P., a Mexican citizen, residing in California, had, at the time of its acquisition by the United States, a perfect title to a tract of land in California, granted to him by Spain in 1820. In 1851 he died intestate, leaving him surviving sons and daughters. The sons, claiming severally distinct portions of such tract by devise of their father, as they alleged, presented to the Board of Commissioners their respective claims to such portions of the land for confirmation, and the same was confirmed and patented to them as severally claimed. The daughters were not parties to the petition presented to the Board, nor to the confirmations, nor to the patents issued. The plaintiff, who had succeeded to the title and interest of one of the sons by grant of a distinct parcel of the portion of the land confirmed and patented to him, brought ejectment against the defendants, who had succeeded by grant to the title and interest of the daughters in and to the same parcel of land. *Held*, that upon these facts, which were pleaded by the defendants, and admitted by the plaintiff to be true, the Court erred in giving judgment for the plaintiff.

APPEAL from the Third Judicial District, Alameda County.

The facts are stated in the opinion of the Court.

H. K. W. Clarke, for Appellants.

The Court below should have allowed defendants' evidence support of their title and right of possession.

What was it? Why, substantially, that the land plaintiff sought to recover had been, previous to 1820, subject to disposition by the Spanish Government, a former proprietor and ruler of the country; that in that year it was granted by the then proprietor, in full and absolute property, to one Luis Pelalta; that the latter was its owner and possessor for thirty years and upwards, until his death in 1851; and in the latter year he died intestate, leaving sons and daughters, and descendants of a deceased daughter, as his heirs and the inheritors of his estate; and that from a portion of these defendants deraigned title and right to the premises in question by direct mesne conveyances, and that defendants were in possession under and through the right thus acquired.

Why was it improper to allow this means of defense? The learned Court below answered, because the sovereign of the country, the Mexican Government—not the proprietor of the land—in 1848 had, by treaty, ceded its sovereignty over the country to the Government of the United States, and that the latter Government having, through Congressional legislation, established a tribunal to ascertain and settle private land claims in the ceded territory, to which all were invited, and to which resort had been had by one only of said sons and heirs, who had obtained, in a proceeding to which himself and the United States alone were parties, a decree of confirmation in his own favor of the entire granted estate, and to the exclusion, who were unheard and unnamed, of its other inheritors, through whom defendants claimed and derived their rights.

Was the Rancho of San Antonio, granted in fee to Luis Pelalta thirty years ago by its then proprietor, and remaining in his uncontrolled possession from the date of the grant until 1851, the time of his death, property *belonging* to the United

States? If not, how could it have been disposed by or in virtue of an Act of Congressional legislation?

That it was the private property in fee simple and by perfect title of Luis Peralta at his death, and thence vested, not in A. M. Peralta, one of his heirs, but in him and *others* as tenants in common, through whom defendants derived, *was the very thing the offered evidence would have shown.*

The Act of Congress of 3d March, 1851, could not effect a change of proprietorship in and to perfect legal titles to lands vested in private individuals, under the laws of the former sovereign, nor was it so intended. This is not only manifest from a want of power to do so, but, in addition, it is unmistakably expressed by the words of its fifteenth section.

A treaty of cession is a deed or grant of one sovereign to another, and transfers nothing in which he had no right of property—and only such rights pass as he owned and could convey to the grantee.

By the treaty of Hidalgo, the United States acquired no lands in California to which any person had lawfully obtained such a right by perfect title.

Congress cannot constitutionally, by a *mere enactment*, deprive a citizen of his lawful estate; and if it should attempt it, this Court would not sustain such a spoliation act. (*United States v. Perchman*, 7 Peters, 87.)

The United States never had any title to the premises in controversy. It has been often decided: "That a patent is absolutely void and inoperative, where the State granting it has no title to the thing granted." This may be shown in an action at law. (*Stoddard et al. v. Chambers*, 2 How. 284–318; 9 Cranch, 99; 4 Cranch, 652; 5 Wheat. 293; 11 Wheat. 384; *Rice v. Railroad Co.*, 1 Black, 375; *Kyle & Thompson v. Tubbs*, 23 Cal.)

The defendants hold under an independent title that arose prior to the acquisition of the country by the United States, and are *third persons* within the meaning of the fifteenth section of the Act of 3d March, 1851. (*Waterman v. Smith*, 13

al. 420; *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 362; *Leese v. Clark*, 20 Cal. 423-425.)

But, independently of this fifteenth section, the defendants are protected by the law of nations, treaty stipulations, and constitutional guarantees. (See Constitution, Treaty with Mexico, and *United States v. Perchman*, 7 Peters, 86, 87.)

In the Court below, it was urged that *Estrada v. Murphy*, 9 Cal. 248, and *Lockwood v. Clark*, 21 Cal. 220, had virtually decided that the action of the United States tribunals, under the Act of 3d March, 1851, on the subject discussed under this head of our brief, was conclusive.

This is incorrect. Both those cases were where Mexican grants had been confirmed on *imperfect* or equitable titles. In this, the title was *perfect*, and needed no confirmation through an Act of Congress or judicial decree. In those cases, before confirmation the legal title was in the Government. It could not, in the matter of confirmation or rejection, as it thought fit. The fee was subject to its disposition, and having disposed of its action was conclusive.

Where two or more persons have an equitable right to the same land, the fee of which is, before confirmation, *in the Government*, and a disposition of the fee is made to one to the exclusion of the other, it is not doubted, however wrongful such disposition may be, it is conclusive until it is set aside. But, not so as in the case here, where the title in fee was vested in individuals, and *not* subject to the disposition of the Government.

E. W. F. Sloan, for Respondent.

It is assumed that Luis Peralta was, in his lifetime, vested with a perfect title to the Rancho de San Antonio, and it is argued that a claim of that character need not be presented for confirmation to the Board of Commissioners. That the Act of Congress makes no distinction between perfect and imperfect or inchoate grants, is too obvious to admit of controversy; consequently the power of Congress to enact the law is disputed. If the Act of Congress is void, so far as by its terms

Minturn v. Brower et al.

it is applicable to perfect legal titles, it must be because it is in violation of the Federal Constitution, or is contrary to common right. I deny that it is either the one or the other.

Article IV, section 3, of the Constitution of the United States, provides that "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

The State of California was "admitted into the Union upon the express condition that the people of said State, through their Legislature or otherwise, should never interfere with the primary disposal of the public lands within its limits."

Upon Congress, therefore, devolves the sole power of providing for the primary disposition of the public lands of the United States. The exercise of that power necessarily includes the means of ascertaining what is and what is not public land. The Government can see and act only through its officers and agents.

At the time of the passage of the Act in question, a vast territory had recently been annexed to the United States. This territory was then but sparsely populated, yet it was correctly supposed that portions of it had become private property. In order to facilitate the orderly settlement of this territory, and the development of its ample resources, it became necessary for Congress to exercise the powers mentioned; to cause surveys to be made; to establish Land Offices; to constitute and appoint Registers and Receivers; to provide for sales, entries, and the issuance of patents. But before proceeding to dispose of the public lands, it was obviously requisite that such portions as had become private property should be ascertained and clearly defined, through the medium of official agents.

It is evident that officers, appointed for that purpose, must either proceed upon an inspection of such record evidence or other proof as they might be able to procure unaided by claimants, or the latter must have an opportunity to be heard.

The Act of Congress secured to each claimant a patent and

impartial hearing. A tribunal was specially appointed for the purpose. Ample time was given for the presentation of claims; and still further time was given for the introduction of proof in support of such claims. In case of a rejection by the Board of Commissioners, an appeal was allowed to the District Court of the United States, where additional evidence could be introduced, with the privilege of again appealing to the Supreme Court. The Surveyor-General was authorized and directed to cause accurate surveys to be made of all lands the claims to which should be finally confirmed; and patents therefor were directed to be issued to the respective confirmees. Thus, lands justly claimed to be private property, whether by titles perfect or imperfect, were rendered potentially secure against adverse titles from the Government of the United States.

It is impossible for Congress to have devised means more adequate to accomplish the end in view. A higher purpose could scarcely have claimed the attention of the national Legislature.

If it is the duty of the Government to respect private rights which depend on imperfect grants, *a fortiori*, is it bound to protect those in the enjoyment of their property who hold lands by perfect titles?

"The Government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means." Per Mr. Chief Justice Marshall, in *M'Culloch v. State of Maryland*, 4 Wheat. 409, 410.)

A mere glance at the existing state of things in the acquired territory will disclose the necessity of Congressional action.

A few grants of land had been made by the Spanish Government; a greater number by that of Mexico. These grants had never been regularly surveyed. Rude *diseños*, intended to delineate some of the natural features of the lands of which grants had been solicited were, indeed, to be found in the archives; but even these were wanting in some *expedientes*.

Archive evidence consisted of petitions—with or without *diseños*—consultations, orders of reference, informations, correspondence, prohibitions, licenses, orders of concessions, etc., and all in a foreign language. *Diseños* generally represented a larger tract of land than was granted. Often, two or more *diseños* represented, in part, the same parcel of land. A sobranted clause was to be found in almost every *título*.

The giving of juridical possession—the last step in completing the title under the Mexican system—was performed by local officers, who retained in their own possession the record of their proceedings. The boundaries intended thereby to be fixed were generally so imperfectly described as to be uncertain.

Under the colonization system of Mexico, grants of land could only be made in writing, so that some sort of record evidence was supposed generally to be found; but it seems they might have been made orally, with livery, according to the Spanish system.

In such state of circumstances, it is not difficult to perceive how liable the Surveyor-General would have been to overlook even perfect grants, survey the lands included by them, and return the same as parts of the public domain of the United States.

An entry of the same land by strangers, and the issuance of patents, would naturally succeed, to terminate at last in litigious strife between the patentees and the original claimants. In such litigation it would be necessary for the latter to maintain their respective rights before juries—often prejudiced in favor of patentees; and to do so with a promptitude not required in the proceedings prescribed by the Act of Congress.

That Act confers, therefore, a special favor on all *bona fide* claimants of land under Spanish or Mexican grants. It provides for the confirmation of all just titles. It secures to the confirmees indisputable evidence of their respective rights in a form at once certain, compact, and convenient. It protects them against adverse grants from the United States. No other

erty was imposed upon claimants except that of presenting their respective claims, with the evidence upon which they were founded, within the time limited. There was a public necessity for the limitation. Whilst ample time was allowed for the presentation and establishment of all just claims, a restraint was placed upon the fabrication of false claims to an definite extent.

Can such an Act be charged with producing the confiscation of private property? An ordinary Statute of Limitations operates upon the remedy only, but in barring the remedy it then puts an end to the right. Such a law, however, even here enacted in reference to past transactions, has always been upheld by Courts, provided a reasonable time be given for the exercise of the remedy. (*Call v. Hagger*, 8 Mass. 429; *Brother v. Lucas*, 12 Peters, 447.)

"Acts of Limitation," says Mr. Chief Justice Marshall, "defeat a contract once obligatory, and may, therefore, be supposed to partake of the character of laws which impair the obligation of contracts. But a partial view of the subject will show us that the two laws stand upon distinct principles

* *. In prescribing the evidence which shall be received in its Courts, and the effect of that evidence, the State is exercising its acknowledged powers. It is likewise in the exercise of its legitimate powers when it is regulating the remedy and mode of proceeding in its Courts." (*Ogden v. Saunders*, 12 Wheat. 348, 349.)

It is unquestionably within the scope of ordinary legislative power, without destroying the right, to prescribe a period within which that right shall be asserted in Courts of justice. It is alike in harmony with the dictates of private justice and public policy to prescribe such limitation.

The law in question is not the result of State legislation, and is, therefore, not directly within the restriction imposed by the Federal Constitution against the passage by States of laws which impair the obligation of contracts. The principle upon which that prohibition rests, however, lies at the foundation of all proper legislation. The same may be said with

regard to the prohibition of *ex post facto* laws. These, and all similar restraints contained in the Constitution of the United States, were deemed sufficient to prevent the States from going beyond the limits of wholesome, legitimate legislation. They indicate what the most liberal and enlightened statesmen and jurists have regarded as the true limits of legislative power, beyond which it could not properly extend, but within which its exercise could be safely intrusted to that branch of government in which it was vested.

An Act of the Legislature of Pennsylvania, which declared valid the deed of a married woman, which was invalid before for want of a proper acknowledgment, was held to be free from constitutional objections, and of obligatory force, although the effect was to divest the right of the heirs.

"It is clear," says Mr. Justice Story, in a case in the Supreme Court of the United States arising under that Act, "that this Court has no right to pronounce an Act of the State Legislature void as contrary to the Constitution of the United States from the mere fact that it divests vested rights of property. The Constitution of the United States does not prohibit the States from passing retrospective laws generally, but only *ex post facto* laws." (*Watson v. Mercer*, 8 Peters, 110.)

Where Congress has legislative power over the subject matter, must it not be, as to that matter, equally extensive? The enactment in question, however, does not undertake to divest any settled right of property; but, on the contrary, to provide for its greater security. In doing so, it is true, it has imposed terms upon the claimant of the right; it requires reasonable activity on his part within a limited period, which he cannot safely refrain from exercising. But, has such legislation ever been condemned by jurists as contrary to common right or unjustly oppressive? Has it, when dictated by considerations of public policy, ever failed to receive the most unqualified judicial approbation? "It cannot be doubted," says Judge Martin, "that the title, or rights acquired under a contract, cannot be modified or affected by any subsequent

of the Legislature; but the means of enforcing such rights and protecting such titles—in other words, the remedy provided by law to insure the enjoyment of such rights and titles—is always in the power of the Legislature, who may extend or restrict it as circumstance may require.” (*Patin et al. v. Prejean*, 7 La. 306.)

As heretofore suggested, a perfect title to land may have been derived from the crown of Spain without any writing whatever. The holder of such title would, of necessity, be compelled at all times to rely on the precarious security of oral evidence for its protection, unless the Government afforded him the means of procuring incontestable evidence thereof, of permanent character, by record and letters patent. Could he justly complain of a law of the United States which provides the means for that purpose, which imposes no terms other than the submission of his claim, with proof of his right, within a reasonable period? A statute which should directly declare such a title null and void might be justly condemned; but the Act of Congress does nothing of the kind.

It is said, however, that a party owning property by a perfect legal title should be permitted to assert his right thereto in any Court of law, without the necessity of taking any positive steps in reference to it which were not required by the law existing at the time the property was first acquired: that the imposition of such necessity, or of any terms or conditions whatever, is beyond the legislative power of any free and enlightened government. If so, our Legislatures have been in the habit of indulging, and our Courts of sanctioning the exercise of despotic power.

The Act of the Legislature of this State, approved April 10, 1863, (Chap. 365,) which imposes upon litigants the taking and subscribing of an expurgatory oath as a condition upon which alone they shall be allowed to prosecute or defend their rights in Courts of justice, has been judicially sustained.

Statutes of the State of New York, similar in the principle of their operation, were passed respectively January 8, 1794, and March 24, 1797. Those statutes have been approved and

enforced, both in the State and Federal Courts. (*Jackson v. Harrington*, 6 Cow. 137, 139; *Jackson v. Lamphire*, 3 Peters, 289, 290.)

They operated upon deeds of conveyance already executed, and by virtue of which perfect legal titles to real estate have been acquired. They compelled the holders of these deeds to register and lodge them in a particular office, on or before a given day, upon peril of not being entitled to read them in evidence in support of such titles.

The Act of Congress, like the statutes last referred to, does not vacate or annul any grants of land; but, on considerations of public policy and private right, prescribe a convenient remedy by which those grants might be permanently established, and the property thereon dependent rendered perfectly secure.

A large majority of those who claimed the ownership of lands in California at the date of the conquest were not vested with titles definitively valid; in few instances had concessions been approved by the Departmental Assembly or Territorial Deputation, and still more rarely had juridical possession been given. And though the fee may be regarded as having passed to the United States by the transfer of the territory, yet it was subject to the equitable rights of those grantees; and it devolved on this Government to complete that which would have been accomplished by the former sovereign but for the change.

So far as the enactment in question applies to claims of that character, no complaint seems to be made. The Government of the United States was bound alike by treaty stipulations, by the law of nations, and by national honor, to recognize and respect all just rights of property, although depending on inchoate grants. Why, then, does not the objection extend to the statute *in toto*? The true reason is to be found in the obvious fact that it does not confiscate private property, or invade private rights in any sense.

By the Court, CURREY, J.

Minturn v. Brewer et al.

This is an action of ejectment brought to recover the possession of a specific part of the "Encinal of San Antonio," which is a portion of a larger tract of land called the "Rancho de San Antonio," situated in the County of Alameda. The plaintiff claims title to the demanded premises under Antonio Maria Peralta, one of the sons of Luis Peralta, deceased. The defendants claim title to five ninths of the same premises, derived by conveyances from the daughters and certain grandchildren of the same ancestor. Luis Peralta died in 1851, leaving him surviving four sons and four daughters, and the children of a deceased daughter, as his heirs at law.

After the cause was at issue upon the complaint and the answers first made and filed by the defendants, each of the defendants, by leave of the Court, amended his answer by adding thereto a further defense, alleging that the demanded premises was a part of the "Rancho de San Antonio," granted in or about the year 1820, by the Spanish Government to the said Luis Peralta, who died intestate in August, 1851, leaving him surviving children and grandchildren as his heirs at law; and that when he died he was seized in fee and possessed of the lands in controversy. That in 1852 the decedent's sons presented to the Board of Land Commissioners appointed under the Act of Congress of March 3, 1851, the title to said rancho for confirmation, and that the same was confirmed first by the Commissioners and afterward by the United States District Court, as good and valid. That these sons, in fraud of the rights of the other heirs, by the use of a simulated, false, and fraudulent document, purporting to be the last will and testament of the deceased, which was never proved nor admitted to probate, procured a confirmation of said rancho in parcels to themselves, and that the portion embracing the demanded premises was confirmed in the name of Antonio Maria Peralta. That the facts as to the means by which the confirmation was thus obtained were fully known to the plaintiff and his grantors at and before they or either of them acquired any claim or interest in the land. The amended answers also show that each of the defendants had

succeeded to whatever rights and interests the daughters and grandchildren of Luis Peralta had in the parcels of land of which the defendants respectively had the possession long before the action was commenced. And in conclusion they pray that plaintiff be compelled to release to the defendants respectively any right in the premises in controversy that he may wrongfully have acquired by the confirmation, and for general relief.

To the amended answers the plaintiff demurred on the grounds: First—That the same did not state facts sufficient to constitute a defense to the action, or to entitle them to relief in equity. Second—That it appeared by the amended answers that there were devisees and heirs at law of Luis Peralta who were indispensable parties, but who were not made parties thereto. Third—That more than three years had elapsed since the commission of the alleged fraudulent acts mentioned in the amended answers. Fourth—That more than four years had elapsed since the alleged cause of equitable relief accrued.

The Court sustained the demurrer, and the defendants excepted.

At the trial it appeared on the part of the plaintiff, that in 1852 Antonio Maria Peralta applied, under the Act of Congress passed on the third of March, 1851, entitled "An Act to ascertain and settle private land claims in the State of California," for the confirmation to him of a certain and specific part of the "Rancho de San Antonio," embracing the land in controversy; and such proceedings were had concerning the matter that his claim thereto was finally confirmed by the proper authorities of the United States as a valid claim, and afterwards a survey was made of the land by the Surveyor-General of the United States for California, which was approved by the United States District Court.

After the plaintiff had produced further evidence in the case and had rested, the defendants, for the purpose of showing that the daughters of Luis Peralta, deceased, through whom they respectively claimed, had a perfect legal title to an undi-

ded share and interest in the demanded premises by descent
 est, offered in evidence duly certified copies of certain docu-
 ents which were in the archives of the office of the Surveyor-
 general of the United States for California, which are set forth
 the transcript of the record in this case. This documen-
 ry evidence is the same that was before the Supreme Court
 the United States in the case of *The United States v. Peralta*,
 How. 344, and is conceded to establish that the title of Luis
 Peralta to the Rancho de San Antonio was a grant in fee to a
 specific tract of land.

And the defendants further offered to prove that Don Luis
 Peralta, the grantee of the lands of "San Antonio," died in-
 state in the year 1851, seized of said lands, and that he left
 surviving him four sons and four daughters, and the children
 a deceased daughter, all of whose names are mentioned;
 and following this, the defendants offered in evidence deeds
 conveyance duly acknowledged and recorded, by which they
 succeeded to all the right, title, and interest which the daughters
 and grandchildren of Luis Peralta acquired in and to the de-
 manded premises upon the death of their ancestor.

The counsel for the plaintiff objected to the evidence so
 offered and to every part of it, and the objection was sustained
 by the Court. To this ruling the defendants' counsel duly
 accepted.

In reviewing this case we shall first consider the question
 presented by the exception to the ruling of the Court in ex-
 cluding the evidence offered on the part of the defendants. It
 is a question of great importance and of more than ordinary
 interest. It involves a determination of the force and effect
 of a final confirmation and approved survey under the Act of
 Congress on the one hand, and the rights of those having per-
 fect titles to lands in California when this territory was ceded
 by Mexico to the United States, who have omitted to submit
 them to be adjudicated upon, as indicated by the Act of Con-
 gress of 1851, on the other.

It is maintained on the part of the appellants that Luis
 Peralta acquired from the Government of Spain, while the

province of California belonged to that nation, a perfect title, or in the language of common law, a title in fee simple, to the "Rancho de San Antonio," and that this title was subsisting and indefeasible when California was acquired by the United States; and the counsel for the respondent concedes the fact so to be, but contends, notwithstanding this, that the United States in its sovereign and governmental capacity had the right, in order to ascertain the extent and limits of its own lands, to require the owners of private land claims in this State, whether by perfect or imperfect titles, to present them for adjudication to the Commissioners and the Courts appointed for the purpose of passing upon their validity, and to declare, as a consequence of an omission to comply with this requirement within the time specified, that such lands "shall be deemed, held, and considered as part of the public domain of the United States."

At the time of the ratification of the treaty entered into between the United States and Mexico, by which the former nation acquired California, it must be presumed it was well known to the high contracting parties that portions of the ceded territory had become the property of individuals, and though it may not have been necessary under the circumstances of the acquisition to have provided by treaty stipulations for the protection of private property, still it was deemed but just to place the subject beyond the questioning of those who claim for conquering nations unlimited powers over and respecting the property of the citizens of the conquered country, and hence we may suppose the Mexican nation, with a deep solicitude for the welfare of its citizens who were then residents of the territories about to be ceded to the United States, proposed the VIIIth and IXth Articles of the treaty of Guadalupe Hidalgo, and that the justness of the provisions therein contained was freely acknowledged and agreed to on the part of the Government of the United States in the creation of this solemn compact.

The portion of the VIIIth Article of the treaty which par-

icularly bears upon the question under consideration is as follows:

"Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof and removing the proceeds wherever they please without their being subjected on this account to any contribution, tax, or charge whatever."

By the IXth Article, the same care was manifested for securing the rights of Mexicans who might, in consequence of the transfer of the dominion and property of the territories about to be ceded, lose the character of citizens of the Mexican Republic before they were admitted "to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution." It was therefore stipulated that during the contemplated interval such Mexicans "shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction."

That it was intended by the treaty that Mexicans then established in California, and having property therein, should retain and enjoy it or dispose of it as to them might seem proper, the language of the treaty places beyond controversy.

Then, did the Congress of the United States intend, by the Act of March 8d, 1851, to compel persons of the class mentioned in the treaty, who at that time held lands in possession of perfect titles derived from the source of paramount proprietorship, to submit them to the Board of Commissioners appointed under that Act, or else to forfeit their lands to the Government?

In *Strother v. Lucas*, 12 Peters, 438, the Supreme Court of the United States said, that "in following the course of the law this Court has declared that even in cases of conquest the conqueror does no more than displace the sovereign and assume

dominion over the country." And in *Perchman's Case*, 7 Peters, 86, Mr. Chief Justice Marshall said: "A cession of territory is never understood to be a cession of the property of its inhabitants. The King cedes only that which belongs to him; lands he had previously granted were not his to cede. Neither party could so understand the treaty; neither party could consider itself as attempting a wrong to individuals condemned by the whole civilized world." And in *Strother v. Lucas*, Mr. Justice Baldwin said: "No construction of a treaty which would impair that security to private property which the laws and usages of nations would, without express stipulation, have conferred, would seem to be admissible further than its positive words require * * *. Without it, the titles of individuals would remain as valid under the new Government as they were under the old; and those titles, so far at least as they are consummate, might be asserted in the Courts of the United States, independently of the treaty stipulation." (12 Peters, 438; 7 Peters, 88; 9 Peters, 133 and 734.) Treaties, like the Constitution itself, are declared by that instrument to be the supreme law of the land. (Article VI.) The treaty of Guadalupe Hidalgo, as we have already seen, stipulates that Mexicans established in the territories then thereby ceded, might retain the property which they possessed, or dispose of it if they elected so to do; that they should be maintained and protected in the free enjoyment of their liberty and property without restriction.

The law deems every man to be in the legal seizin and possession of land to which he has a perfect and complete title; this seizin and possession is co-extensive with his right, and continues until he is ousted thereof by an actual adverse possession. This is a settled principle of the common law. (*United States v. Arredondo*, 6 Peters, 743; *Mitchel v. United States*, 9 Peters, 734.)

The cases of *Arredondo* and *Perchman* involved the construction of the treaty between Spain and the United States, by which Florida was ceded to the latter, relative to grants of land in the ceded territory, made by the King of Spain, or by

is lawful authorities therein, before the 24th of January, 1818. The treaty was drawn up in both the English and Spanish languages, and both of them were considered, in Merchman's case, as originals. The II^d Article contained the cession of the territory, and the VIIIth, stipulations respecting the titles to lands in the territory ceded. The English part of the VIIIth Article was as follows: "All grants of land made before the 24th of January, 1818, by his Catholic Majesty, or by his lawful authorities in the said territory ceded by his Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty." The Spanish part of this Article was the same as that in English, except the words "shall be ratified and confirmed" were "shall *remain* ratified and confirmed;" and Mr. Chief Justice Marshall, in speaking of this difference in language, said: "Although the words 'shall be ratified and confirmed' are properly the words of contract, stipulating for some future legislative act, they are not necessarily so. They may import that they shall be ratified and confirmed by the instrument itself."

In *Foster and Elam v. Nelson*, 2 Peters, 814, the Court considered the words, "shall be ratified and confirmed," as importing contract, and in that case the same illustrious Judge said: "Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in Courts of justice as equivalent to an Act of the Legislature, wherever it operates of itself without the aid of any legislative provision. But when the terms of stipulation import a contract, where either of the parties engages to perform a particular act, the treaty addresses itself to the political not the judicial department; and the Legislature must execute the contract before it can become a rule of the Court." And he further said, had the Article declared that all the grants made by his Catholic Majesty before the 24th of January, 1818, shall be valid to the same extent as if the ceded territory had remained under his domin-

ion, it would have acted directly on the subject; and in *Perchman's Case*, 7 Pet. 89, he said if the circumstances of the difference of the language referred to between the English and Spanish parts of the treaty had been known in deciding *Foster and Elam v. Nelson*, he believed it would have produced the construction which was given to the VIIIth Article by the Court in *Perchman's Case*.

In *United States v. Wiggins*, 14 Pet. 349, Mr. Justice Catron said: "The object of the Court in the cases of *Arredondo* and *Perchman* was to exempt perfect titles from the operation of the VIIIth Article of the treaty under consideration in these cases, for the reason that they were perfect titles by the laws of Spain when the treaty was made; and that when the soil and sovereignty of Florida were ceded by the II^d Article, private rights of property were by implication protected;" and he further said: "The Court, in its reasoning, most justly held that such was the rule by the laws of nations, even in case of conquest, and undoubtedly so in case of cession; therefore, it would be an unnatural construction of the VIIIth Article to hold that perfect and complete titles at the date of the treaty should be subjected to investigation and confirmation by the Government; and to reconcile the Article with the laws of nations, the Spanish side of the Article was referred to in aid of the meaning of the American side, when it was ascertained that the Spanish side was in the present tense; whereupon the Court held that the implication resulting from the II^d Article, being according to the laws of nations, that and the VIIIth Article were consistent, and must be so recognized by the United States in its Courts." And further on he used this language: "That the perfect titles made by Spain before the 24th of January, 1818, within the ceded territory, are intrinsically valid and exempt from the provisions of the VIIIth Article, is the established doctrine of this Court, and that they need no sanction from the legislative or judicial departments of this country."

Where the claim of an individual to lands was of the nature of an inchoate or incomplete grant, which was of such

character as to have bound the conscience of the former sovereign to perfect it, the United States, having acquired the territory, received it charged with the duty of carrying out in good faith the obligations of the former Government to its grantee, existing at the time of the cession. The former Government never having parted with the title, and the United States having acquired the territory, with all the rights and obligations of the old Government, could, in its political capacity, prescribe the proceeding necessary to accomplish the duty which devolved upon it to invest the grantee with a perfect title; and hence the same political authority could impose such terms and conditions upon the claimant, for the speedy accomplishment of the end in view, as might be just to him and conducive to the public interests; and claimants under such grants could not complain if the Government upon which they depended for the perfection of their claims should provide a tribunal to examine their fairness, and should make their validity depend on their being submitted to such tribunal. (*Henderson v. Poindexter*, 12 Wheat. 543; *McCulloch v. State of Maryland*, 4 Wheat. 409; *Hall v. Doe*, 19 Ala. 36.) But the rule that applies to cases of inchoate titles can have no just application to titles that were already perfect and which stood confirmed by the treaty acting at the time of its creation, *eo instanti*, directly upon the subject.

It is argued by the counsel for the plaintiff that as the Constitution of the United States provides that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," and as the sole power of providing for the primary disposition of the public lands devolves upon Congress, that therefore, in order to ascertain what is and what is not public land, Congress can exercise the means that may be necessary for such purpose, and that the Act of 1851 prescribed the means for the ascertaining not only who had the legal titles and merely equitable claims to lands, but thereby provided the mode by which the Government could ascertain the limits and extent of its own lands; and he further argues

that "the Government which has a right to do an act, and has imposed upon it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means." (4 Wheaton, 409, 410.) While the soundness of the doctrine urged is admitted, it could not be justly claimed that Congress could, in the proper exercise of its power, prescribe means imposing conditions which, if disregarded, would operate to divest the titles that were perfect and stood protected by compact beyond the repealing power of Congress. By the common law, the King has no right of entry on lands which are not common to his subjects; the King is put to his inquest of office, or information of intrusion, in all cases where the subject is put to his action; their rights are the same, though the King has more convenient remedies in enforcing his. If the King has no original right of possession to lands, he cannot acquire it without office found, so as to annex it to his domain. (3 Black. Com. 257, 258; *Mitchel v. United States*, 9 Peters, 742.) If the King could not recover lands without an affirmative proceeding on his behalf, so as to annex them to his domain, who will say that the Congress of the United States intended, or could, if such was the intention, by conditions negative in their character, divest the owner in fee simple of lands of his title thereto, and transfer the same to the United States?

That the citizen of the Mexican Republic who was seized in fee simple absolute of lands in California at the date of treaty, and who thereafter elected, according to its provisions, to become a citizen of the United States, could, if he chose to do so, have submitted his title and claim to such lands to be passed upon by the Commissioners and the proper Courts, under the Act of 1851, we have no doubt; but that he was bound to do so or lose his lands, we cannot believe was intended by the Act of Congress, nor do we conceive that a construction of the Act which would so result is authorized by its language or spirit.

The eighth section of the Act of 1851, it is true, provides that "each and every person claiming lands in California by

due of any right or title derived from the Spanish or Mexican Government, shall present the same to the said Commissioners when sitting as a Board," whose duty it shall be "to decide upon the validity of said claim." And the thirteenth section declares that "all lands the claims to which have been finally rejected by the Commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall have been presented to the Commissioners within two years after the date of this Act, shall be deemed, held, and considered as part of the public domain of the United States."

The language of these sections seems sufficiently comprehensive to include titles and claims of all possible classes, and these sections of the Act were to be interpreted without reference to other portions of it, or to the treaty or the law nations affecting the subject, or could be considered independently of the principles of common right or right by the common law, we should not hesitate in coming to the conclusion that all titles and claims to lands, whether perfect or imperfect, were inexorably required to be presented to the Commissioners sitting as a Board, in order to save their forfeiture to the United States.

That Congress could select the means and prescribe the mode of perfecting just claims to lands that were imperfect and incomplete, in fulfilment of the Government's obligations, and could limit the holders of such claims to the means and mode provided, no one, we apprehend, for a moment would suggest doubt. It may be observed that the many Acts that have been passed by Congress establishing Commissioners for the ascertainment and settlement of land claims in territories acquired by the United States by cession, have been passed for the benefit of persons whose claims to land were of that inchoate and incomplete character that required action on the part of the Government before they could become invested with the legal title thereto.

In *Henderson v. Poindexter*, 12 Wheat. 543, the Court considered the effect of certain Acts of Congress requiring per-

Minturn v. Brower et al.

sons having claims to lands which needed confirmation to render them titles at law, to perform certain specified conditions within a time prescribed, that the Government might determine the question of their rights; and these Acts declared that in case of neglect to comply with the requirements enumerated therein such claims should become void and thereafter be forever barred. It will be seen, by reference to these Acts, that their object was twofold: first, to regulate grants of land in the ceded territory; and second, providing for the disposal of the lands of the United States in the same territory. The Chief Justice, in passing upon the case before the Court, first declared that the land claims which were confirmed as provided for in those Acts derived no validity from any other source than through the proceedings ordained by Congress, and then said: "The whole legislation on this subject requires that every title to lands in the country which had been occupied by Spain should be laid before the Board of Commissioners. The motives for this regulation are obvious; and as the titles had no intrinsic validity, it was opposed by no principle. Claimants could not complain if the law which gave validity to their claims should also provide a Board to examine their fairness, and should make the validity depend on their being laid before that Board."

In *Strother v. Lucas* both parties claimed under the same inchoate or incomplete title, and one of them had obtained under the Act of Congress a confirmation of his claim, while the other failed to present his to the Commissioners. In reference to his omission to present his claim to the Commissioners, Mr. Justice Baldwin said: "We find by various Acts the time of filing such claims is limited, after which they are declared void so far as they depend on any Act of Congress, and shall not be received in evidence in any Court against any person claiming by a grant from the United States. These," he said, "are laws analogous to Statutes of Limitations for recording deeds or giving effect to the awards of Commissioners for settling claims to land under the laws of the States;

the time and manner of their operations and the exceptions to them depend on the sound discretion of the Legislature, according to the nature of the titles, the situation of the country, and the emergency which calls for their enactment. Reasons of sound policy have led to the general adoption of laws of such descriptions, and their validity cannot be questioned. Cases may occur where the provisions of a law may be such as to call for the interposition of the Courts, but these under consideration do not."

The case of *Barry v. Gamble*, 3 How. 32, is similar to that of *Strother v. Lucas*, and the Court decided that the claim of the party who relied upon an incomplete foreign title became barred by neglecting compliance with the requirements of the act of Congress to deliver to the proper officer by a given day and year a prescribed notice with the muniments of his right, to be recorded.

It will be seen by a careful examination of these authorities, and others of a like character, that the Court was dealing with imperfect titles. In one case they were said to have "no intrinsic validity," (12 Wheat. 543) and in others they were designated "inchoate and incomplete;" and we have not been able to find a case, nor has the learned counsel for the plaintiff, than whom no one is more thorough in his researches, furnished us with one where the question was involved, in which it was held that a perfect title could become extinguished and its holder divested of his property by omitting to submit it for adjudication to a Board of Commissioners or to a court appointed for the purpose. In *Clarke's Case*, 8 Peters, 4, in which it was said: "The grant which constitutes the foundation of the petitioner's claim is a complete title, subject to no condition whatever," which had been presented to a Board of Commissioners, the Chief Justice, while approving the Acts of Congress appointing Boards of Commissioners for the purpose of ascertaining and determining as to the validity of titles to lands, in order that there might be no conflict between these and those which might be acquired under the United States, said: "But neither the law of nations,

or the faith of the United States, would justify the Legislature in authorizing these Boards to annul pre-existing titles which might consequently be asserted in the ordinary Courts of the country against any grantee of the American Government."

It must be admitted that if a perfect title be required to undergo the ordeal of a Board of Commissioners, it might be declared invalid, notwithstanding it, before then, stood confirmed by the treaty; and hence it is that the Supreme Court of the United States, respecting the obligations of treaties and the binding force of law, as well as the rights of the citizen, have uniformly maintained that persons holding perfect titles to lands could not be deprived of their property otherwise than by due course of law; and to attribute to Congress the intention of imposing upon persons having perfect titles to lands in California at the date of the treaty, and who in due time became citizens of the United States, the necessity of submitting them to the Board of Land Commissioners to save their property from forfeiture to the United States, we should deem a grave charge, unsupported by a fair construction of the Act of 1851.

In addition to the provisions of the Act of 1851, to which we have already directly referred, we must, in the construction of the Act, consider all its provisions, and determine from it as a whole its meaning and intent. By the fifteenth section it is provided "that the final decrees rendered by the said Commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this Act, shall be conclusive between the United States and said claimants only, and shall not affect the interests of third persons."

If such only can be the effect of decrees and patents, and the interests of third persons are not to be affected thereby, then who are these third persons, and what is the character of the interests that stand unaffected? Third persons must be regarded to be all persons who were not parties to the proceeding before the Land Commission, or standing in any such relation with those who were parties thereto, as to

Minturn v. Brower et al.

come affected and bound as privies; and the interests of third persons that remained unaffected by the final confirmation and patent are those subsisting in perfect titles derived from a source of paramount proprietorship, which could be relied in resisting successfully any action of the Government respecting them. (*Waterman v. Smith*, 13 Cal. 419, 420; *Middle Boggs v. Merced Mining Co.*, 14 Cal. 362; *Leese v. Mark*, 20 Cal. 425.) In the case last cited, Mr. Chief Justice held said: "The acquisition of California by the United States did not affect the rights of the inhabitants to their property. The inhabitants retained all such rights, and were entitled by the law of nations to protection in them to the same extent as under the former Government." (*Teschmacher v. Thompson*, 18 Cal. 22.) And in respect to the "third persons" mentioned in the fifteenth section of the Act of 1851, he said: Third term 'third persons' refers not to all persons other than the United States and the claimants, but to those holding dependent titles arising previous to the acquisition of the country. The latter class are not bound by the decree and content, for they do not hold in subordination to the Government, nor by any title subsequent, but by title arising anterior to the conquest."

We are aware that the impression prevails to some extent at the same learned Judge, in *Estrada v. Murphy*, 19 Cal. 39, gave countenance to the idea that all land claims, whether resting on perfect or imperfect grants, had to be presented to the Commissioners in order to save such lands from passing to the United States; but we think such an impression is not justified by his opinion in that case, for he was then dealing with the question as involved in a case arising upon the failure of Estrada to present an imperfect or inchoate title to the Land Commission; and after having referred to the language of the Supreme Court of the United States in the cases of Fremont and Fossatt, suggested that doubts might exist as to the validity of the legislation of Congress, so far as required the presentation to the Board of claims where the

lands were held by perfect titles acquired under the former Government.

It may, perhaps, be supposed that the observations of the Chief Justice in the case of *Fremont*, 17 How. 553, and of Mr. Justice Campbell in the case of *Fossatt*, 21 How. 447, are opposed to the views we have expressed as to the import and effect of the eighth and thirteenth sections of the Act of 1851. In the former case, the Chief Justice, after observing that the eighth section embraces not only inchoate or equitable titles, but legal titles also, and requires them all to undergo examination and to be passed upon by the Court, says: "The object of this provision appears to be to place the titles to lands in California upon a stable foundation, and to give to the parties who possess them an opportunity of placing them on the records of the country in a manner and form that will prevent future controversy." And in *Fossatt's Case*, in reference to the same subject, Mr. Justice Campbell says that the claim to be submitted to the inquiry and determination of the Board of Commissioners, it will be understood, comprehended all private claims to land in California, and that the effect of the inquiry and decision of these tribunals upon the matter submitted is final and conclusive, and referring to the Acts of Congress on the subject, he says: "These Acts of Congress do not create a voluntary jurisdiction that the claimant may seek or decline. All claims to land that are withheld from the Board of Commissioners during the legal term for presentation are treated as non-existent, and the land as belonging to the public domain."

It will be observed, by reference to the history of those cases, that both the claims of *Fremont* and *Fossatt* were of the class that required action on the part of the Government before they could become perfect and the land to which the claimants were respectively entitled could be segregated from the Government domain; and the question that exists in the case under consideration was in nowise involved in the determination of those cases.

If the opinions thus expressed in the cases of *Fremont* and

ssatt could be considered an authoritative construction of the Act of 1851, holding that lands belonging in fee to Mexican citizens at the date of the treaty became forfeited to the United States by reason of failure to present them for adjudication to the Board of Commissioners, we should acquiesce with that spirit of obedience which we freely acknowledge should actuate us in the presence of authority which we are not disposed to question.

It is true, as we have already observed, that the language of the eighth section of the Act is sufficiently comprehensive to embrace all classes of titles, and that titles not submitted to the judgment of the Commissioners should, by the thirteenth section, be deemed, held, and considered a part of the public domain; but, as we have seen, the fifteenth section provides that neither the final decrees rendered nor any patent issued shall include third persons or affect their interests. That the fifteenth section contemplated the existence of a class of persons and a variety of interests that could be conserved by its saving provisions, there can be no doubt; otherwise we would be inevitably impelled to the conclusion that this section was without sign.

The Act of 1851 nowhere provides, as was the case by the acts considered in *Henderson v. Poindexter*, and *Strother v. Lucas*, that by failing to present his claim to land to the Commissioners the possessor of the title should not be permitted to use it as evidence in an action for the maintenance of his right; and no other consequence for the omission is declared in the thirteenth section than that the land shall be deemed, held, and considered as part of the public domain. If it were necessary to construe this provision as working an annulment of a perfect title, we should be compelled to hold it to be repugnant to the stipulations of the treaty, which are of paramount obligation; and we believe it would be so held by the Supreme Court of the United States, if directly presented to that tribunal.

The decisions to which we have referred, and to which others might be added, we regard as declaring principles and

rules of law which constrain us to hold that perfect titles to lands which existed at the date of the treaty of Guadalupe Hidalgo in Mexicans then established in California, were guaranteed and secured to such persons, not only by the law of nations, but also by the stipulations of that treaty acting directly on the subject and operating as a confirmation *in presenti* of such titles.

We think the original and amended answers filed by each of the defendants constituted a defense to the action of the plaintiff, and that the Court erred in sustaining the demurrer to the amended answers, and, also, in refusing to admit the evidence offered by the defendants in their defense; and that the judgment should be reversed and the cause remanded for a new trial.

There are other points presented by the record as grounds on which the defendants ask this Court to reverse the judgment, respecting which it is not necessary to say more than that the ruling of the Court on such points was correct.

The judgment is reversed and the cause remanded for a new trial.

EXTRA ANNOTATION
TO
PRECEDING VOLUME

AMW

25 CAL

VOLUME XXIV.

By JOSEPH A. JOYCE.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

24 Cal. 11-14. PEOPLE v. JENKS.

Criminal Law.—Peremptory challenge may be made at any time before juror is sworn, or if sworn then it may be allowed for cause shown, p. 13.

Cited, *People v. Scoggins*, 37 Cal. 690, in concurring and dissenting opinion, but the case holds that jurors may be sworn as they are passed on; also that such challenge may be allowed after juror is sworn and good cause is shown; *State v. Anderson*, 4 Nev. 275, holding that jurors may be sworn before panel is completed and that the principal case is not in conflict with such rule; *Statute v. Pritchard*, 15 Nev. 81, 82, holding that although the court delays swearing the jury until its completion, the right to challenge a juror before he is sworn exists notwithstanding the court notifies counsel prior thereto that in passing his challenge he would be considered as having accepted all the jurors; *Baker v. Stage*, 3 Tex. App. 529, as authority, and explained as being decided under the statute and a peremptory challenge was not allowed even by leave of court where a juror on a special venire had been accepted.

24 Cal. 17-30. PEOPLE v. SANCHEZ.

Jurisdiction.—Term does not expire, in absence of judge, by failure of sheriff to adjourn court at noon but judge may open court in afternoon and transact business, pp. 19-22.

Cited, *Loesnitz v. Seelinger*, 127 Ind. 427, in connection with the failure of a board of county commissioners to meet and consequent lapse of the term; *Union Pac. v. Hand*, 7 Kan. 386, and also *In re Dossett*, 2 Okla. 386, both to the point that a court legally opened continues its term, until it adjourns sine die or such session expires by law; *In re Terrill*, 52 Kan. 32; 39 Am. St. Rep. 329; and also *In re McCloskey*, 2 Okla. 574, to the point that there being no authority in law for the clerk to open and adjourn court, the failure of the judge to appear upon the day appointed was a loss of the term; *State v. Roberts*, 8 Nev. 241, holding that

where the judge did not appear until long after the time fixed for holding the term the same had lapsed, there being no adjournment as required by statute.

Dying Declarations must be made under the sense of impending death, and are not admissible if deceased had the slightest hopes of recovery, p. 24.

Cited, *People v. Hodgdon*, 55 Cal. 76; 36 Am. Rep. 31; and *People v. Taylor*, 59 Cal. 645, with approval; *Boyle v. State*, 105 Ind. 486, in dissenting opinion, but only generally as to such declarations.

Same.—Existence of such belief need not be proved by express statement but may appear from circumstances, pp. 24, 25.

Cited, *People v. Taylor*, 59 Cal. 645, in affirmance; *State v. Cantieny*, 34 Minn. 10, as to what is sufficient proof that the declarations were made in view of impending death and when such declarations in writing are admissible.

Same.—They should be received with great caution and should be of such things only as witness could have testified to if living. Matters of opinion, hearsay, or irrelevant matter should be excluded, pp. 24, 25.

Cited, *People v. Taylor*, 59 Cal. 645, in affirmance; *Boyle v. State*, 97 Ind. 329, to the same effect; *Lipscomb v. State*, 75 Miss. 580, sustaining instructions as to weight of such declarations.

Murder and Manslaughter.—In case of mutual combat, to reduce offense to manslaughter, contest must have been on equal terms with undue advantage taken, otherwise malice may be inferred and the killing be murder, p. 27.

Cited, *King v. State*, 4 Tex. App. 56; 30 Am. Rep. 161, quoting from the principal case on this point in affirmance; *State v. Cochran*, 147 Mo. 519, holding offense to have been murder in first degree; *Bingham v. State*, 6 Tex. App. 181, to the same points in connection with the question whether a certain state of facts as to justification should have gone to the jury; *Dunlap v. State*, 9 Tex. App. 192, where a charge as to mutual combat was held correct; *Spearman v. State*, 23 Tex. App. 228, where the correctness of a like rule is admitted and the decision approved, but held subject to material qualifications under the statute of that state.

No Instruction should be given which is not predicated upon some theory logically deducible from at least some portion of the testimony, p. 28.

Cited, *People v. Byrnes*, 30 Cal. 207, holding that instructions should always be given with reference to the facts proved and the principle was applied to a definition of murder in the second degree; *People v. Best*, 39 Cal. 691; *People v. Atherton*, 51 Cal. 498; and *People v. Bourke*, 66 Cal. 456, all affirming the principle; *Territory v. Gay*, 2 Dak. Ter. 141, as so decided and applied in connection with the correctness of an instruc-

tion as to evidence tending to reduce the grade of an offense constituting no justification.

Murder in First Degree.—Killing by means of poison, lying in wait, torture, or attempt to commit certain felonies conclusively evidences premeditation, p. 28.

Cited, *People v. Taylor*, 36 Cal. 265, where the construction of certain instructions based upon statutes and taken in part from the opinion of the principal case is considered; *People v. Long*, 39 Cal. 697, as to the difference between the two degrees of murder. So, also, in *People v. Doyell*, 48 Cal. 97; *Kilgore v. The State*, 74 Ala. 8, holding that homicide in attempt to commit a felony under the statute is murder in the first degree; *Hill v. People*, 1 Colo. 446, but to the point that in states where degrees of crime are recognized, intent is necessary to be proved where the statute makes a crime to consist of an act and a particular intent; *State v. Gray*, 19 Nev. 221, to the same effect as the instruction being a copy of a part of the opinion thereon; see next heading herein.

Murder in First and Second Degrees.—There must be not only a clear intent to kill to constitute the first degree, but also premeditation and deliberation, even though as instantaneous as successive thoughts. This constitutes the distinction between the two degrees, pp. 28, 30.

Cited, *People v. Foren*, 25 Cal. 365, noting the distinction between the two degrees of murder; also affirming the point that there must be a clear intent to take life; *People v. Long*, 39 Cal. 697, to the same effect as the principal case; *People v. Doyell*, 48 Cal. 96, 97, and *People v. Hunt*, 59 Cal. 435, all in substantial affirmance; extended note 18 Am. Dec. 778, 783, as to deliberation and premeditation and time; several other points relating to homicide are also considered fully; see preceding heading herein.

24 Cal. 31-40. **PEOPLE v. WILLIAMS.** S. C. 18 Cal. 187, on the first appeal.

Bias or Prejudice of Judge does not legally disqualify him to try cause, pp. 34-35.

Cited in *People v. Compton*, 123 Cal. 412, as rule before recent code amendment; *Bryan v. State*, 41 Fla. 659; *Gaines v. State*, 38 Tex. Cr. 215; *State v. Board*, 19 Wash. 14, 67 Am. St. Rep. 711, noted under *McCauley v. Weller*, 12 Cal. 500; *In re Guerrero*, 69 Cal. 102, where the principle was approved; the case holding that the fact that the mayor presided over the council which passed an ordinance did not disqualify him as judge in a trial for violating the ordinance; other matters were considered and also held not to disqualify; *Mining Co. v. Mining Co.*, 83 Cal. 617; *In re Davis' Estate*, 11 Mont. 19; and *Allen v. Reilly*, 15 Nev. 455, all in affirmance.

Change of Venue.—Bias or prejudice on the part of the judge is no legal ground therefor, pp. 34-35.

Notes Cal. Rep.—77

Cited, *People v. Shuler*, 28 Cal. 495; *Mining Co. v. Mining Co.*, 83 Cal. 617; *In re David Jones*, 103 Cal. 398; and *Allen v. Reilly*, 15 Nev. 455, all in affirmance.

Bias or Prejudice is not evidenced by the fact that the same judge had made an erroneous ruling on a previous trial of the same case, p. 35.

Cited, *Graham v. Selbie*, 8 S. Dak. 608, to the point that the objection that the same judge had tried the case before was frivolous, etc.

Change of Venue.—Affidavit of prejudice upon information and belief is insufficient, as it does not show the sources of information or upon what the belief is based, p. 36.

Cited in *Gay v. Torrence*, 145 Cal. 152, following rule; *City of Emporia v. Volmer*, 12 Kan. 627, to the point that such facts and circumstances must clearly be shown by affidavits or evidence as clearly establish prejudice.

Affidavit for Continuance must show due and sufficient diligence to procure testimony by legal means. If it does not, there is no error or abuse of discretion in refusing continuance, pp. 37, 38.

Cited, *People v. Jocelyn*, 29 Cal. 563, in affirmance and holding that it should be shown that service of subpoena of the kind witness was bound to obey was made; *People v. Burke*, 34 Cal. 663, in affirmance; *State v. O'Flaherty*, 7 Nev. 156, holding that material facts should be positively stated in such affidavit in a case where the facts were substantially the same as in the principal case; *State v. Fiester*, 32 Or. 260, noted under *People v. Gaunt*, 23 Cal. 156; *Territory v. Perkins*, 2 Mont. 471; also *State v. O'Neil*, 13 Oreg. 185, both holding that the granting or refusing a continuance rests in the sound discretion of the court below and ought not to be disturbed except for the best reasons.

Jurors are Presumed to have performed their sworn duty; to overthrow this presumption there must be some direct positive testimony contra, p. 40.

People v. Lee Chuck, 78 Cal. 334, 337, to the same point; *Higgins v. City of San Diego*, 126 Cal. 314, noted under *People v. McCauley*, 1 Cal. 379; *Hutchins v. State*, 161 Ind. 672, applying rule to affidavit as to misconduct of jurors; *People v. Tarm Poi*, 86 Cal. 231, holding that an affidavit of misconduct made on information and belief is insufficient; *People v. Leary*, 105 Cal. 494, as authority in regard to presumption. In this case the alleged misconduct was reading newspaper reports; *People v. Kramer*, 117 Cal. 650, in affirmance.

General Citation.—*Eastman v. Holt*, 43 W. Va. 615.

24 Cal. 41-51. PEOPLE v. BRUZZO.

Former Acquittal.—Discharge of an accomplice used as a witness operates as a bar to another prosecution, p. 46.

Cited, extended note 40 Am. St. Rep. 768, 775, fully considering the effect of state's evidence and agreements concerning same, etc.

24 Cal. 52-60. ROWLAND v. KREYENCHAGEN.

Appeal.—Dismissal is an affirmance of judgment and binds the parties unless set aside and appeal reinstated, pp. 57, 58.

Cited, *Chase v. Beraud*, 29 Cal. 139, holding that a dismissal affirms the judgment and binds the sureties; *State v. Biesman*, 12 Mont. 18, in affirmance.

Filing Remittitur in court below without inadvertence or fraud vacates appellate jurisdiction, pp. 58, 59.

Cited, *People v. McDermott*, 97 Cal. 248, *In re Levinson*, 108 Cal. 459, *Hazard v. Cole*, 1 Idaho, 305; *Kimpton v. Jubilee P. M. Co.*, 16 Mont. 383, and *State v. Jacobs*, 11 Oreg. 320, all of said cases affirming the rule.

Remittitur filed may be recalled, in case of fraud, inadvertence, accident, or mistake, and proceedings stayed, pp. 59, 60.

Cited, *Vance v. Peñña*, 36 Cal. 328, in affirmance, and the rule was followed; *Trumpler v. Trumpler*, 123 Cal. 252, recalling for fraud under facts stated; *Vernon v. Board*, 142 Cal. 518, applying rule and discussing power of supervisors to rescind order; *In re Jessup*, 81 Cal. 469, in connection with the question of the power of the court to grant rehearings, noting also the rules of the supreme court of 1866, and that remittitur did not issue until time for petitioning for rehearing had expired; also that filing said petition stayed proceedings; *Lovett v. State*, 29 Fla. 393, 396, in affirmance, the judgment being vacated and case recalled, the transcript by mistake being erroneous; extended note 21 Am. Dec. 119, as to power of appellate court after remittitur.

24 Cal. 61-72. PEOPLE v. MILLER.

Tax Suits.—Jurisdiction.—Character of action will be determined by prayer of complaint. The district court has no jurisdiction of personal action for taxes for less than jurisdictional sum, but has jurisdiction to foreclose tax lien in equity in any sum, pp. 66-71.

Cited, *Bell v. Crippen*, 28 Cal. 328, to the same points and affirming the rule; *Courtwright v. Bear etc. Co.*, 30 Cal. 581, as authority upon the general proposition of the right to proceed in law or equity in connection with the question of jurisdiction of actions to abate a nuisance; *People v. Doe*, 31 Cal. 221, as authority to the point that as the judgment upon which a tax sale took place appeared to have been obtained in a justice's court, it must have been a money judgment without any order of sale; *Mahlstadt v. Blanc*, 34 Cal. 580, to the point that when the relief sought is to enforce a lien for taxes or street assessments the district court has jurisdiction without reference to the amount; *Nevada etc. Co. v. Kidd*, 37 Cal. 504, holding upon a complaint for injunction

to restrain trespass and diversion of water that the prayer may determine the nature of the action; *People v. Olivera*, 43 Cal. 494, to the point of jurisdiction of district courts; *Locke v. Moulton*, 108 Cal. 53, by counsel but declared not in point, the prayer to an answer in ejectment asking for affirmative relief being held immaterial.

Taxes.—Jurisdiction of justice's court is ousted if answer, in action to recover money judgment, puts in issue legality of tax, p. 72.

Cited, *City of Santa Barbara v. Eldred*, 95 Cal. 384, an affirmance and the rule applied to the police court in a tax suit.

General Citation.—*Gillis v. Barnett*, 38 Cal. 394, 395, as authority, but held to have no bearing upon the question of jurisdiction in that case, as in the principal case action was commenced after the organization of the new courts; *Young v. Wright*, 52 Cal. 410, which is declared not distinguishable in principle, since there the justice's court was held not to have equitable powers concerning the overplus in suits against animals in rem for the recovery of damages.

24 Cal. 73-78. PEOPLE v. DE LA GUERRA.

Descent and Distribution.—Civil law has been adopted as to degrees of consanguinity, but in other cases than descent and distribution the common law prevails, p. 76.

Cited, *Robinson v. S. P. Co.*, 105 Cal. 558, and explained as having been decided before the adoption of the codes, and that section 1393 of the Civil Code establishes the degrees of consanguinity or relationship.

Judge who was disqualified by relationship or consanguinity within the third degree at common law had no right to dismiss case or to act except to arrange calendar and change of venue, and his judicial acts were void though no objection was made, p. 77.

Cited, *Tracy v. Colby*, 55 Cal. 72, to the point that a judge cannot act in a cause or proceeding in which he is interested; *Robinson v. S. P. Co.* 105 Cal. 558, holding that the fact that a supreme justice is first cousin by marriage or cousin german to a stockholder does not disqualify him from sitting in a suit in which the corporation is interested; *Allen v. State*, 102 Ga. 623, but holding judge not disqualified from passing a motion under facts stated; *Frevort v. Swift*, 19 Nev. 364, to the point that statutory prohibitions have changed the rule of the common law in several states, and holding that where a judge is disqualified his acts involving judicial discretion are not void, but only voidable; *Abrams v. State*, 31 Tex. Crim. Rep. 452, to the point that a judgment by a disqualified judge is a nullity. So, also, in *State ex rel. v. Sachs*, 3 Wash. 695; extended note 84 Am. Dec. 128, 130, 131, exhaustively reviewing the authorities upon this and analogous points.

Pleadings.—Records and papers must be annexed by originals or copies to make them a part of the pleadings, merely referring to them being insufficient, p. 78.

Cited, *Ward v. Clay*, 82 Cal. 505, holding that a copy of a note annexed to a complaint and referred to an exhibit formed a part thereof.

Court cannot take judicial notice of record of another case in the same court without its formal introduction in evidence, nor can it notice the existence of a record not introduced in evidence in the court below, p. 78.

Cited, *Simon v. Durham*, 10 Oreg. 55, to the same effect; *Glaze v. Bogle*, 105, Ga. 293, as to necessity for proof of plea of *res judicata* although record is annexed to pleading. So, also, in extended note 89 Am. Dec. 688.

General Citation.—*Gage v. Downey*, 79 Cal. 155, as to collateral attack on judgment and disqualification of judge, an error having been made at to what was the most accessible and nearest county seat for transfer of cause. *Clement Gravel Co. v. Wylly*, 105 Ga. 208.

24 Cal. 78-84. **PEOPLE v. SEXTON.**

Mandamus will not lie to compel the court to proceed with a trial after order changing venue, p. 83.

Cited in *Kerr v. Superior Court*, 130 Cal. 186, denying writ to compel respondent to issue a citation in proceedings under Penal Code, section 772; *State v. Smith*, 23 Mont. 332, noted under *People v. Judge*, 17 Cal. 548; extended note 89 Am. Dec. 739, where the question of mandamus is fully considered.

Mandamus lies to compel subordinate court to perform duty enjoined by law, but will not lie to control exercise of judicial discretion in a particular manner nor to review legality of action of such court, nor in cases where there is a plain, speedy, and adequate remedy at law, pp. 83, 84.

Cited, *People v. Pratt*, 28 Cal. 169, 87 Am. Dec. 111, in affirmance; *People v. Weston*, 28 Cal. 641, to the point that the writ will not lie to control exercise of judicial discretion; *Cariaga v. Dryden*, 29 Cal. 309, holding that writ will not lie to control judgment, however erroneous, where court had jurisdiction; *Lewis v. Barclay*, 35 Cal. 214, in substantial affirmance; *Clark v. Crane*, 57 Cal. 634, to the point that the writ will not lie where there is a remedy by appeal; *People v. Superior Court*, 114 Cal. 479, in dissenting opinion, but the case holds that the writ does not lie to review judicial errors, nor where there is a remedy by appeal.

rules of law which constrain us to hold that perfect titles to lands which existed at the date of the treaty of Guadalupe Hidalgo in Mexicans then established in California, were guaranteed and secured to such persons, not only by the law of nations, but also by the stipulations of that treaty acting directly on the subject and operating as a confirmation *in presenti* of such titles.

We think the original and amended answers filed by each of the defendants constituted a defense to the action of the plaintiff, and that the Court erred in sustaining the demurrer to the amended answers, and, also, in refusing to admit the evidence offered by the defendants in their defense; and that the judgment should be reversed and the cause remanded for a new trial.

There are other points presented by the record as grounds on which the defendants ask this Court to reverse the judgment, respecting which it is not necessary to say more than that the ruling of the Court on such points was correct.

The judgment is reversed and the cause remanded for a new trial.

EXTRA ANNOTATION
TO
PRECEDING VOLUME

Cited in *Deere v. Bonne*, 108 Iowa, 284, holding wife's separate property not liable for husband's debts because of his gratuitous labor thereon; note to *Morris v. Fletcher*, 77 Am. St. Rep. 98, on general subject; *Lake v. Bender*, 18 Nev. 397, quoting from the principal case (p. 103); notes 89 Am. Dec. 204; 91 Am. Dec. 103; 99 Am. Dec. 177, 536; 20 Am. St. Rep. 785; extended note 58 Am. St. Rep. 497, as to agreements as to compensation or relinquishment of claims between and by husband and wife.

General Citation.—*Yesler v. Hockstettler*, 4 Wash. 355, to the point that presumptions weigh in favor of property being community. The case, however, relates to the confusion indiscriminately, of separate and community property.

24 Cal. 104-113. SCHENK v. EVOY.

Description in Deed.—Conveyance out of a larger parcel of land of a definite quantity, not located, creates tenancy in common, pp. 109-113.

Cited in *Adams v. Hopkins*, 144 Cal. 42, 44, sustaining sufficiency of descriptions in *Sobranite* deeds; *Hodge v. Bennett*, 78 Miss. 870, 84 Am. St. Rep. 653, quoting *Grogan v. Vache*, 45 Cal. 612; *Jenkins v. Frink*, 30 Cal. 594, as authority to the point that a purchaser by one of land, he paying therefor out of a common fund, makes the associates therein tenants in common in equity; *Lawrence v. Ballou*, 37 Cal. 520, in affirmance, but holding also that ejectment could be maintained by such grantees; *Grogan v. Vache*, 45 Cal. 612, as authority, but holding that a defective description of a particular tract does not so operate; *Cullen v. Sprigg*, 83 Cal. 62, as settled law in that state; *Smith v. Crawford*, 81 Ill. 298, and *Dohoney v. Womack*, 1 Tex. Civ. App. 362, both to this same point; *Jory v. Palace etc. Co.*, 30 Oreg. 200, as so deciding, but the deed there neither conveyed a definite quantity nor described any particular parcel of land, "so that it could not be construed as conveying any interest in such lot either undivided or several"; *Gratz v. Land and River Imp. Co.*, 82 Fed. Rep. 389, but only generally to a like point; note 58 Am. Dec. 336.

24 Cal. 114-124. DOWNER v. SMITH.

Evidence.—Entry in alcalde's record book is primary evidence of grant on proof of execution, p. 122.

Cited, *Donner v. Palmer*, 31 Cal. 510, to the same point in affirmance; *Id.* 523, in concurring opinion, but declared to have no application; *Palmer v. Low*, 98 U. S. 12, to the same effect as the principal case; also that said book is one of original entry.

No Proof of Delivery of alcalde grant is required where the original grant is contained in book of grants kept by alcalde, p. 122.

Cited, *Donner v. Palmer*, 31 Cal. 513, to the same effect.

Ejectment.—Quitclaim deed is sufficient to enable grantee to maintain ejectment if grantor could have done so, p. 123.

Cited *Carpentier v. Williamson*, 25 Cal. 168; *Lawrence v. Ballou*, 37 Cal. 521; *Rego v. Van Pelt*, 65 Cal. 256, all affirming the rule, but the last case limits its application to a time prior to the act of 1854.

Probate Courts had no jurisdiction of estates of persons dying before adoption of the constitution, p. 123.

Cited, *People v. Senter*, 28 Cal. 505, holding that the Mexican system was superseded by the adoption of the common law April 13th, 1850, and that the Probate Act applied to estates of persons dying prior to its passage and subsequent to the adoption of the common law; *Coppinger v. Rice*, 33 Cal. 423, holding that the Probate Act was not retroactive; *Ryder v. Cohn*, 37 Cal. 99, holding that between the time of the passage of the Probate Act and the acquisition of California by the United States, courts of first instance had jurisdiction; *Id.* 91, in dissenting opinion; *McNeil v. Congregational Soc.*, 66 Cal. 108, 112, deciding that the Probate Act was not retroactive; *Hardy v. Harbin*, 1 Sawy. 199; 4 Sawy. 541; and *Seaverns v. Gerke*, 3 Sawy. 363, in affirmance; extended note 33 Am. Dec. 239; note 65 Am. Dec. 547.

Pleading.—Equitable defense in ejectment must be pleaded with same particularity which is observed in bill in equity, p. 124.

Cited *Blum v. Robertson*, 24 Cal. 141, as authority that a person having a perfect equitable title to land in possession could use it effectually in resistance to ejectment action by one holding the legal title; *Rose v. Treadway*, 4 Nev. 460, 97 Am. Dec. 549, as deciding the same point as in the last citing case, but holding that a defendant claiming affirmative relief must plead as fully as if he were plaintiff; *Clarke v. Huber*, 25 Cal. 597; *Davis v. Davis*, 26 Cal. 39; 85 Am. Dec. 165; and *Bruck v. Tucker*, 42 Cal. 352, all in affirmance of the doctrine.

24 Cal. 125-127. *STONE v. ELKINS.*

Supervisors.—Purely judicial powers cannot be conferred by statute on supervisors, pp. 126, 127.

Cited, note 63 Am. Dec. 86, to the same point.

Supervisor's Powers.—There are many duties, relating to police and fiscal regulations of counties, of a quasi judicial or mixed character which belong to such boards, p. 127.

Cited, *Emery v. Bradford*, 29 Cal. 85, where the doctrine is applied to the right to determine whether a contract for street work has been properly performed; *People v. Provines*, 34 Cal. 541, in concurring opinion to the same effect as the principal case.

24 Cal. 127-147. **BLUM v. ROBERTSON.**

Power of Attorney.—Acts of agent must be within the exercise of power delegated or within its limits, p. 140.

Cited, *First Nat. Bank v. Hall & Co.*, 8 Mont. 346; and *Sullivan v. Germania L. Ins. Co.*, 15 Mont. 535, both to this same point; note 9 Am. Dec. 224.

Where Agent acts under special authority the party dealing with him is bound to know what his power is and its legal effect, p. 140.

Cited, *Wallace v. Mayor*, 29 Cal. 188, in affirmance and the doctrine applied to the common council as agents; *Moyle v. Society*, 16 Utah, 81, holding defendant not bound by certain acts of building committee appointed by its trustees; *Bank of Deer Lodge v. Hope M. Co.*, 3 Mont. 160, 35 Am. Rep. 460, in connection with an agency to draw a bill of exchange in the principal's name; *First Nat. Bank v. Hall & Co.*, 8 Mont. 346, and *Sullivan v. Germania L. Ins. Co.*, 15 Mont. 535, both in affirmance.

Pleading.—Equitable defense in ejectment must be specially pleaded and with all the fullness and particularity of a bill in equity, p. 141.

Cited, *Clarke v. Huber*, 25 Cal. 597; *Davis v. Davis*, 26 Cal. 39; 85 Am. Dec. 165; *Bruck v. Tucker*, 42 Cal. 352; and *Rose v. Treadway*, 4 Nev. 460; 97 Am. Dec. 549; *Wallace v. Flores*, 79 Cal. 436, all affirming the doctrine; *Dale v. Hunneman*, 12 Neb. 224, to the point that a defendant seeking affirmative relief must aver facts entitling him thereto in the answer; note 73 Am. Dec. 599, as citing on the same point; *Morrison v. Wilson*, 13 Cal. 494; 73 Am. Dec. 593.

Specific Performance.—One claiming right to conveyance of land under a parol contract on the ground of part performance must prove contract clearly and satisfactorily and as alleged, and the acts of performance proved must unequivocally evidence such agreement, p. 142.

Cited, *Agard v. Valencia*, 39 Cal. 301, to the same effect; *Forrester v. Flores*, 64 Cal. 26, as well settled law; *Bank v. Small*, 144 Cal. 713, applying rule to establishment of parol gift of land; *Wallace v. Maples*, 79 Cal. 436, to the point that as: "The respondent was the owner of the legal title of the property the appellants were bound in order to prevent a recovery to make out a complete equitable title and the right to possession thereunder"; *Karns v. Olney*, 80 Cal. 97; 13 Am. St. Rep. 107, to the point that: "It may be conceded that an appointment in writing was necessary to authorize him [the agent] to make a binding sale: Code Civ. Proc., sec. 1624; and that no subsequent parol ratification or acknowledgment by the principal is sufficient, but here the sale was in legal effect made by the principals": *Foster v. Maginnis*, 89 Cal. 266, in affirmance; extended note 17 Am. Dec. 58, as to "statute of frauds—contracts affecting real estate."

Tenant at Will is entitled to notice of intention to terminate estate, p. 145.

Cited, *Pomeroy v. Bell*, 118 Cal. 637, as so deciding in connection with the question of the right to improvements in vendee in possession under an optional and executory contract of purchase; extended note 42 Am. Dec. 129, as to tenancies at will and their determination, etc.

24 Cal. 147-153. CLARY v. ROLLAND.

Pleading—Replevin Bond.—In action against sureties complaint must aver that the value of the property was found and that an alternative judgment was rendered, p. 153.

Cited, *Vinyard v. Barnes*, 124 Ill. 350, holding that on a replevin bond a breach of a condition to prosecute to effect is not sufficient proof of a breach of a condition to return the property; *Cox v. Sargent*, 10 Colo. App. 6, noted under *Mills v. Gleason*, 21 Cal. 474; *Thomas v. Irwin*, 90 Ind. 561, holding that sureties are not liable for failure to return the property where there is no judgment of return, but simply a verdict that the property be returned; *Marix v. Franke*, 9 Kan. 136, but criticised as not commendable, it being declared that a judgment simply for return, though irregular, is valid and cannot be attacked collaterally, and that sureties are not relieved simply because plaintiff has not taken all the judgment he ought to have done; *Lomme v. Sweeny*, 1 Mont. 592, doubting the principal case and holding that if the judgment does not fix the value it is only irregular and not void.

24 Cal. 154-156. QUIRIAQUE v. DENNIS.

Chattel Mortgage on growing crops is valid without delivery of possession when executed and recorded as a mortgage of realty, p. 156.

Cited, extended notes 46 Am. Dec. 713, and 76 Am. Dec. 726, where these and analogous questions are exhaustively considered.

24 Cal. 157-167; 85 Am. Dec. 53. DANE v. CORDUAN.

Party contracting jointly with another is principal debtor, as between himself and the creditor, though he may be merely a surety for his codebtor, p. 165.

Cited, *Shriver v. Lovejoy*, 32 Cal. 577; holding joint makers on a note principals; *Damon v. Pardow*, 34 Cal. 281, in affirmance; *Chafoin v. Rich*, 77 Cal. 477, as so deciding, and holding that such surety has all the rights of a guarantor, but not those of an indorser; *Southern Cal. Nat. Bank v. Wyatt*, 87 Cal. 618, in affirmance; note 11 Am. St. Rep. 726.

Surety on promissory note is not released by failure of creditor to sue principal on demand. The surety can himself sue the creditor and principal debtor and compel the latter to pay, p. 165.

Cited, *Hayes v. Joseph*, 28 Cal. 543, to the point that the surety may pay the debt and proceed against the principal; *Sichel v. Carrillo*, 42 Cal. 500, 507, in affirmance; *Chafoin v. Rich*, 77 Cal. 477, holding that such surety is not entitled to a demand upon the principal at maturity and notice of nonpayment to fix his liability; *Barnes v. Mowry*, 129 Ind. 570, to the point that a surety is not released by the creditors in action except where the surety has under the statute taken such steps as to compel the creditor to proceed or lose his claim; *Smith v. Freyler*, 4 Mont. 493, 494; 47 Am. Rep. 359, holding that the surety is not released in such case, even though the principal afterward becomes insolvent; notes 11 Am. Dec. 589; 90 Am. Dec. 415.

24 Cal. 167-171. **MUNCH v. WILLIAMSON.**

New Trial.—Statement must be filed within time limited or right to motion is lost, unless it appear from the transcript that objection is waived, but such waiver must be clearly proven, pp. 169, 170.

Cited, *Calderwood v. Brooks*, 28 Cal. 154, where the court says: "The record must contain the evidence of the service of the notice, or it must clearly appear from the record that service of the notice was waived"; *Campbell v. Jones*, 41 Cal. 518, holding that such motion is waived by failure to file the statement within time. So, also, in *Fox v. Meacham*, 6 Neb. 533, and in *Aulton v. Leahy*, 24 Neb. 289, the statute being held mandatory; *Keane v. Murphy*, 19 Nev. 96, where the rule, as to clear proof of a waiver being necessary, is followed.

24 Cal. 171-179. **OWEN v. FRINK.**

Objection to Testimony must be specific and not in general terms as "irrelevant," especially so if the objection could have been cured if the reason of the irrelevancy had been stated, p. 177.

Cited, *Yik Hon v. Spring Valley W. W.*, 65 Cal. 620, as authority to the point that no objection having been made in that case to certain evidence when offered, nor any motion to strike out the same, the point of variance between the averment and proof could not be taken in the supreme court; *People v. Louie Foo*, 112 Cal. 22, in affirmance. So, also, in *Hamilton v. Southern etc. M. Co.*, 13 Sawy. 120; 33 Fed. Rep. 567.

Joinder.—Parties not jointly interested, in strictness of that term, in contract, may join in a bill in equity or answer where there is one connected common interest, pp. 177, 178.

Cited, *People v. Morrill*, 26 Cal. 360, in affirmance; *Baines v. West Coast L. Co.*, 104 Cal. 8, holding that a creditor's bill by two judg-

ment creditors jointly to reach the assets of a corporation is not demurrable for misjoinder; *Utterback v. Meeker*, 16 Wash. 192, as adverse to the position of counsel for respondents in that case, the misjoinder there being of parties claiming under separate and distinct contracts embracing separate and distinct parcels of land purchased at different dates; *Schiffer v. City of Eau Claire*, 51 Wis. 392, to the point that all plaintiffs having an interest in the subject matter and in obtaining relief may be joined.

Option to Purchase is assignable and may be enforced in equity on compliance with conditions of option, pp. 175, 178.

Cited, *Rice v. Gibbs*, 33 Neb. 474, in affirmance.

Employer may discontinue the work at any time where employee is to work for a given time or by the job, but is liable in commensurate damages, p. 178.

Cited, note 43 Am. Dec. 671.

General Citation.—*Lewis v. Adams*, 70 Cal. 412, 59 Am. Rep. 427, to the point that "where it is not necessary for a plaintiff to sue as executor or administrator, all averments in his complaint in relation to his official capacity may be rejected."

24 Cal. 179-181. *EASTERBY v. LARCO*.

New Trial.—Order extending time to file statement made before notice of intention to move for new trial has been given, dates from time of order and not from notice, p. 181.

Followed, *Jenkins v. Frink*, 27 Cal. 338.

New Trial.—Statement must be filed within time limited or right to motion is lost, p. 181.

Cited, *Campbell v. Jones*, 41 Cal. 518, in affirmance.

24 Cal. 182-190; 85 Am. Dec. 58. *ESTATE OF HARLAN*.

Probate Court.—Jurisdiction of, is determined by residence of decedent at time of his death, pp. 188-190.

Cited, extended note 33 Am. Dec. 242, as to "probate of will or letters of administration, when void for want of jurisdiction"; notes 91 Am. Dec. 508; 95 Am. Dec. 115; 13 Am. St. Rep. 903.

Probate Court of old county retains jurisdiction where portion of county where decedent so resided is erected into a new county, pp. 189, 190.

Cited, extended note 85 Am. Dec. 103, as to jurisdiction in civil cases where new county is formed.

24 Cal. 192-194. *OWEN v. FOWLER*.

Ejectment.—Right to possession in plaintiff and possession in de-

defendant both existing at time suit is brought must be shown to warrant recovery, p. 194.

Followed in *Owen v. Morton*, 24 Cal. 379; *Hawkins v. Reichart*, 23 Cal. 536, 539, in affirmance; *Hestres v. Brennan*, 37 Cal. 389, affirming the point that plaintiff must show himself entitled to possession at time of bringing suit; *Frazier v. Lynch*, 97 Cal. 372, in affirmance as to showing defendant's possession; *South Park Commrs. v. Gavin*, 139 Ill. 284, as authority that at common law persons claiming through independent and distinct sources could not be joined as defendants, but the case holds that it is sufficient to aver possession in plaintiff some day after his title accrued, and being so possessed, the defendant, on a day stated, afterward entered and ejected him. The replication, however, averred possession in defendant at commencement of the action. *McLane v. Bovee*, 35 Wis. 34, in affirmance as to showing plaintiff's title or right of possession; *Ozark Land Co. v. Leonard*, 20 Fed. Rep. 881, in affirmance as to showing defendant's possession. But see *Salmon v. Symonds*, 24 Cal. 260, and *Vance v. Anderson*, 113 Cal. 536.

24 Cal. 195-217. HASTINGS v. DOLLARHIDE.

None but Infant and his heirs or personal representatives can plead infancy as defense, p. 207.

Cited, *Simpkins v. Searcy*, 10 Tex. Civ. App. 412, but generally to the point that the heirs of an infant might disaffirm his deed within the same time as the infant himself could have done; exhaustive note 18 Am. St. Rep. 695, 698.

Infant may Make or Indorse promissory note and contract is void or voidable at his election, pp. 208, 209.

Cited, note 25 Am. Dec. 618; also in exhaustive note 18 Am. St. Rep. 577, 611, 632.

Infant may contract by agent, p. 208.

Doubted, *Turner v. Bondalier*, 31 Mo. App. 587, as not in accordance with other authority. The rule there held being that the appointment of an agent by an infant to contract for him is void and cannot be ratified; cited, note 7 Am. Dec. 234; exhaustive note, 18 Am. St. Rep. 611, 632,

Infant Indorser may intercept payment to his endorsee by notice to maker. Such notice gives maker a defense. Otherwise he cannot plead infancy of indorser, pp. 209, 210.

Cited, exhaustive note 18 Am. St. Rep. 610, 697.

Infant's Deed is not void, but voidable, p. 211.

Cited, *Taylor v. Brown*, 5 Dak. Ter. 345; *Haynes v. Bennett*, 53 Mich. 18; and *Dixon v. Meritt*, 21 Minn. 200, all in affirmance: exhaustive note 18 Am. St. Rep. 576, 614.

Infant Grantor cannot affirm or disaffirm until age of majority, pp. 211, 215.

Cited, note 13 Am. Dec. 132; exhaustive note 18 Am. St. Rep. 670.

Infant's deed once ratified cannot be disaffirmed, p. 211.

Cited, exhaustive note 18 Am. St. Rep. 701.

Infants.—Executory and executed contracts are distinguished in matter of ratification, p. 212.

Cited, *Kendrick v. Neisz*, 17 Colo. 508, in affirmance.

Infant.—Deed not ratified may be disaffirmed by second conveyance to another, p. 215.

Cited, *Haynes v. Bennett*, 53 Mich. 18, in affirmance; exhaustive note 18 Am. St. Rep. 665.

Infant's deed may be ratified after age of majority expressly or by acts or by failure to disaffirm within a reasonable time, pp. 215, 217.

Cited, *Kendrick v. Neisz*, 17 Colo. 508, as authority as to what constitutes ratification; *Taylor v. Brown*, 5 Dak. Ter. 345, declaring that as a rule such deeds are valid if not disaffirmed after age of majority; *Goodnow v. Empire L. Co.* 31 Minn. 470, 47 Am. Rep. 800, where the conflicting decisions on the point of mere acquiescence being a ratification are noted and it was held that an unexplained delay of three years was fatal to a disaffirmance; notes 4 Am. Dec. 184; 45 Am. Dec. 571; exhaustive note 18 Am. St. Rep. 674, 675, 679, where it is said as to the point of acquiescence or inaction that the principal case is not supported either by principle or authority.

General Citation.—*Williams v. Sapieho*, 94 Tex. 433.

24 Cal. 218-227. LONG v. DOLLARHIDE.

Parol Partition may be made under the Spanish or Mexican law, as well as by tenants in common under the common law, but such agreements must be satisfactorily proved and fully executed by a several possession, pp. 222-227.

Cited, *Elias v. Verdugo*, 27 Cal. 425, in affirmance; *Lanterman v. Williams*, 55 Cal. 66, where the rule as to proof is followed, but in that case there was held to be no valid parol partition; *Tuffree v. Polhemus*, 108 Cal. 677, with approval; 420 *Mining Co. v. Bullion M. Co.*, 3 Sawy. 659, applying the rule to tenants in common of a mining claim; *Le Bourgeoise v. Blank*, 8 Mo. App. 441, holding that an executed parol partition severs the relation of tenants in common; extended note 92 Am. Dec. 122.

Parol Sale of Real Estate with delivery of possession was valid under Spanish or Mexican law, p. 223.

Cited, *Cook v. Frink*, 44 Cal. 382, and *Hall v. Yoell*, 45 Cal. 587, both in affirmance.

Recording Act.—Prior and subsequent purchasers of land means purchasers claiming under same common grantor, p. 227.

Cited, *Garber v. Gianella*, 98 Cal. 529, in affirmance. Followed, *Rankin v. Miller*, 43 Iowa, 19; and *Edwards v. McKernan*, 55 Mich. 526; cited, *Sharon v. Minnock*, 6 Nev. 391, to same effect.

Bona Fide Purchaser.—Burden of proof is upon party who claims by virtue of a priority of record against prior unrecorded deed. The recital of consideration is no evidence in favor of a purchaser against holders of a prior equity; there must be proof aliunde, pp. 227, 228.

Cited in *Bell v. Pleasant*, 145 Cal. 412, applying rule in action to cancel deeds where plaintiff asserts title under prior unrecorded deed and defendants claim under recorded deeds resting on subsequent recorded deeds from plaintiff's grantor under which grantee took no title as such; *Douglass v. Willard*, 129 Cal. 40, permitting reopening of case to establish such proof; *Galland v. Jackman*, 26 Cal. 86, 85 Am. Dec. 175, as to such recital not being conclusive; *Everadon v. Mayhew*, 85 Cal. 9, where the court declares: "It has been said that the burden of proof of want of notice is on the party setting it up. But while this is certainly true as to the payment of value, we are not sure whether it is true as to the want of notice, and we express no opinion in regard to it"; *Wilhoit v. Lyons*, 98 Cal. 413, as well settled that the burden is upon one claiming as such purchaser to show that he had not notice; *Garber v. Gianella*, 98 Cal. 529, as authority as to notice and burden of proof; *Lake v. Hancock*, 38 Fla. 61, 56 Am. St. Rep. 163, to the same points as the principal case; *Sillyman v. King*, 36 Iowa, 213, 215, to same effect as the principal case; *Am. Exch. Bank v. Fockler*, 49 Neb. 716, to the same point quoting from the principal case; *Rogers v. Verlander*, 30 W. Va. 645, to the point that a recital of payment in a deed is not evidence against a stranger nor creditor of the grantor assailing deed as voluntary and fraudulent; *Lakin v. Sierra etc. Co.*, 25 Fed. Rep. 342, 11 Sawy. 239, to the same point as to recital of payment in a deed.

General Citation.—*Spangel v. Dellinger*, 38 Cal. 282, as authority that declarations of a vendor subsequent to deed in the absence of the grantee, he being in exclusive possession, are admissible to show fraudulent conveyance and defeat the title. *Murray v. Montana etc. Lumber Co.*, 25 Mont. 18.

24 Cal. 228-230. **WARNER v. HOLMAN.**

To Make Exceptions to finding of facts available they should be brought to the attention of the court below, specifying the defect, p. 229.

Cited, *Lyons v. Liemback*, 29 Cal. 142, to the point that "the statute declares that the judgment shall not be reversed because of the omission from the finding of a part of all such facts, unless the court

below has, after the defect has been pointed out, refused to make the proper finding"; *State v. Manhattan S. M. Co.*, 4 Nev. 336, to the point that application should be made below to amend the findings, and it not appearing in the record that it has been done, the objection cannot be raised in the appellate court; *Warren v. Quill*, 9 Nev. 264, where it is declared that it has universally been held in California "that unless objections are made and exceptions taken to the findings, as specified in the statute, there is no necessity for a finding of all the facts in issue."

Service of notice of appeal should be made after or at time of filing notice, p. 229.

Cited, *Wright v. Ross*, 26 Cal. 263, holding in effect that filing must precede or accompany service. Examine, however, explanation of this case in *Buffendeau v. Edmondson*, 24 Cal. 96.

Notice of Appeal.—Estoppel from denying that a copy thereof has been served arises from appearing and arguing case upon merits, p. 230.

Cited, *Buffendeau v. Edmondson*, 24 Cal. 96, explaining the principal case as so deciding on rehearing, "though the opinion does not express it."

24 Cal. 230-237. PEOPLE v. COFFMAN.

Criminal Law.—Jury.—Accused is entitled to have all legal formalities observed in summoning, drawing, and impaneling jury, and to have omissions or irregularities in this respect corrected, p. 234.

Cited, *Bruner v. Superior Court*, 92 Cal. 249, as general authority to the point that an indictment by an illegally constituted jury and the proceedings thereon are void; *State v. McNamara*, 3 Nev. 75, quoting from the principal case on this point and holding that jurors must be selected by officers designated by law; also that an indictment by an illegally selected jury is void; dissenting opinion in *Eastham v. Holt*, 43 W. Va. 628, noted under *People v. Thurston*, 5 Cal. 69.

Same.—Objections to manner of impaneling jury are waived unless made at time, p. 234.

State v. Jackson, 27 Kan. 584, 41 Am. Rep. 426, affirming the principle; *State v. Pickett*, 103 Iowa, 719; *State v. Collyer*, 17 Nev. 279, with approval; *Dakota v. O'Hare*, 1 N. Dak. 40, as in accordance with the settled rule of waiver, quoting from the principal case.

Criminal Law.—Insanity.—It is error to instruct that: "The possession of a sound mind by the defendant at the time of the homicide is requisite to constitute murder or any other crime," p. 234.

Cited, *People v. Best*, 39 Cal. 692, where the following instruction was declared too broad and erroneous: "If the jury find that the defendant was insane at the time of the alleged shooting of Flynn, you will

Notes Cal. Rep.—78

declare the defendant not guilty (without regard to the degree of insanity)."

Same.—There must be such a defect of reason from disease of the mind at the time as not to know the nature or quality of the act, or, if defendant did not know it, that he did not know he was doing wrong, p. 235.

Cited, *People v. Ferris*, 55 Cal. 591, in affirmance; extended notes 36 Am. Dec. 407, 40 Am. Rep. 566.

Criminal Law.—Preponderating proof is sufficient to establish any fact in defendant's favor, p. 236.

Cited, *Territory v. Edmondson*, 4 Mont. 146, to the same point as applied to mitigating circumstances. So, also, in *State v. McCluer*, 5 Nev. 137, and in *State v. Pierce*, 8 Nev. 301.

Same—Insanity.—Proof beyond a reasonable doubt is not required but it must be established affirmatively by a preponderance of proof as in civil cases, pp. 236, 237.

Cited, and the principle affirmed in *People v. Wilson*, 49 Cal. 14; *People v. Messersmith*, 61 Cal. 248; *People v. Pico*, 62 Cal. 55; *People v. Travers*, 88 Cal. 238; *People v. McNulty*, 93 Cal. 443; *People v. Ward*, 105 Cal. 343; *People v. Walter*, 1 Idaho, 391; *State v. De Rance*, 34 La. Ann. 189; 44 Am. Rep. 429; and in *State v. Lewis*, 29 Nev. 354, citing a page and one-third of authorities, also other cases opposing the rule; extended notes 69 Am. Dec. 651, 97 Am. Dec. 176, both exhaustively reviewing the authorities; note 44 Am. Rep. 436.

24 Cal. 237-241. COOK v. DE LA GUERRA.

New Trial.—Surprise which ordinary prudence could have guarded against is insufficient. The moving party must have had a valid defense to some material part of action, and must show that result might be different on new trial, p. 240.

Cited, *McGuire v. Drew*, 83 Cal. 230, where various grounds of surprise are considered; *Overton v. State*, 57 Ark. 64, holding that a party is not entitled to a new trial on the ground of surprise where he fails to apply for a postponement to repair the damage done him by unexpected testimony.

Purchaser at Foreclosure Sale acquires no greater right in premises than mortgagors held, and they being heirs of deceased the property in purchaser's hands will be subject to proceedings in probate court, p. 241.

Cited, *Wood v. Curran*, 99 Cal. 141, to the same point.

Findings of Fact.—Exceptions must be taken in court below to warrant reversal of judgment for want of such finding, p. 241.

Cited, *Lyons v. Leimback*, 29 Cal. 142, to the same effect. So, also, in *State v. Manhattan S. M. Co.*, 4 Nev. 336; *Warren v. Quill*, 9 Nev.

264, to the point that there is no necessity for finding all the facts in the absence of objections and exceptions as specified in the statute.

24 Cal. 241-245; 85 Am. Dec. 62. **EX PARTE GREGORY YALE.**

Attorney at Law is not a public officer, nor does he hold an "office" or "public trust," pp. 243, 244.

Cited, *Ex parte Williams*, 31 Tex. Crim. 272, holding that they are not public officers; *State v. Hocker*, 39 Fla. 485, approving definition of "office" and "officer"; note to *State v. Hocker*, 63 Am. St. Rep. 183, on public offices.

Powers, duties, and privileges of attorneys at law are subject to legislative control, p. 244.

Cited, *In re Guerrero*, 69 Cal. 98, to the same point, quoting from the principal case; *In re Collins*, 147 Cal. 13, false statements made by attorney in individual capacity to savings bank whereby he secured payment of deposit therefrom are not cause for disbarment in absence of conviction of felony or of misdemeanor involving moral turpitude; *State v. Webster*, 150 Ind. 618, noted under *Cohen v. Wright*, 23 Cal. 392; *State v. Dent*, 25 Va. 11, as to the right of the legislature to restrain persons in their business or profession when public security or prosperity would thereby be promoted.

Legislature may exercise all powers not forbidden by the constitution of the state or United States or delegated to the general government, p. 245.

Cited, note 60 Am. Dec. 595, to the same point.

24 Cal. 245-259. **DORAN v. CENTRAL PAC. R. R. CO.**

Mining Law.—Right of way granted to Central Pacific Railroad covers all lands, whether mineral or not, pp. 252-255.

Cited, *Hamilton v. Spokane & C. Ry. Co.*, 2 Idaho, 907, as authority recognizing the distinction between a land grant and grant of right of way; *Wilkinson v. North Pac. R. R. Co.*, 5 Mont. 549, holding a like grant of right of way to be absolute.

Same.—Occupants of mineral lands have no title against the United States or railroad grantee, pp. 255-259.

Cited, *Wilkinson v. North Pac. R. R. Co.*, 5 Mont. 549, to the same effect; *Bybee v. Oregon etc. R. R. Co.*, 139 U. S. 680; 26 Fed. Rep. 590; 11 Sawy. 496, with approval quoting from the principal case (p. 259—last nine lines); note to *Schneider v. Hutchinson*, 76 Am. St. Rep. 479, on adverse possession of public property.

24 Cal. 260-266. **SALMON v. SYMONDS.**

Ejectment.—Averment of ownership prior to ouster is sufficient without averment of continued ownership which is a presumption of law, p. 266.

Cited, *Kidder v. Stevens*, 60 Cal. 420, the case affirming the rule; *McCarthy v. Brown*, 113 Cal. 20, to the point that withholding possession from one who is seized of the premises is presumptively adverse to his right and wrongful; *Vance v. Anderson*, 113 Cal. 563, holding however, that there should be an averment of seisin or right of possession at the time of the commencement of the suit, and that it is not sufficient to aver it merely as of the date of the alleged ouster.

24 Cal. 267-268. **BUCKMAN v. WHITNEY.** S. C. 28 Cal. 555, 557.

Jurisdiction.—Supreme court cannot make an order supplying lost records of court below. Appellant should move court below to supply same by copies or by other means within its control, p. 268.

Cited, *Bonds v. Hickman*, 29 Cal. 464, holding that the appellate court may order a document to be inserted in or stricken from the transcript in order to perfect it, but cannot vary or amend the document itself; *Satterlee v. Bliss*, 36 Cal. 521, in affirmance as to want of power to correct or amend records of court below. So, also, in *Thompson v. Patterson*, 54 Cal. 547; *Miller v. State*, 40 Ark. 499, in affirmance; *Boggess v. Harris*, 90 Tex. 477, to the same effect; note 14 Am. Dec. 517, as to "amendments after appeal."

24 Cal. 268-285. **CARPENTIER v. THIRSTON.**

Ejectment Lies upon Mexican grant to full extent of exterior boundaries until final confirmation or survey, where a specific quantity thereof is confirmed by decree of United States court, pp. 279, 280.

Cited, *Rich v. Maples*, 33 Cal. 108, in affirmance as to right of possession to exterior boundaries until segregation and survey; *Mound City etc. Assn. v. Philip*, 64 Cal. 497, as authority, but not directly in point, sustaining the proposition as to the effect of a decree partitioning lands under such a grant and also as to what rights could be asserted against a copatentee of the grantor.

Estoppel—Mexican Grant.—Mere disclaimer made to one who has no claim or right will not estop, unless it was the moving cause of possession, as to that it would be a fraud to retract it, pp. 281-284.

Cited, *Davis v. Davis*, 26 Cal. 41, 85 Am. Dec. 166, quoting, also, from *Mr. Justice Field* as to the four grounds of estoppel given in the principal case (p. 281); *Raynor v. Draw*, 72 Cal. 313, as authority that to constitute an estoppel one must have acted in ignorance of his true position; *Wythe v. Smith*, 4 Sawy. 25, in affirmance of the principles declared as to estoppel generally.

Court should not submit to jury the determination of the legal effect of written papers in evidence, p. 285.

Cited, *Johnson v. Shively*, 9 Oreg. 334, in affirmance.

24 Cal. 289-308. RICHARDSON v. WILLIAMSON.

Mexican Grant.—Statute of limitations does not begin to run against Mexican grant until final confirmation, pp. 297, 298.

Cited, *Davis v. Davis*, 26 Cal. 46; 85 Am. Dec. 171, in affirmance; *Reed v. Spicer*, 27 Cal. 65.

Same.—When defendant proves five years' adverse possession, burden is upon plaintiff to show that less time has elapsed since confirmation of grant, pp. 297, 298.

Cited, *Vassault v. Seitz*, 31 Cal. 230; *Arrington v. Liscom*, 34 Cal. 390, 94 Am. Dec. 741; *Anderson v. Fisk*, 36 Cal. 632; and *Morris v. De Celis*, 51 Cal. 63, all affirming the principle, note 81 Am. Dec. 727.

Ejectment.—Statute of Limitations, section 7, does not apply to action of ejectment, but only to personal actions founded on title to realty. Section 6 was the only section applicable to actions for recovery of land, pp. 299-303.

Cited, *Carpentier v. Mitchell*, 29 Cal. 335, but only generally in construing the statute as to rents and profits in ejectment; *Hagely v. Hagely*, 68 Cal. 351, where the rule as to section 7 is applied to section 319 of the Code of Civil Procedure; so, also, in *Tully v. Tully*, 71 Cal. 348, and in *Brusie v. Gates*, 80 Cal. 465. Cited, *Bissell v. Henshaw*, 1 Sawy. 559, and *Palmer v. Low*, 2 Sawy. 253, both to the same effect as the principal case.

24 Cal. 308-317. RUSH v. JACKSON.

Legislative Grant to build wharf construed to mean that length of same was to be extended at right angles, or nearly so, to the slough, and not along its bank, p. 314.

Cited in *Workman v. S. P. R. R. Co.*, 129 Cal. 545, on point that grantee of franchise is bound by his election as to mode of construction thereunder; *Northern etc. Co. v. Bigelow*, 84 Wis. 170, in dissenting opinion, as authority to the point that the rule in measuring a shore line is to draw side lines at each end of the base line and at right angles with it to low water mark.

Legislative Grant to build wharf must be accepted by commencing work within reasonable time and prosecuting with ordinary diligence, providing the time for accepting franchise is not fixed in grant, p. 316.

Cited, *Welsh v. County of Plumas*, 80 Cal. 341, affirming the doctrine as applied to building a road within the time mentioned in the act granting the right; *Arcata v. Arcata etc. Co.*, 92 Cal. 647, with approval.

Same.—Where the extent of the acceptance is not the full limit of territory in the grant, all land outside the boundaries accepted absolutely remains the property of the state as if not granted, p. 316.

Cited *Arcata v. Arcata etc. Co.*, 92 Cal. 646, to the point that in like cases no action is necessary to enforce the forfeiture, but the title to the thing forfeited immediately vests in the state.

24 Cal. 322-329; 85 Am. Dec. 65. **ASHLEY v. VISCHER.**

Receipt is only prima facie evidence of payment or delivery, and may be contradicted or rebutted. If a contract is embodied with it, as such contract it cannot be contradicted, p. 326.

Cited, *Young v. Mutual L. I. Co.*, 2 Sawy. 329, as recognizing and discussing said distinction; note 3 Am. St. Rep. 749, as to explaining or contradicting receipt.

Receipt containing promise to apply proceeds to account of holder is a contract in writing within four years' limitation, pp. 327, 328.

Cited, *Osmont v. McElrath*, 68 Cal. 473, where certain letters signed by defendant were held sufficient acknowledgments to constitute a contract obligation or liability founded upon an instrument in writing; *Conductors' Benefit Assn. v. Loomis*, 142 Ill. 569, to the point that entries in a depositor's bank-book are acknowledgments of liability to pay; *Bridges v. Stephens*, 132 Mo. 553, as to what agreements are regarded as "written" within the statute of limitations, and holding that a written receipt by a bank cashier for payment in full for subscription to shares is governed by the statute of limitations applicable to writings for payment of money or property; *Atlantic Trust Co. v. Irrigation Co.* 86 Fed. Rep. 983, to the ruling stated. Limited in *Scrivner v. Woodward*, 139 Cal. 316, to express promises so contained, and overruled as to implied promises.

General Citation.—*Johnson v. Johnson*, 74 Miss. 562.

24 Cal. 329-333. **KEYES v. FENSTERMAKER.**

Promissory Note is payable on demand when no day or time of payment is specified, p. 331.

Cited, *Roberts v. Snow*, 27 Neb. 429, in affirmance.

To Charge Indorser of demand paper presentment must be made within a reasonable time, such time being dependent on facts of each case, p. 332.

Cited, *Machado v. Fernandez*, 74 Cal. 363, 364, where it is said: "A distinction is clearly made between notes payable on demand without interest and those payable on demand with interest," and that rule of the principal case is changed by sections 3135, 3214, 3247 and 3248 of the Civil Code; *Beer v. Clifton*, 98 Cal. 326, 35 Am. St. Rep. 174, where the rule is considered, as well, also, as section 3135 of the Civil Code, but the question of reasonable time did not, however, arise in the citing case; extended note 80 Am. Dec. 251.

Waiver.—Unequivocal promise of indorser to pay after maturity

with notice of laches is binding and waives presentment and notice, p. 333.

Cited, *Curtis v. Sprague*, 51 Cal. 241, and *Stanley v. McElrath*, 86 Cal. 457, both in affirmance.

4 Cal. 334-338. SACRAMENTO ETC. R. R. CO. v. HARLAN.

Writ of Error is allowable only where an appeal is not provided by statute, p. 337.

Cited, *Ex parte Thistleton*, 52 Cal. 224; *People v. Jordan*, 65 Cal. 50; and *Widber v. Superior Court*, 94 Cal. 431, all in affirmance; *State v. Reed*, 3 Idaho, 558, dismissing writ of error to order of district court overruling application for change of venue; note 68 Am. Dec. 325.

Appeal.—Order or judgment in condemnation proceedings is final judgment in special proceedings and appealable, and therefore not reviewable by writ of error, pp. 337, 338.

Cited, *San Francisco etc. R. R. Co. v. Mahoney*, 29 Cal. 115, and *Phillips v. Pease*, 39 Cal. 584, both in affirmance; *Appeal of Houghton*, 42 Cal. 8, in dissenting opinion to the point that the court has sanctioned jurisdiction in special cases from an early day; *Jacksonville etc. Ry. Co. v. Adams*, 29 Fla. 284, as authority in a discussion as to the constitutional right to prosecute a writ of error in a like proceeding; extended note 60 Am. Dec. 434.

General Citation.—In *re Jessup*, 81 Cal. 482, as authority supporting the rights of the legislature to control and provide for the procedure of courts, even in respect to their inherent powers.

4 Cal. 338. LUBECK v. BULLOCK.

Appeal.—Judgment will not be disturbed where there is a conflict of evidence, p. 338.

Cited, *Quint v. Ophir M. Co.*, 4 Nev. 307, where the court says: "The law is now thoroughly settled that a verdict will not be set aside by an appellate court upon this ground where the lower court has refused to do so, unless there be such a preponderance of evidence against it as to create a conviction that it was the result of mistake or misconduct on the part of the jury"; *State v. Yellow Jacket etc. Co.*, 5 Nev. 421, to the same effect; *Lehigh etc. Co. v. Moyle*, 4 Utah, 330, in substantial affirmance.

4 Cal. 339-349. RICHARDSON v. McNULTY.

Mining Claim.—Abandonment as a defense may be rebutted by judgment in action for possession against third parties, p. 343.

Cited, *Bell v. Bed Rock etc. Co.*, 36 Cal. 218, where it is said: "The leaving being established, it is competent for the opposite party to show any acts explanatory of the leaving which tend to show that it

was not accompanied with an intent not to return"; extended note 40 Am. Dec. 465.

Mineral Lands.—Abandonment to a particular person or for a consideration cannot exist, pp. 344, 345.

Cited, *McLean v. Benton*, 43 Cal. 476, and *Middle Creek D. Co. v. Henry*, 15 Mont. 577, both in affirmance.

Abandonment of mining claims is a question of intention. Possession must be left without intention to repossess, creating thereby a vacancy in possession, the land being free to the next comer, p. 345.

Cited in *Wood v. Etiwanda Water Co.* 147 Cal. 234 applying rule to abandonment of water right secured by appropriation; *Davis v. Perley*, 30 Cal. 636, holding that abandonment is a question of intention to be gathered from the acts of the party alleged to have abandoned; *Moon v. Rollins*, 36 Cal. 337, 95 Am. Dec. 183, in affirmance, quoting from the principal case; *Morenhaut v. Wilson*, 52 Cal. 267, with approval as to intent to abandon being necessary; *Utt v. Frey*, 106 Cal. 397, substantially following the principal case; *Oviatt v. Big Four Min. Co.*, 39 Or. 123, where owner of mining right and ditch became financially involved, sold movables, allowed property to be sold for taxes, and made no attempt to use or claim it for eighteen years, intention to abandon conclusively established; *Derry v. Ross*, 5 Colo. 301, holding that by abandonment property reverts to original status, becomes *publici juris* and is open to location by first comer; *Beaver Brook v. St. Vrain Co.*, 6 Colo. App. 136, to the point that abandonment is a question of intention dependent on the facts of each case and that it must be clearly and unequivocally proven; *Putnam v. Curtis*, 7 Colo. App. 442, holding that an intention to abandon must exist, although this may be inferred from a single act; also that mere absence of nonuser does not constitute abandonment, although it would be otherwise if sufficiently long continued, so as to be inconsistent with any other hypothesis; *Mitchell v. Carder*, 21 W. Va. 285, to the same effect as the principal case; *Lakin v. Sierra etc. M. Co.*, 25 Fed. Rep. 343, 11 Sawy. 240, to the point that abandonment is a voluntary act; *Northern Pac. R. Co. v. Amacker*, 53 Fed. Rep. 53, in substantial affirmance; *Harkrader v. Carroll*, 76 Fed. Rep. 475, to the same effect; *Valcalda v. Silver Peak Mines*, 86 Fed. Rep. 95; extended note 40 Am. Dec. 466.

Mining Claims.—In action for possession rule that plaintiff must recover on strength of his own title does not apply, pp. 347, 348.

Cited, *Bradley v. Lee*, 38 Cal. 370, in dissenting opinion to the same point; *Strepey v. Stark*, 7 Colo. 622, in affirmance.

Ejectment for Mining Claims.—Mere prior occupancy or possession is only involved, p. 348.

Cited, extended note 63 Am. Dec. 105, to the same point.

Same.—Trespasser cannot show outstanding title to the mine in a third person as against a prior possessor, pp. 347, 348.

Cited, *Harris v. McGregor*, 29 Cal. 129, in affirmance; *Bradley v. Lee*, 38 Cal. 370, to the same point in dissenting opinion; *Niagara M. Co. v. Bunker Hill M. Co.*, 59 Cal. 613, with approval; *House v. Reavis*, 89 Tex. 631, as authority sustaining this point, although the question was not decided in that case; notes 60 Am. Dec. 616; 70 Am. Dec. 620.

Mining Claim.—Ejectment may be brought by one holding possession merely, p. 348.

Cited in *Miller v. Chrisman*, 140 Cal. 450, discussing rights of locators on oil lands before discovery.

24 Cal. 349-350. EDMONSON v. ALAMEDA COUNTY.

If Briefs or Points are not filed in supreme court on time, court will not examine the record, but judgment will be affirmed, p. 349.

Cited, *Hutton v. Reed*, 25 Cal. 488; *Hickinbotham v. Monroe*, 28 Cal. 189; *Faris v. Lampson*, 73 Cal. 191; *Killhonic v. Nuss*, 24 Mont. 293; *Lake v. Lake*, 17 Nev. 241; and *Tucker v. Constable*, 16 Oreg. 239, all in affirmance.

24 Cal. 350-354. EX PARTE BURRILL.

Award of Costs only relates to supreme court; costs of court below on reversal abide event, p. 353.

Cited, *Stoddard v. Treadwell*, 29 Cal. 282, as authority, but the case holds that the prevailing party on a second trial is entitled to costs of first trial as a matter of right; also, that costs are discretionary only when so specified in the statute; *Bank of Woodland v. Hiatt*, 59 Cal. 583, in affirmance, citing, also, Code Civ. Proc., secs. 274, 1033, 1034; *Reay v. Butler*, 99 Cal. 479, to the point that if a new trial of certain issues had been ordered, the costs of the first trial would be taxable against the party against whom judgment was rendered in the new trial.

24 Cal. 354-358. BEAR RIVER & A. W. & M. CO. v. BOLES.

New Trial.—Notice must be given within time limited or right is waived, p. 356.

Cited, *Ellisassar v. Hunter*, 26 Cal. 284, and *Campbell v. Jones*, 41 Cal. 618, both in affirmance.

New Trial.—Notice intended is a written notice, although a notice in open court in presence of other party might be sufficient if affirmative-ly shown by the record, p. 356.

Cited, *Calderwood v. Brooks*, 28 Cal. 154, to the point that the record must contain the evidence of service of the notice or it must clearly appear that service was waived; *Killip v. Empire M. Co.*, 2 Nev. 40, 46, in

affirmance as to the point that verbal notice is insufficient and also as authority to the point of sufficiency of notice given in open court and dispensing with written notice.

Same.—Order extending time to give notice, after time for notice has expired is void, p. 357.

Cited, Cooney v. Furlong, 66 Cal. 522, and Sullivan v. City of Helena, 10 Mont. 140, both to this same effect.

Same.—Such order should express in apt and precise language the object intended, p. 358.

Cited, Jenkins v. Frink, 27 Cal. 339, in affirmance.

If Notice is Defective in not complying with statute, it will not be considered except the record discloses a waiver, p. 358.

Cited, Gregg v. Garrett, 13 Mont. 12, in affirmance.

24 Cal. 359-364. BEAR RIVER & A. W. & M. CO. v. BOLES.

Judgment Will not be Reversed for error not apparent of record, p. 364.

Cited, Rosina v. Trowbridge, 20 Nev. 120, as authority to the point that judgment will not be reversed for nonprejudicial error.

24 Cal. 364-366. FLATEAU v. LUBECK.

New Trial.—Record must show that notice was given or waived, p. 365.

Cited, Calderwood v. Brooks, 28 Cal. 154, to the same point.

New Trial.—Statement is dependent on valid and effectual notice, and if there is no such notice the statement does not give jurisdiction to grant new trial, p. 366.

Cited, Ellsasser v. Hunter, 26 Cal. 284, to the same effect; Quivey v. Gambert, 32 Cal. 312, in affirmance. So, also, in Street v. Lemon etc. Co., 9 Nev. 253.

Appeal Will Not be Dismissed for insufficiency of notice, where notice shows that the judgment or order are the same intended to be appealed from, even though there are mistakes as to date of order, p. 366.

Cited, Sharon v. Sharon, 68 Cal. 338, as so deciding, but distinguishing the principal case in that no point was made, as in the citing case, that the notice was insufficient because it recited two appeals; Gregg v. Garrett, 13 Mont. 12, to the point that if notice of intention is insufficient under the statute the appeal will be dismissed unless defect is waived.

24 Cal. 367-373; 85 Am. Dec. 69. WIXON v. BEAR RIVER & A. W. & M. CO.

Grounds of Appeal must be set forth in statement or they will not be considered, p. 372.

Cited, *Moore v. Murdock*, 26 Cal. 524, in affirmance; *Burnett v. Pacheco*, 27 Cal. 410, to the same effect; notes 89 Am. Dec. 549; 90 Am. Dec. 554.

Doctrine of Priority in favor of one appropriating land, bordering on stream, for garden or orchard purposes is not subservient to right of miner or ditchowner subsequently appropriating water, p. 373.

Cited, *Woodruff v. North Bloomfield etc. Co.*, 18 Fed. Rep. 807, 9 Sawy. 542, quoting from the principal case (p. 373) as to last four instructions as authority in a case for an injunction to restrain an hydraulic mining company from injuring navigation and lands by mining debris; extended notes 43 Am. Dec. 279, as to "doctrine peculiar to Pacific states and territories"; *Id.* 282, as to "rights of prior appropriator in general"; 63 Am. Dec. 97, as to rights of settlers; notes 90 Am. Dec. 541; 91 Am. Dec. 595.

24 Cal. 373-379. OWEN v. MORTON.

Ouster.—Tenant in common in exclusive possession is presumed to hold for himself and cotenant, p. 376.

Cited, *Tully v. Tully*, 71 Cal. 346, in affirmance; *Abernathie v. Con. Virginia M. Co.*, 16 Nev. 269, to the same point.

Same.—To rebut such presumption there must be proof of acts and declarations indicating intention to exclude cotenant, pp. 376, 377.

Cited, *Squires v. Clark*, 17 Kan. 87, quoting from the principal case as approving 2 Preston on Abstracts, 291, on this point; *Abernathie v. Consolidated Virginia M. Co.*, 16 Nev. 269, to the same effect.

Same.—Intention of cotenant to hold exclusively for himself is equivalent to actual ouster, p. 377.

Cited, *Salmon v. Wilson*, 41 Cal. 610, and *Cook v. Webb*, 21 Minn. 430, both in affirmative; notes 13 Am. Dec. 141.

Same.—That cotenant is in possession merely, not claiming by deed or lease does not prove ouster, p. 377.

Cited, *Trenouth v. Gilbert*, 63 Cal. 406, to the same point, quoting from the principal case.

Findings.—Evidence not returned will be presumed sufficient to support the judgment, since every intendment is in favor of the verdict or decision of court below, p. 378.

Overruled. *Hidden v. Jordan*, 28 Cal. 311-313, to the extent that the citing case holds that it is presumed that the statement contains all the evidence and no more than is necessary to explain the claimed defect of evidence to support the finding, although the record does not show affirmatively that such was the case; *Lyons v. Leimback*, 29 Cal. 141, to the point that it is a presumption that facts not found were proved.

Ejectment.—Possession in defendant at time of commencement of action must be shown, p. 379.

Cited, *Ozark Land Co. v. Leonard*, 20 Fed. Rep. 881, in affirmance.

24 Cal. 379-385. EASTMAN v. TURMAN.

Mortgage—Parties to Action.—Assignee of note and mortgage may join maker and indorser as defendants, p. 382.

Cited, *Mehan v. First Nat. Bank*, 44 Neb. 222, to the same point.

Mortgage.—Only one action lies for the recovery of the debt and the enforcement of the right secured by mortgage, p. 382.

Cited, *Cederholm v. Loofborrow*, 2 Idaho, 178, to the point that the code provides for the protection of all rights in one suit, and if the plaintiff chooses to enforce his rights by foreclosure such action becomes exclusive; *Bacon v. Raybould*, 4 Utah, 360, holding that a party having one suit either pending or in judgment for a debt secured by mortgage cannot have another action for recovery of the same debt. His whole claim must be embraced in one suit.

24 Cal. 385-392. LODGE v. TURMAN.

Absolute Deed may be shown to be a mortgage, pp. 390, 391.

Cited, *Sears v. Dixon*, 33 Cal. 332, holding that a conditional sale may be proven a mortgage; *Jackson v. Lodge*, 36 Cal. 62, in dissenting opinion distinguishing the principal case, but the doctrine thereof was nevertheless affirmed; *Vangilder v. Hoffman*, 22 W. Va. 19, in affirmance, both as to absolute deeds or conditional sales.

24 Cal. 398-403. LEET v. WILSON.

Objections to Evidence should be specific. The general objection to admissibility will be disregarded, p. 402.

Cited, *People v. Nichols*, 62 Cal. 521, as applied to the duty in a criminal case of defendant to specifically object to action of the court taking away his right to have the jury polled; *Rush v. French*, 1 Ariz. Ter. 126; *Kansas Pac. R. R. Co. v. Cutter*, 19 Kan. 88; *Keys v. Grannis*, 3 Nev. 557, in dissenting opinion; *State v. Jones*, 7 Nev. 415, a criminal case; and in *Knapp v. Schneider*, 24 Wis. 72, all affirming the rule.

24 Cal. 403-411; 85 Am. Dec. 73. CUNNINGHAM v. HAWKINS.

Statute of Limitations—Mortgage Lien.—Right to enforce such lien is barred four years from time right of action on debt accrues, p. 408.

Cited, notes 94 Am. Dec. 547; and 20 Am. St. Rep. 524, to the same point.

Same.—Possession of mortgagee does not extend mortgage lien, p. 408.

Cited, *Robinson v. Russell*, 24 Cal. 473, in affirmance; note, 93 Am. Dec. 117.

Mortgage is mere security for debt due, p. 409.

Cited, note, 76 Am. Dec. 488, to same point.

Statute of Limitations.—Fact that a debt is secured by mortgage does not affect debtor's right to avail himself of the statute, p. 409.

Cited, note, 82 Am. Dec. 757, as citing *McCarthy v. White*, 21 Cal. 495, 82 Am. Dec. 754, on this point; note 3 Am. St. Rep. 515, as to whether suit to foreclose mortgage may be maintained where action on note is barred.

Statute of Limitations.—Mortgagor's right of action to redeem is barred after four years from time right of action on debt accrues, pp. 409, 410.

Cited, *Millard v. Hathaway*, 27 Cal. 146, and explained as not precluding the voluntary acceptance of the debt; *Arrington v. Liscom*, 34 Cal. 369, 372; 94 Am. Dec. 724, 726, with approval.

Statute of Limitations.—Right to redeem and right to foreclose are reciprocal and commensurable, and if one is barred so is the other, p. 410.

Cited, *Arrington v. Liscom*, 34 Cal. 372; 94 Am. Dec. 726, in affirmance; *Wright v. Ross*, 36 Cal. 434, with approval, but held not applicable to a case of continuing trust created by agreement or resulting therefrom; *Taylor v. McClain*, 60 Cal. 652, following the rule. So, also, in *Henderson v. Grammar*, 66 Cal. 336. Cited, *Raynor v. Drew*, 72 Cal. 311, as undoubtedly the rule before the code, but "doubted whether the reason of the old equity rule applies under a system where no title passes to the mortgagee." So, also, in *Hall v. Arnott*, 80 Cal. 355, quoting from the last citing case to the same point; *Allen v. Allen*, 95 Cal. 197, applying the rule of the principal case since it was the law in force at the date of the deed there under consideration; *Green v. Turner*, 38 Iowa, 116, in affirmance, but the doctrine held to have no application to that case, which was one of claimed adverse possession as between the mortgagor and mortgagee; *Adams v. Holden*, 111 Iowa, 60, construing local statutes; note to *Walker v. Warner*, 70 Am. St. Rep. 98, on general subject. Followed *King v. Meighen*, 20 Minn. 267; and *Parsons v. Noggle*, 23 Minn. 331. Cited, note 73 Am. Dec. 656.

24 Cal. 411-419; 85 Am. Dec. 78. **DONAHUE v. McNULTY.**

Sheriff's Deed.—Parol evidence of officer making sale and executing deed is inadmissible to contradict or alter deed, p. 417.

Cited, *Frink v. Roe*, 70 Cal. 316, to the point that parol evidence is inadmissible to contradict, enlarge, alter, or modify a written instrument; notes 2 Am. Dec. 510; 90 Am. Dec. 546; 91 Am. Dec. 461.

Sheriff's Deed should recite judgment execution, levy, and sale, p. 418.

Cited, *Wiseman v. McNulty*, 25 Cal. 236, holding that such a deed not reciting the judgment is void.

Estoppel—Sheriff's Deed.—Officer and those claiming under deed are

estopped from denying truth of recitals, but not strangers, especially those claiming adversely, p. 418.

Cited, *Wiseman v. McNulty*, 25 Cal. 237, where a constable's sale was held void as against certain defendants not served with process and who did not appear; *Hihn v. Peck*, 30 Cal. 288, holding that such recital is prima facie evidence against strangers and that the principal case is not inconsistent therewith; *Blood v. Light*, 38 Cal. 658, 99 Am. Dec. 447, holding that recital of a levy is conclusive against a party; *Ingersoll v. Truebody*, 40 Cal. 611, with approval, but holding that parties to a deed are not estopped to deny recitals of collateral facts not essential to the validity of the deed; *Los Angeles County Bank v. Raynor*, 61 Cal. 147, to the point that the legal presumption exists that all the officer's acts preceding the sale were duly performed; *Zabriskie v. Mead*, 2 Nev. 238, 90 Am. Dec. 545, in affirmance.

24 Cal. 419-424. PETERIE v. BUGBEY.

New Trial.—If testimony is conflicting order of court below in refusing new trial will not be disturbed, p. 420.

Cited, *Hall v. Bark "Emily Banning,"* 33 Cal. 525, so holding; also deciding that error in granting or refusing new trial must affirmatively show abuse of discretion.

24 Cal. 424-427. WILLIAMS v. BENTON.

Reference to take an account and report upon issue of fact involved may be ordered by court in an equity case, but other issues not involved in account cannot be referred without consent of parties, nor can referee be ordered to report a judgment, pp. 425, 426.

Cited, *Hastings v. Cunningham*, 35 Cal. 552, holding that an appointment of referees in partition can only be made upon consent of parties, except in cases under section 183 of the Practice Act; *Huston v. Wadsworth*, 5 Colo. 215, as so deciding, but holding that there should be a liberal construction of the code remedy providing a reference without consent in certain cases; *Sieber v. Frink*, 7 Colo. 150, but declared not an analogous case and holding that in purely equitable cases the court may of its own motion direct the taking and reporting evidence; extended note, 79 Am. Dec. 207, 208, as to reference in equity cases and compulsory reference of action at law.

24 Cal. 427-435. CURRAN v. SHATTUCK.

Eminent Domain.—If private property be taken for public use just compensation must be made or tendered before right vests in the public, p. 431.

Cited, *Brady v. Bronson*, 45 Cal. 643, in affirmance.

Board of Supervisors for condemnation of land possess but limited

jurisdiction and must strictly pursue statute to validate proceedings, pp. 431, 432.

Cited, *Godchaux v. Carpenter*, 19 Nev. 418, applying the rule to a board of county commissioners, also holding that the record must show affirmatively all jurisdictional facts.

Eminent Domain.—Statute is unconstitutional which fails to provide for compensation in any manner, or at any time or place, or by any person, p. 432.

Cited, *Sherman v. Buick*, 32 Cal. 256, 91 Am. Dec. 585, noting that the act of 1861, so far as this defect is concerned, is obviated by act of 1864.

Same.—Statutes for taking private property for public use must be strictly pursued, p. 432.

Cited, *Stanford v. Worm*, 27 Cal. 174; *Creighton v. Manson*, 27 Cal. 628; *Smith v. Davis*, 30 Cal. 537; *Trumpler v. Bemerly*, 39 Cal. 491; *Chase v. Putnam*, 117 Cal. 368, all affirming the doctrine; notes, 40 Am. Dec. 266; 73 Am. Dec. 584.

Condemning Land.—Notice of proceedings must be given owner of land or they will be void, p. 433.

Cited, *Silva v. Garcia*, 65 Cal. 592, to the same point; *New Orleans etc. R. R. Co. v. Frederic*, 46 Miss. 10, in affirmance; so, also, in *Hull v. Chicago etc. R. R. Co.*, 21 Neb. 385.

General Citation.—*Aldredge v. School Dist. Payne Co.*, 10 Okla. 698.

24 Cal. 435-446. VANCE v. FORE.

Description.—Deed may refer to another for description, and a map or survey referred to is part of deed and may control its calls, pp. 443-446.

Cited in *Miller v. Grunsky*, 141 Cal. 450, quoting *Serrano v. Rawson*, 47 Cal. 55; *Caldwell v. Center*, 30 Cal. 543, 89 Am. Dec. 133, to the point that a map referred to is part of the deed; *Hastings v. Stark*, 36 Cal. 125, as to conflicting evidence concerning uncertain calls of the same deed before the court in the principal case, and quoting from said case (p. 444); *Mayo v. Mazeaux*, 38 Cal. 448, as to a map referred to being part of the deed and controlling its calls; *Serrano v. Ransom*, 47 Cal. 55, to the point that a plat or survey is part of the patent and often entitled to more weight than courses or distances; *Black v. Sprague*, 54 Cal. 271, to the same point as the last citing case; *People v. Blake*, 60 Cal. 508, in dissenting opinion as to the effect of a map and its controlling calls; *Crosby v. Dowd*, 61 Cal. 605, in dissenting opinion, but the case held that a decree of foreclosure embodying the description of the land contained in the mortgage, which referred to other instruments and records, was insufficient; *Chapman v. Pollock*, 70 Cal. 495, in affirmance as to maps or plans controlling calls and being a part of the deed by

reference; *Cadwallader v. Nash*, 73 Cal. 45, to the point that a map or other writing referred to in a deed becomes incorporated therein; *Andrew v. Watkins*, 26 Fla. 407; *Sanders v. Ransom*, 37 Fla. 462; and *Mining Co. v. Mining Co.*, 5 Utah, 635, all affirming the rule as to incorporation of deeds or maps or other instruments by reference; *Beatty v. Robertson*, 130 Ind. 592; and *Coles v. Yorks*, 36 Minn. 391, following the doctrine that in case of variance the map or plan controls; extended note, 30 Am. Dec. 741, fully considering the questions involved.

Deeds.—If descriptions conflict, that which is least likely to be affected with mistakes is adopted, p. 445.

Cited, *Piercy v. Crandall*, 34 Cal. 341, to the same point.

Same.—Monumental lines or points control courses and distances, p. 446.

Cited, *Piercy v. Crandall*, 34 Cal. 341, to the same point; *Wise v. Burton*, 73 Cal. 171, to the same effect; extended note, 30 Am. Dec. 741.

Deed.—Where conflicting decisions are of equal authority that most favorable to grantee controls, p. 446.

Followed, *Piper v. True*, 36 Cal. 617, *Colter v. Mann*, 18 Minn. 106; and in *Cox v. McGovern*, 116 N. C. 134, but this last case adds the qualification that the rule obtains if the first description in the deed does not determine the variance; extended note, 30 Am. Dec. 735, covering this and various analogous points.

General Citation.—*Vanve v. Peña*, 41 Cal. 687, 693, but only in connection with the performance of certain covenants by the plaintiff in the principal case, claimed to depend upon the determination of said case.

24 Cal. 447-449. ALLENDER v. FRITTS.

Appeal does not lie from order refusing to dissolve attachment, p. 448.

Cited, *Myers v. Mott*, 29 Cal. 362, 89 Am. Dec. 50, with approval; *Herman v. Paris*, 81 Cal. 625, holding that an error in attachment proceedings does not affect the validity of a judgment or of an order denying a new trial; *Wehle v. Kerbs*, 6 Colo. 168, holding that the rule is not applicable upon writs of error; contra, *Sheppard v. Yocum*, 11 Oreg. 235, noting the change under Code Civ. Proc., sec. 939, subd. 3 (see also *id.*, sec. 963); cited *Windt v. Banniza*, 2 Wash. 154, affirming the rule under the laws of that state (1889-90, pp. 333, 336) for the removal of causes to the supreme court.

24 Cal. 449-457. DORSEY v. BARRY.

Election Contest is special and statutory, pp. 452-453.

Followed, *Casgrave v. Howland*, 24 Cal. 458. Cited, *San Francisco etc. R. R. Co. v. Mahoney*, 29 Cal. 115, but distinguished from that case which related to proceedings to condemn land; *People v. Rosborough*, 29

Cal. 416, and explained but holding that proceedings in insolvency are not special cases; *McDonald v. Katz*, 31 Cal. 169, holding that proceedings in insolvency are special and no intendments can be made in favor of the jurisdiction; *Keller v. Chapman*, 34 Cal. 640, in affirmance; *Appeal of Houghton*, 42 Cal. 68, in dissenting opinion in connection with the construction of "special cases." So, also, in the same connection in *Bixler's Appeal*, 59 Cal. 555, and in *Lord v. Dunster*, 79 Cal. 483, where the same question is fully examined, the decisions upon the point being declared "incongruous mixtures of opinion"; *Packard v. Craig*, 114 Cal. 96, 97, where the same question is again considered at length; *Schwarz v. County Court*, 14 Colo. 47, to the point that election contest proceedings are special and summary, and strict observance of the statute is required; *Gillespie v. Dion*, 18 Mont. 192, to the same point; so, also, in *Garrard v. Gallagher*, 11 Nev. 386.

Same.—County court cannot grant a new trial, but appeal lies from the judgment in such cases and upon reversal new trial may be ordered, pp. 453-457.

Cited, *Casgrave v. Howland*, 24 Cal. 458, in affirmance; *San Francisco etc. R. R. Co. v. Mahoney*, 29 Cal. 115, holding that an appeal lies in proceedings to condemn lands; *People v. Rosborough*, 29 Cal. 416, holding that county courts may grant new trials in insolvency cases, and that an appeal lies from the judgment; *Bixler's Appeal*, 59 Cal. 555, contra, to the extent of holding that the supreme court has no appellate jurisdiction of special cases and proceedings; *Lord v. Dunster*, 79 Cal. 483, affirming the rule as to appellate jurisdiction; *Belser v. Hoffschneider*, 104 Cal. 461, holding that the action of the city council in the matter of an appeal is judicial and the final judgment of the council cannot be vacated; *Packard v. Craig*, 114 Cal. 96, 97, affirming the doctrine of the principal case under sections 1111-1127 of the Code of Civil Procedure; *Townley v. Adams*, 118 Cal. 384, holding that the superior court cannot set aside a verdict and order a new trial of its own motion, except as provided by section 682 of the Code of Civil Procedure; *Aven v. Wilson*, 61 Ark. 300, in dissenting opinion, but the case holds that the county court may grant new trials in election contests; *Lloyd v. Sullivan*, 9 Mont. 588, in affirmance to appellate jurisdiction; *Thomas v. Franklin*, 42 Neb. 313, to the point that the court below cannot set aside election contests and grant new trial.

24 Cal. 457-458. CASGRAVE v. HOWLAND.

New Trial Statement cannot be considered on appeal from judgment, p. 458.

Cited, *Thompson v. Connolly*, 43 Cal. 638, in affirmance; *Kerr v. Clappitt*, 95 U. S. 190, to the same point.

Election Contest.—County court cannot grant a new trial but appeal must be taken from the judgment, p. 458.

Notes Cal Rep.—79

Cited, in the following cases (all of which are fully considered under the preceding case of *Dorsey v. Barry*, 24 Cal. 449); *Keller v. Chapman*, 34 Cal. 640; *Lord v. Dunster*, 79 Cal. 483; *Packard v. Craig*, 114 Cal. 97; *Aven v. Wilson*, 61 Ark. 300; *Schwarz v. County Court*, 14 Colo. 47; *Lloyd v. Sullivan*, 9 Mont. 588; *Thomas v. Franklin*, 42 Neb. 313, and *Garrard v. Gallagher*, 11 Nev. 386.

24 Cal. 458-466. **MILLER v. VAN TASSEL.**

Forms of Action are abolished by the statute, but the substantial allegations of the pleadings remain unchanged, p. 463.

Cited, *Wa Ching v. Constantine*, 1 Idaho, 267, to the point that forms of action are abolished; *Zeile v. Moritz*, 1 Utah, 286, in affirmance. Cited in *Conrad etc. Bank v. G. N. Ry. Co.*, 24 Mont. 182, holding complaint in assumpsit insufficient.

Evidence.—Objection urged may not have been correct, but it is not material if exclusion was proper on any ground, p. 463.

Cited, *Spottiswood v. Weir*, 80 Cal. 451, in affirmance.

Warranty.—Vendor of chattels in his possession warrants title by implication, but such presumption may be rebutted by parol, pp. 464-465.

Cited, *Gross v. Kierski*, 41 Cal. 113, affirming the rule of warranty by implication; *Johnson v. Powers*, 65 Cal. 181, with approval, and also holding that parol evidence is inadmissible to show the existence of a warranty not expressed in a written agreement for sale of personal property; extended note, 62 Am. Dec. 464-467; exhaustively considering the authorities.

24 Cal. 467-473. **ROBINSON v. RUSSELL.**

Entry of Mortgagee into possession of premises confers no greater rights upon him, pp. 472, 473.

Cited, extended note, 85 Am. Dec. 78, to the same point.

Injunction lies by mortgagee to prevent impairment of mortgage security if defendants are insolvent, p. 473.

Cited, *Lavenson v. Standard Soap Co.*, 80 Cal. 246, 13 Am. St. Rep. 148, approving the rule, but that case was one of unlawful removal of fixtures and an action for damages was sustained therefor after foreclosure and a deficiency found; *Miller v. Waddingham*, 91 Cal. 381, where the principle is declared to be well recognized so far as the necessity exists for showing that the security has been impaired in order to sustain such injunction; *Arnold v. Broad*, 15 Colo. App. 391, mortgagee or beneficiary in trust deed may maintain action for damages for impairment of security by cutting and removing timber from mortgaged premises; *Fairbank v. Cudworth*, 33 Wis. 364, holding that if the threat-

ened injury is irreparable injunction lies against the mortgagor without showing or proving insolvency of the latter; note 13 Am. St. Rep. 156.

24 Cal. 474-490. **WOOD v. TRUCKEE TURNPIKE CO.**

Franchise cannot be sold under execution. It is a personal trust which cannot be transferred by forced sale or assigned without consent of the granting power, and then only in the mode pointed out, pp. 486, 487-489.

Cited in *Carter v. Meuli*, 122 Cal. 369, but holding transfer so consented to by the granting board; *Appeal of North Beach etc. Co.*, 32 Cal. 529, in dissenting opinion to the point that the only property of railroad corporations is its easement or franchise which cannot be sold except with consent of the legislature; *People v. Duncan*, 41 Cal. 510, in affirmance; *Southern Pac. Co. v. Burr*, 86 Cal. 283, noting the change in the rule under section 388 of the Civil Code; *Gregory v. Blanchard*, 98 Cal. 313, also noting and explaining the same code section, and section 523 of the Civil Code, and holding that a franchise cannot be levied upon or sold under execution, in the absence of a statutory provision which limits the manner, mode, and extent of exercise of the power; *Toll Road Co. v. People*, 22 Colo. 432, holding that the right of collecting tolls is a part of the sovereign power which may be delegated, but the grantee takes subject to all limitations imposed; *Montgomery v. Multnomah Ry Co.*, 11 Oreg. 353, in substantial affirmance. So, also, in *Hackett v. Wilson*, 12 Oreg. 37; *Baxter v. Turnpike Co.*, 10 Lea, 492, to the point that nothing passes by levy upon and sale of roadbed and right of way; extended notes, 99 Am. Dec. 335; 35 Am. St. Rep. 391.

Franchise.—"Road" is a legal term synonymous with "way," p. 487.

Cited, *Chollar-Potosi Min. Co. v. Kennedy*, 3 Nev. 373, 93 Am. Dec. 415, holding contra.

A Way is an Easement and owner is not entitled to participate in rents and profits from land on which easement is imposed, p. 487.

Cited, *San Francisco v. Calderwood*, 31 Cal. 589; 91 Am. Dec. 544, with approval.

Easement.—Ejectment does not lie to try right to enjoy an easement, p. 488.

Cited, *Tennessee etc. R. R. Co. v. East Alabama Ry. Co.*, 75 Ala. 524, 51 Am. Rep. 476; but holding that ejectment will lie for a railway by one having title only to the right of way. Distinguished, *San Francisco v. Grote*, 120 Cal. 61, holding that ejectment will lie for recovery of possession of a street dedicated to the public use by the owner of the fee; *Territory v. Trust Co.*, 172 U. S. 184, as distinguished in *Southern Pac. Co. v. Burr*, 86 Cal. 279; *Fresno etc. Co. v. Southern Pac. Co.*, 135 Cal. 204, applying rule to railroad right of way.

Plank or Turnpike Roads can hold no land beyond right of way or

easement. Such road belongs to the public and is not private property; the company's sole right is to collect tolls, pp. 489, 490.

Cited, *Pico v. Colimas*, 32 Cal. 581, as authority in connection with the extent of the right of entry of the owner of an easement; *McMullin v. Leitch*, 83 Cal. 240, to the point that a tollroad franchise having expired and the road having become a public highway by dedication the owners of the franchise had no interest left for which they were entitled to compensation; *Kellett v. Clayton*, 99 Cal. 212, quoting from the principal case to the same points; *Blood v. McCarty*, 112 Cal. 564, in substantial affirmance; *Connor v. Railway Co.*, 109 Fed. 939, 940, on point that franchise will not pass as appurtenant to part of roadbed; *Lachman v. Barnett*, 18 Nev. 273, affirming the principle that an easement or way does not give possession of the land. But see *Southern Pac. Co. v. Burr*, 86 Cal. 284, and *Welch v. County of Plumas*, 80 Cal. 338.

24 Cal. 490-502. WILLIS v. FARLEY.

Statute of Limitations.—Mortgage is a mere incident of the debt, is discharged by its payment, and is barred when the debt is barred, pp. 497, 498.

Cited, notes, 63 Am. Dec. 135; 70 Am. Dec. 676; 76 Am. Dec. 488; and 82 Am. Dec. 757, to the same points.

District Courts had jurisdiction in all equity cases and this could not be transferred to other courts by legislative act, p. 499.

Cited in *Burns v. Superior Court*, 140 Cal. 7, noted under *Hicks v. Bell*, 3 Cal. 219; *Rosenberg v. Frank*, 58 Cal. 400, 402, to the same point.

Jurisdiction.—District Courts and not probate courts could foreclose mortgages, p. 499.

Cited, *Estate of Orr*, 29 Cal. 104, with approval; *Harp v. Calahan*, 46 Cal. 233, to the same effect; notes, 73 Am. Dec. 560, 81 Am. Dec. 146.

Same.—Mortgage creditor of deceased could foreclose at once in district court after presentation of claim to executor and probate court whether the same was allowed or rejected, p. 500.

Cited, *Brown v. Orr*, 29 Cal. 122, holding that a mortgage by husband and wife could be enforced against the heirs after his death; *Sichel v. Carillo*, 42 Cal. 505, but distinguished and held to have no application where "there is a contract of another party still alive—where the land is under a contract, not barred, to satisfy the demand"; *Harp v. Calahan*, 46 Cal. 233, in affirmance of the rule; *Hibernia etc. Soc. v. Hayes*, 56 Cal. 306, in dissenting opinion, but the case holds in this connection that the amendments of 1874 to sections 1493 and 1500 of the Code of Civil Procedure are not retroactive; *Verdier v. Bigne*, 16 Oreg. 210, to the same point as the principal case; extended note, 65 Am. Dec. 124; note, 73 Am. Dec. 560.

Administrators are but one Person and authorized act of one of two or more binds all, p. 500.

Cited, *Gilmore v. Baker Co.*, 12 Wash. 471, in affirmance; note 58 Am. Dec. 110; extended note 65 Am. Dec. 123.

Probate Law.—Allowance of claim prevents bar of statute though debt is not filed in probate court, pp. 500-502.

Cited, *Estate of Schroeder*, 46 Cal. 316, in substantial affirmance and holding that the provisions as to filing claims are merely directory.

Action and Decree against administrator, commenced and entered after his discharge is a nullity, p. 502.

Cited in *MacKay v. San Francisco*, 128 Cal. 685, construing section 1699, Code of Civil Procedure, as to power of court over testamentary trustees; In re Noah, 88 Cal. 471, quoting from the principal case on this point.

General Citation.—*Wise v. Williams*, 72 Cal. 548, to the point that unless the complaint shows that the cause of action is barred the defense must be by answer, and it not appearing from the complaint when the administrator was appointed, the question cannot be raised by demurrer.

24 Cal. 502-505. **MILLER v. STEWART.**

Fraudulent Intent in the sale or disposition of property is a question of fact and an instruction taking it from the jury's consideration is error, pp. 504, 505.

Cited, *Levitzky v. Canning*, 33 Cal. 305, to the point that the jury should not be charged as to facts in the sense of the constitutional prohibition; *Bull v. Bray*, 89 Cal. 302, quoting from the principal case with approval.

24 Cal. 505-513. **ALEXANDER v. GREENWOOD.**

Parties.—Decree of Foreclosure does not affect those not made parties or privies to the action, p. 512.

Cited in extended note 70 Am. Dec. 578, as to defect in parties; note 76 Am. Dec. 550 to the same point.

Sale.—Equitable right of redemption gives the right to sale on execution of interest not cut off by foreclosure, p. 512.

Cited, *Martens v. Gilson*, 13 Nev. 492, and conceded as law in the opinion, but in that case the premises mortgaged were claimed and held as a homestead, and when the mortgage lien was satisfied the homestead was declared to have attached.

24 Cal. 513-518. **ALDRICH v. PALMER.**

New Trial.—Newly discovered evidence which is merely cumulative is no ground therefor, p. 515.

Cited, *Barton v. Laws*, 4 Colo. App. 219, and *Brown v. Evans*, 17 Fed. Rep. 917; 8 Sawy. 496, both cases in affirmance.

Where Record does not contain instructions it will be presumed that the law applicable was correctly given, p. 515.

Cited, *Dawson v. Pogue*, 18 Oreg. 117, to the same effect.

The law fixes no precise rule of damages in cases of negligence but leaves their assessment to jury, p. 516.

Cited, *Wheaton v. North Beach etc. Co.*, 36 Cal. 591; *Lee v. Southern Pac. R. R. Co.*, 101 Cal. 120; *Solen v. Virginia etc. Co.*, 13 Nev. 154; and *Speck v. Gray*, 14 Wash. 591, all approving the rule; *North Point etc. Irr. Co. v. Canal Co.*, 23 Utah, 206, applying rule in action by way of supplemental complaint in injunction proceedings where use of water in irrigating ditch damaged by befoulment.

Same.—The judgment of the jury as to damages should control unless verdict is unjust or oppressive or passion or prejudice clearly appears, pp. 516-518.

Cited, *Boyce v. California Stage Co.*, 25 Cal. 474, in affirmance; *Tarbell v. Central Pac. R. R. Co.*, 34 Cal. 623, with approval, although in that case the verdict was held excessive; *Kinsey v. Wallace*, 36 Cal. 484, in dissenting opinion, although the judgment was reversed and case remanded; *Wheaton v. North Beach etc. Co.*, 36 Cal. 591, in affirmance. So, also, in *Morgan v. Southern Pac. Co.*, 95 Cal. 508, where a verdict for fifteen thousand dollars for the company's negligence was held not excessive; *Lee v. Southern Pac. Co.*, 101 Cal. 120, where the rule is followed; *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 286, where damages for fourteen thousand dollars for the death of a wife and mother were declared not excessive; *Howland v. Oakland C. St. Ry. Co.*, 110 Cal. 523, where a verdict of ten thousand dollars was affirmed as not excessive; *Speck v. Gray*, 14 Wash. 591, where the action was for seduction of a wife and alienation of her affections and a verdict of fifteen thousand dollars was sustained as within the rule; *Brown v. Evans*, 17 Fed. Rep. 918; 8 Sawy. 496, approving the rule.

General Citation.—*McGlynn v. Brodie*, 31 Cal. 382, as authority, but held inapplicable to the question of liability of master for injury to a servant, although the court says it was raised by counsel in the principal case, although not discussed in the opinion.

24 Cal. 518-560. FRENCH v. TESCHEMAKER.

Constitutions must be construed, if possible, so as to give same force and effect to each provision, each and every clause being intended for some useful purpose, p. 539.

Cited, *Lloyd v. Silver Bow Co.*, 11 Mont. 413, quoting from the principal case to this point.

Corporations.—At common law, no individual liability is imposed upon members of a corporation, pp. 540, 541.

Cited, *Marshall v. Sherman*, 148 N. Y. 18, 51 Am. St. Rep. 657, with approval; note 3 Am. St. Rep. 834; note 76 Am. St. Rep. 129.

Stockholders—Constitutional Law.—Section 36 of former constitution is not self-executing, but legislature may regulate liability and fix rule of ascertainment of each stockholder's proportion thereof, pp. 540, 544.

Cited, *Larrabee v. Baldwin*, 35 Cal. 166; *McGowan v. McDonald*, 111 Cal. 63, 64, 65; 52 Am. St. Rep. 151, 152, 153, both cases in affirmance and the latter case fully considering the point; *Jones v. Jarman*, 34 Ark. 331, noting the same section and holding that a creditor of the corporation could enforce the liability in equity; *Tuttle v. National Bank*, 161 Ill. 503, applying the same rule to a Kansas constitutional provision; *Willis v. Mabon*, 48 Minn. 152, 31 Am. St. Rep. 631, where the rule is considered, but declared not in point as the language of the Minnesota constitution failed to indicate the necessity of ancillary legislation to effectuate its purpose and said constitution was held self-executing; *Marshall v. Sherman*, 148 N. Y. 18, 51 Am. St. Rep. 657, in affirmance, adopting a like rule, but a question of conflict of laws was involved; *Brown v. Hitchcock*, 36 Ohio St. 682, as so deciding, but the constitution of Ohio was declared to be modeled after the New York constitution; *May v. Black*, 77 Wis. 104, to the same point as the principal case; *Morley v. Thayer*, 3 Fed. Rep. 740, in affirmance; *United States v. Stanford*, 69 Fed. Rep. 43, holding the rule of the principal case binding on the federal courts; exhaustive note 3 Am. St. Rep. 837.

Cross-references.—See *McDonald v. Patterson*, 54 Cal. 245; *Hyatt v. Allen*, 54 Cal. 353; *People v. Board of Ed. of Oakland*, 55 Cal. 331; *People v. Hoge*, 55 Cal. 612.

Constitution.—General laws must have uniform operation operating equally on all persons and things without discrimination, or indulgence granted to one not accorded to another. p. 544.

Cited, *Bourland v. Hildreth*, 26 Cal. 256, in dissenting opinion in connection with the constitutionality of an election law; *Jackson v. Shawl*, 29 Cal. 271, in affirmance as applied to a law as to rate of interest pawnbrokers may charge; *Appeal of N. B. & M. R. R. Co.*, 32 Cal. 527, in dissenting opinion upon the constitutionality of an act for widening streets; *Corwin v. Ward*, 35 Cal. 199, in affirmance as applied to an act for taxing costs against losing litigants in San Francisco; *People v. S. F. & A. R. R. Co.*, 35 Cal. 616, holding that the legislature had no power to tax a part and exempt a part of the commerce of San Francisco port from certain wharf and dockage charges; *Brooks v. Hyde*, 37 Cal. 375, in affirmance, holding the act of 1864 as to the limitation of actions for recovery of real estate in San Francisco not unconstitutional; *Ex parte Smith*, 38 Cal. 710, following the rule and deciding that legis-

lative enactments or municipal ordinances to prevent noisy amusements and immorality are constitutional; *Miller v. Kister*, 68 Cal. 145, in affirmance, holding the act of 1883 as amended 1885 to establish a uniform system of county and township governments to be local or special legislation; *Ptope v. Henshaw*, 76 Cal. 445, with approval as applied to the law of 1885, as to police courts in cities having inhabitants within certain limited numbers; *Ex parte Clancey*, 90 Cal. 558, in affirmance, holding, however, that section 1222 of the Code of Civil Procedure must prevail over the clause of section 64, of the Insolvent Act as to appeal in contempt cases; *Sasser v. Martin*, 101 Ga. 456, noted under *Smith v. Judge*, 17 Cal. 554; *Henderson v. State*, 137 Ind. 579, in dissenting opinion, quoting from the principal case (p. 544) as authority in connection with the constitutionality of an act as to compensation and duties of certain county officers; *Vermont etc. Co., v. Whithed*, 2 N. Dak. 93, holding that a certain statute as to building and loan associations was a general and not a special one; *Northern Pac. R. R. Co. v. Barnes*, 2 N. Dak. 376, as authority in consideration of the question of the classification of railroad corporations for taxation purposes; *McGill v. State*, 34 Ohio St. 240, holding a certain act as to the selection of jurors for a certain county not a general law; *Driggs v. State*, 52 Ohio St. 51, in substantial affirmance of the rule.

Refusal of Legislature to exercise power or its nonaction is no argument against the power, p. 545.

Cited, *People v. Tilton*, 37 Cal. 626, to the same point in connection with the question of appointment to office.

Act is Unconstitutional exempting stockholder from liability and persons organized under such act would acquire no corporate rights, p. 545.

Cited, *McGowan v. McDonald*, 111 Cal. 64; 52 Am. St. Rep. 152, in affirmance.

Constitutional Law.—Entire act is not unconstitutional for mere defect in independent part, but it is otherwise if the parts are so interblended that it is clear that neither would have been enacted without the other, pp. 546-548.

Cited, *Wills v. Austin*, 53 Cal. 179, and so holding; *Ex parte Frazer*, 54 Cal. 97, in affirmance; *McGowan v. McDonald*, 111 Cal. 65, 52 Am. St. Rep. 153, approving the doctrine.

Legislative Grants of corporate power must be exercised and enjoyed in the mode, manner and upon the conditions presented, p. 550.

Cited, *McCoy v. Briant*, 53 Cal. 250, in affirmance; note 81 Am. Dec. 107.

Municipal Corporations may, when authorized by the legislature, subscribe to stock of private corporations, pp. 550, 551.

Cited, *Commissioners of L. Co. v. Miller*, 7 Kan. 506, 12 Am. Rep. 440.

in affirmance, citing also two and one-third consecutive pages of authority; *Harcourt v. Good*, 39 Tex. 472, to the same effect; citing, also, authorities from twenty-five states.

In Construction of Statutes the intent is to be ascertained and search may be extended to every provision of the act, regard being had to substance rather than form, pp. 553, 554.

Cited, *People v. San Francisco*, 36 Cal. 604, to the same point and so holding; *Eyre v. Harmon*, 92 Cal. 585, holding also that words and sentences may be transposed, if necessary, in order that every word may have a practical effect; *State v. Santee*, 111 Iowa, 6, 82 Am. St. Rep. 492, but holding act unconstitutional.

Construction making statute unconstitutional should be avoided if possible, p. 554.

Cited, *Town of Wilton v. Town of Weston*, 48 Conn. 338; *Whitehurst v. Dey*, 90 N. C. 545, both in affirmance; *Northern Pac. R. R. Co. v. Barnes*, 2 N. Dak. 376, in dissenting opinion, quoting from the principal case (p. 544); *Bird v. County of Wasco*, 3 Oreg. 284, with approval; *Blanchard v. Hartwell*, 131 Cal. 266, noted under *Argenti v. San Francisco*, 16 Cal. 283; *Talcott v. Pine Grove*, 1 Flipp. 136, Fed. Cas. No. 13,735, sustaining railway aid act.

Personal Liability of stockholders may be waived by contractors with corporation, p. 559.

Cited, *Wells v. Black*, 117 Cal. 161, 59 Am. St. Rep. 164, as unquestionable law; *Bush v. Robinson*, 95 Ky. 497, with approval; exhaustive note 3 Am. St. Rep. 848.

General Citations.—*People v. Coon*, 25 Cal. 648, 650, 651, considering the effect of the act of 1863, and that of 1864, passed when the principal case was pending; also noting the question of compromise in relation thereto. It is further held that the principal case is in a qualified sense a final judgment compelling the supervisors of San Francisco to execute and deliver certain bonds to the railroad company under the act of 1863; *Pixley v. Western Pac. R. R. Co.*, 33 Cal. 188, 192, 193, 91 Am. Dec. 625, 629, but only as a case where the attorneys employed were the plaintiffs in the citing case.

24 Cal. 561-562. HARLAN v. RACKERBY.

Mortgage.—Writ of assistance cannot dispossess purchaser without notice of suit before *lis pendens* filed, pp. 561, 562.

Cited, extended note 51 Am. Dec. 155; notes 76 Am. Dec. 550, 567.

24 Cal. 562-569. AH YEW v. CHOATE.

Patent for School Lands is a judicial determination that land conveyed is not mineral land, p. 568.

Cited in *Saunders v. La Purisima etc. Co.*, 125 Cal. 165, noted under *Doll v. Meador*, 16 Cal. 295; *Cleary v. Skiffich*, 28 Colo. 368, where lode claim was discovered without lines of millsite, but boundaries as fixed embraced portion of millsite claim, action of lode claimants in projecting claim so as to include part of millsite not trespass within rule that title to mining claim cannot be initiated by trespass; *O'Connor v. Frasher*, 56 Cal. 501, and *Dodge v. Perez*, 2 Sawy. 655, both to this same point, and also to the point that the same cannot be attacked collaterally, but the court in the principal case declared it unnecessary to consider this last question; *Dreyfus v. Badger*, 108 Cal. 65, quoting from the principal case. The citing case was also one of attempted collateral attack of the patent.

General Citations.—Extended note 63 Am. Dec. 93, 96, considering exhaustively the law governing the rights of miners and settlers upon public lands and other analogous questions.

24 Cal. 569-585. THORNTON v. MAHONEY.

Mexican Grant.—Until segregation and location by the United States government grantee or his successor is entitled as against third persons without title or possession of all land within exterior boundaries, pp. 579-581.

Cited, *Carpentier v. Webster*, 27 Cal. 564; *Love v. Shartzter*, 31 Cal. 494, both in affirmance; *Bernal v. Lynch*, 36 Cal. 145, approving the principle, but applying it to the rule that the title is not perfect until such lands are segregated.

Appeal to Supreme Court suspends all proceedings below, pp. 584, 585.

Cited and affirmed in the following cases: *People v. Frisbie*, 26 Cal. 139; *McGarrahan v. Maxwell*, 28 Cal. 91, also holding that no appeal bond was required; *Hills v. Sherwood*, 33 Cal. 479; *McGarrahan v. New Idria M. Co.*, 49 Cal. 336; *Harris v. Barnhart*, 97 Cal. 550, also holding that in such case the judgment is inadmissible in another case, even between the same parties, and considering the effect of section 1049 of the Code of Civil Procedure; *Bullard v. McArdle*, 98 Cal. 359, 35 Am. St. Rep. 178, in a case of appeal from a justice court, but holding that by removal of the record the judgment was vacated and set aside; cited, *Glenn v. Brush*, 3 Colo. 25, as opposed to the point that a judgment suspended by a writ of error operating as a supersedeas is not evidence of title, it being suspended for all purposes. Affirmed, *Plaisted v. Nowlan*, 2 Mont. 362; so, also, in *Sharon v. Hill*, 26 Fed. Rep. 391; 11 Sawy. 371, and also deciding that such judgment is at such time not admissible in evidence.

General Citation.—*Treadway v. Semple*, 28 Cal. 658, distinguishing the principal case in that the question was not as in the citing case, whether, when the appeal was dismissed or the decree confirmed by the

appellate court, the rights of the parties became fixed by relation to the date of the decree; noting also an error in the reference (p. 582) to the "act of Congress of June 14th, 1860," which should have been to the state act of April 26th, 1858.

24 Cal. 585-608. **BRANHAM v. M. & C. C. OF SAN JOSE.**

Pleadings.—Complaint should aver facts and not conclusions of law, p. 602.

Cited, *Hedges v. Dam*, 72 Cal. 522, to the same effect; *Callahan v. Broderick*, 124 Cal. 83, as to allegations of "lawfulness" of demand and similar allegations.

Pleadings.—Demurrer admits truth of issuable and well-pleaded facts, but not conclusions therefrom of counsel though stated in complaint, p. 602.

Cited, *Water Works v. San Francisco*, 82 Cal. 319, 320, in dissenting opinion, although the complaint in that case was held sufficient to sustain a judgment declaring void an ordinance as to water rates; *American Water Works Co. v. State*, 46 Neb. 199; 50 Am. St. Rep. 612, in affirmative; *Dundee etc. Co. v. Hughes*, 20 Fed. Rep. 40; 10 Sawy. 147, to the point that a demurrer admits only such allegations as the law adjudges true, but does not admit mere conclusions of law in the pleadings; extended note 16 Am. St. Rep. 134.

Mexican Law.—Ayuntamiento had no power to mortgage lands of pueblo and city was not estopped by decree of foreclosure to assert invalidity of title attempted to be conveyed by sheriff's deed thereunder, pp. 602, 604.

Cited, *San Francisco v. Canavan*, 42 Cal. 556, to the point that these lands were not subject to forced sale on execution and could not be alienated except in accordance with the trust; *People v. Halladay*, 93 Cal. 250, 27 Am. St. Rep. 194, explaining the case as so decided and declaring it not to be in conflict with the point that a judgment against the city as to certain land held in trust was conclusive; *Oakland v. Oakland Water F. Co.*, 118 Cal. 228, quoting from the principal case (p. 604) as to the powers of the ayuntamiento and estoppel; *Mayor etc. v. Watumpha W. Co.*, 63 Ala. 634, to the point that the laches of corporation officers did not preclude the corporation, upon a bill in equity to enforce the judgment, from showing that certain bonds covered by the judgment were issued in violation of a statute.

Powers of Municipal Corporation.—Parties dealing with such corporation are chargeable with knowledge of its powers and act at their peril, p. 604.

Cited, *Wallace v. Mayor of San Jose*, 29 Cal. 188, in affirmance.

Mere Release is Void unless releasee is in possession, p. 606.

Cited, note 53 Am. Rep. 750, 752, to the same point.

Purchaser under Foreclosure Sale cannot maintain action for purchase money, p. 608.

Cited, note 14 Am. Dec. 131, note 76 Am. Dec. 567, as to the right to be relieved against a mistake of law in independent action.

24 Cal. 609. CARPENTIER v. WILLIAMSON.

Undertaking on Appeal filed before notice filed and served will be dismissed on motion, p. 609.

Cited, *Little v. Jacks*, 68 Cal. 345, in affirmative. So, also, in *Alvord v. McGauchy*, 4 Colo. 97; and in *Johnson v. Badger M. & M. Co.* 12 Nev. 262.

Cross-reference.—*Buffendeau v. Edmonson*, 24 Cal. 94-98.

24 Cal. 609-630; 85 Am. Dec. 84. TERRY v. MEGERLE.

Public Lands.—Grant of five hundred thousand acre tract gave state no right of selection, as against United States, before survey, pp. 624, 625.

Cited, *Athearn v. Poppe*, 25 Cal. 633, to the same point upon like facts; *Megerle v. Ashe*, 27 Cal. 328, 87 Am. Dec. 79, to the same effect; *Grogan v. Knight*, 27 Cal. 520, with approval. So, also, in *Smith v. Athern*, 34 Cal. 512; and in *Toland v. Mandell*, 38 Cal. 33, in connection with the construction of the act of 1866; *Hastings v. Devlin*, 40 Cal. 363, 370, to the point that the location of school land warrants issued under act of 1852 upon unsurveyed lands was void; *Hastings v. Jackson*, 46 Cal. 243, to the point that valid selection can be made till after survey. So, also, in *Chant v. Reynolds*, 49 Cal. 217, in connection with the act of 1866; approved in *Medley v. Robertson*, 55 Cal. 398; and *Roberts v. Columbet*, 63 Cal. 24; cited, *Layton v. Farrell*, 11 Nev. 455, holding such grant to be in praesenti taking effect upon survey; *McNee v. Donahue*, 142 U. S. 595, to the point that it is the act of surveyors rather than the will of Congress which determines the state's title; note 39 Am. St. Rep. 768.

Same.—Valid selection cannot be made of lands occupied by pre-emptor, pp. 625-628.

Cited, *Athearn v. Poppe*, 25 Cal. 633, to the same point upon like facts; *Megerle v. Ashe*, 33 Cal. 89, in affirmance. So, also, in *Hastings v. Jackson*, 46 Cal. 243; and in *Layton v. Farrell*, 11 Nev. 455.

Same.—Pre-emptor may attack patent, for such selection in ejectment as he is in privity with the common source of title, pp. 628, 630.

Cited, with approval in the following cases, *Athearn v. Poppe*, 25 Cal. 633; *Kile v. Tubbs*, 28 Cal. 403; *Rosecrans v. Douglass*, 52 Cal. 216;

Schieffery v. Tapa, 68 Cal. 186; *White v. Allen*, 3 Oreg. 113; cited, *People v. Stratton*, 25 Cal. 251, as to what is a requisite title or interest to enable one to impeach a patent; *Carder v. Baxter*, 28 Cal. 101, in affirmance in connection with a patent to swamp and overflowed land and what defendant in ejectment must show; *Hagar v. Lucas*, 29 Cal. 312, affirming the principle in a case where certain evidence to attack a Mexican grant was rejected; *Robinson v. Forrest*, 29 Cal. 321, but only generally upon the point as to what title from the United States is required to enable one to contest a state patent; *Rondell v. Fay*, 32 Cal. 362, affirming the principle; notes 12 Am. St. Rep. 49; 31 Am. St. Rep. 236; 38 Am. St. Rep. 615; 43 Am. St. Rep. 186.

24 Cal. 630-633. **PEOPLE v. JACKSON.**

Cancellation of Patent.—One who relies upon a pre-emption must plead the facts giving the right, p. 633.

Cited, *Burrell v. Haw*, 40 Cal. 377, to the same point; distinguished, *Treadway v. Wilder*, 8 Nev. 97, as having so decided after demurrer and refusal to amend.

Pleading.—Statutory conditions precedent must be specially pleaded although a general averment thereof is sufficient in cases of contract, p. 633.

Cited, *People v. Holladay*, 25 Cal. 303, in affirmance; *Himmelman v. Danoz*, 35 Cal. 448, with approval as to statutory conditions precedent; *Rhoda v. Alameda Co.*, 52 Cal. 352, following the doctrine; *Biron v. Board of W. Commrs.* 41 Minn. 520; and in *M'Keon v. Northern Pac. R. Co.*, 45 Fed. Rep. 465, both in affirmance as to statutory conditions precedent; *White Pine Co. v. Herrick*, 19 Nev. 37, but distinguished in that that action was upon a contract between the defendants and the state.

Amendment after demurrer sustained and affirmance of judgment below will not be allowed, p. 633.

Cited, *Sutter v. San Francisco*, 36 Cal. 117, in affirmance; *Greelley v. McCoy*, 3 S. Dak. 625, but distinguished as to leave to amend after appeal from demurrer, no judgment having been rendered.

24 Cal. 634-637. **CRARY v. CAMPBELL.**

Mining Claim.—Where transfer is by bill of sale, parol evidence is inadmissible, p. 636.

Cited, *Patterson v. Keystone M. Co.*, 30 Cal. 365, in affirmance.

24 Cal. 638-640. **NOBLE v. HOOK.**

Homestead.—Statutory requirement of declaration of homestead being made and filed is constitutional, pp. 639, 640.

Cited, *Speidel v. Schlosser*, 13 W. Va. 700, with approval; *Price v. Wolfer*, 33 Or. 19, holding secondary evidence of transfer of personality

inadmissible when bill of sale not accounted for; *In re Swearinger*, 5 Sawy. 54, but holding that the courts of Nevada were not bound to adopt the construction of the California statute, although the same act, as the constitutions of the two states differed; note 87 Am. Dec. 468.

24 Cal. 640-643. **PEOPLE v. CARKHUFF.**

Murder.—Declarations of deceased not part of *res gestae* and not in extremis are inadmissible, pp. 642-643.

Cited, *People v. Carlton*, 57 Cal. 84, 85, 40 Am. Rep. 114, to the same effect; *People v. Taylor*, 59 Cal. 648, but referred to generally as sustaining a like rule; *People v. Irwin*, 77 Cal. 500, where certain declarations were rejected in conformity with the doctrine; *People v. Gress*, 107 Cal. 463, in affirmance; *Montag v. People*, 141 Ill. 83, but only generally as to when declarations are part of the *res gestae*; *Siebert v. People*, 143 Ill. 588, where certain declarations made within a year prior to death were rejected.

24 Cal. 644-672. **MINTURN v. BROWER.**

Mexican Grants.—Under treaty of Guadalupe Hidalgo, Mexicans having a perfect title were protected, p. 658.

Cited, *Steinbach v. Moore*, 30 Cal. 507, 508, with approval of the doctrine; *Phelan v. Poyoreno*, 74 Cal. 452, in affirmance.

Same.—Titles of Mexicans perfect at time of acquisition of California were not compelled to submit them for confirmation, pp. 659-663.

Cited, *Emeric v. Penniman*, 26 Cal. 123, to substantially the same effect; *Stevenson v. Bennett*, 35 Cal. 431, in affirmance; *Harvey v. Barker*, 126 Cal. 271, but holding patent to Mexican grantee to conclude all claims of mission or pueblo Indians not presented for confirmation; *Banks v. Moreno*, 39 Cal. 236, 237, commenting on and explaining this doctrine. So, also, in *Schmit v. Giovanari*, 43 Cal. 622; *Phelan v. Poyoreno*, 74 Cal. 452, in affirmance. Denied in *Botiller v. Dominguez*, 130 U. S. 243, 254, 255, reversing S. C. 74 Cal. 457, holding that no Spanish or Mexican grant can be of any validity which has not been submitted to and confirmed by the commissioners, or, if rejected by that board, confirmed by the district or supreme court of the United States. Cited, *Boyle v. Hinds*, 2 Sawy. 529, deciding that although the holder of a perfect Mexican grant may not be compelled to submit it for confirmation, yet, having done so, and the grant being confirmed, surveyed, and patented, the final decree and patent are conclusive; *Dodge v. Perez*, 2 Sawy. 646, discussing generally the right of a claimant to purchase under act of Congress of July 23d, 1866; note 79 Am. Dec. 162; *Carpentier v. Montgomery*, 13 Wall. 489, but referred to as not precluding further examination as to the validity of the title in dispute, and holding that where such grant does not identify the precise tract of land granted,

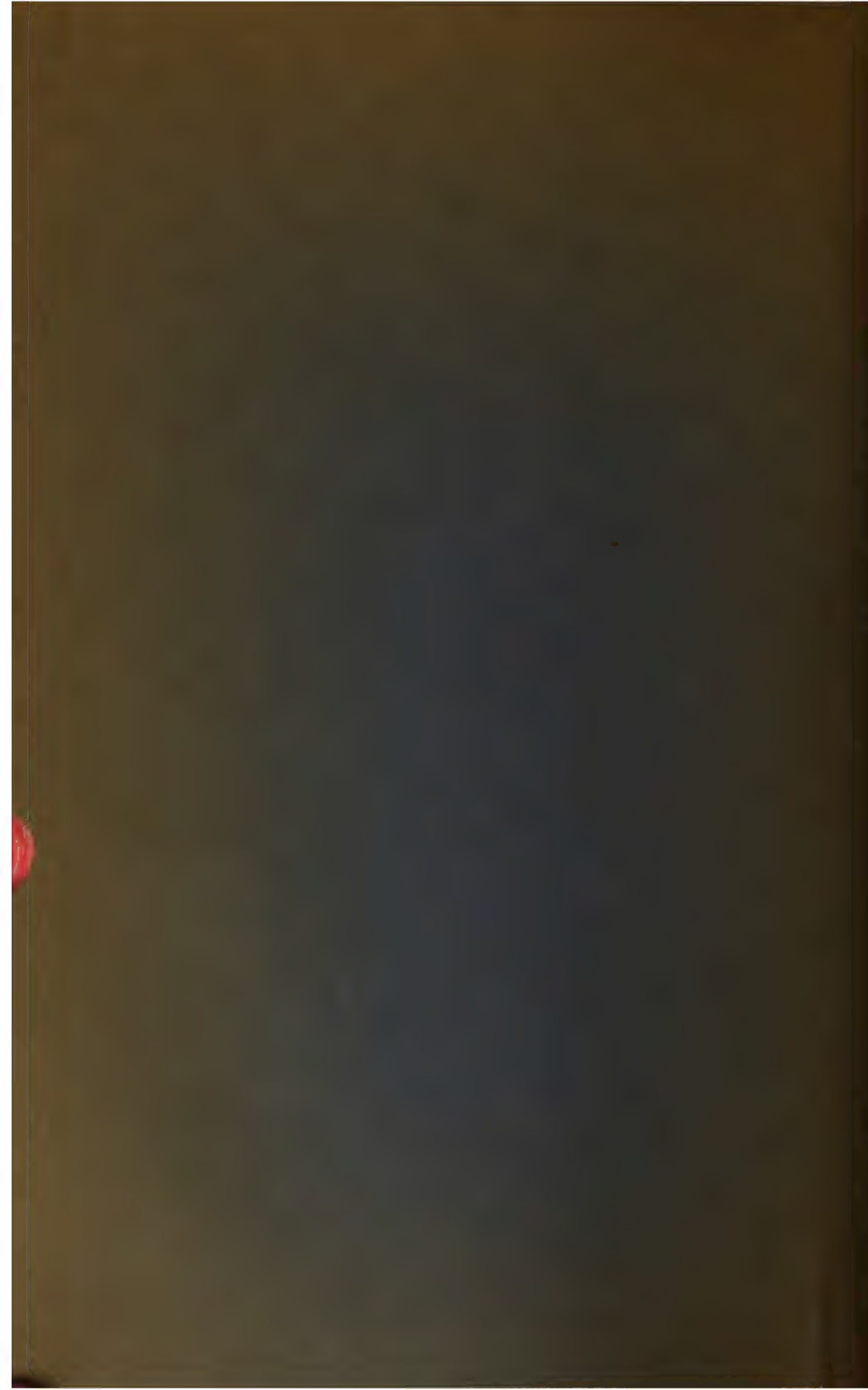
the title is an imperfect one, needing further action of the United States government to make it perfect.

Same.—Treaty operated as a confirmation of all perfect titles, pp. 661, 672.

Cited, *Seale v. Ford*, 29 Cal. 107, to the same effect; *Thompson v. Doaksum*, 68 Cal. 597, in affirmance.

Same.—Third persons protected against confirmation were only those holding title prior to acquisition of California, pp. 668, 669.

Cited, *De Arguello v. Greer*, 26 Cal. 627, quoting from the principal case (pp. 668, 669) to the same point; so, also, in *Miller v. Dale*, 44 Cal. 577.



REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

CHARLES A. TUTTLE,
REPORTER.

VOLUME 25

WITH
NOTES ON CAL. REPORTS

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1906.

Entered according to Act of Congress, in the year of our Lord, 1865, by
CHARLES A. TUTTLE,
In the Clerk's Office of the District Court of the United States in and for the
Northern District of the State of California.

COPYRIGHT, 1898.

BY BANCROFT—WHITNEY CO.

COPYRIGHT, 1905,

BY BANCROFT—WHITNEY CO.

COPYRIGHT, 1906,

BY BANCROFT—WHITNEY CO.

JUSTICES THE SUPREME COURT

DURING THE TERM OF THESE REPORTS.

HON. SILAS W. SANDERSON.....CHIEF JUSTICE.

HON. JOHN CURREY.....

HON. LORENZO SAWYER.....

HON. AUGUSTUS L. RHODES...

HON. OSCAR L. SHAFTER.....

} ASSOCIATE JUSTICES.

OFFICERS OF THE COURT.

J. G. McCULLOUGH, Esq.....ATTORNEY-GENERAL.

W. D. HARRIMAN, Esq.....CLERK.

CHARLES A. TUTTLE, Esq.....REPORTER.

DISTRICT JUDGES.

FIRST DISTRICT.....	PABLO DE LA GUERRA.
SECOND DISTRICT.....	W. T. SEXTON.
THIRD DISTRICT.....	S. B. McKEE.
FOURTH DISTRICT.....	E. D. SAWYER.
FIFTH DISTRICT.....	JAMES M. CAVIS.
SIXTH DISTRICT.....	J. H. McKUNE.
SEVENTH DISTRICT.....	J. B. SOUTHARD.
EIGHTH DISTRICT.....	WILLIAM R. TURNER.
NINTH DISTRICT.....	E. GARTER.
TENTH DISTRICT.....	I S. BELCHER.
ELEVENTH DISTRICT.....	S. W. BROCKWAY.
TWELFTH DISTRICT.....	O. C. PRATT.
THIRTEENTH DISTRICT.....	J. M. BONDURANT.
FOURTEENTH DISTRICT.....	T. B. McFARLAND.
FIFTEENTH DISTRICT.....	S. H. DWINELLE.

CASES REPORTED.

	Page
Abadie et als., Curiae v.....	502
Aitken et al. v. Mendenhall.....	212
Atherton, Carpentier v.....	564
Athearn v. Poppe.....	631
Backus, Irwin v.....	214
Bartram v. Ogilby et als.....	233
Bartram v. Central Turnpike Co.....	233
Board of Supervisors, Miller v.....	92
Bodley v. Ferguson et als.....	534
Boggs et al., Muller v.....	175
Bosworth v. Danslen.....	296
Boyce v. California Stage Co.....	460
Boyd, Estate of.....	511
Bounds, Priest v.....	188
Bours v. Walsh.....	631
Brennan et al. v. Wallace et als.....	108
Brown v. Martin et als.....	82
Brown v. Scott.....	189
Burson v. Cowles.....	535
Cahoon v. Marshall et als.....	197
California Stage Co., Boyce v.....	460
Carpentier v. Williamson et als.....	154
Carpentier v. Atherton.....	564
Carr, Estate of.....	535
Central Turnpike Co., Bartram v.....	233
Clarke, Robles v.....	217
Clarke v. Huber.....	598
Coleman et als., Hicks v.....	122
Coon et als., Peelle v.....	635
Copper Hill M. Co. v. Spencer et als., No. 1.....	11
Copper Hill M. Co. v. Spencer et als., No. 2.....	19
Cowles, Burson v.....	535

	Page
Crary, Union Water Company v.....	504
Crowell v. Sonoma Co. v.....	513
Curlie v. Abadie et als.....	502
Danson, Bosworth v.....	394
De Castro v. Richardson et als.....	40
Dougherty et al., Gray et al. v.....	304
Eastman, People v.....	601
Elam, Porter v.....	521
Ellis et als., Tavis v.....	515
Emmons, Seale v.....	508
Englund v. Lewis et al.....	537
Estate of Boyd.....	511
Estate of Carr.....	535
Faulkner et al., Lick v.....	404
Ferguson et als., Bodley v.....	504
Findla, Middleton et al. v.....	70
Forem, People v.....	561
Fox v. Fox.....	557
Garcia, People v.....	551
Greely v. Townsend.....	604
Gray et al. v. Dougherty et al.....	200
Gregory v. Haworth.....	555
Hagar v. Mead.....	596
Haworth, Gregory v.....	553
Herron v. Hughes et als.....	505
Hicks v. Coleman et als.....	122
Higgins v. Houghton.....	252
Hockett et al., Mitchell v.....	539
Holm v. Beach et al.....	37
Holladay et al., People v.....	300
Houghton, Higgins v.....	252
Houghton, Tyler v.....	26
Huber, Clarke v.....	593
Hughes et als., Herron v.....	555
Hurlburt v. Jones.....	225
Hutton v. Reed et als.....	478
Irwin v. Backus et als.....	214
Jones v. Parsons et al.....	100
Jones, Hurlburt v.....	225
Kieraki v. Mathews.....	591
Kimball v. Semple et als.....	440
Kramer v. Market Street R. R. Co.....	434
Lackman et al. v. Wood et als.....	141
Lay v. Neville.....	545

CASES REPORTED.

7

	Page.
Lent v. Morrill et als.....	492
Lewis et al., Englund v.....	337
Lick v. Faulkner et al.....	404
Lick v. Madden.....	302
Love et al., MacIay v.....	367
Love et als., People v.....	520
Lyle v. Rollins et al.....	437
MacIay v. Love et al.....	367
Madden, Lick v.....	202
Market Street R. R. Co., Kramer v.....	434
Marshall et als., Cahoon v.....	197
Martin et als., Brown v.....	82
Mathews, Kieraki v.....	591
McCammon et als., Trinity County v.....	117
McEvoy et al., Wilson v.....	169
McGlynn et al., Moore et al. v.....	384
McGrath et al., Polack v.....	54
McNulty et als., Wiseman v.....	230
Mead, Hagar v.....	598
Mendenhall, Altken et al. v.....	212
Middleton et al. v. Findla.....	76
Miller v. Board of Supervisors.....	93
Mitchell v. Hockett et al.....	538
Morrill et als., Lent v.....	492
Morrell, Uridias v.....	31
Moore et al., McGlynn et al. v.....	384
Moss v. Shear.....	38
Muller v. Boggs et al.....	175
Neville, Lay v.....	545
O'Connell, Tewksbury v.....	362
Ogilby et als., Bartram v.....	283
Osborn, Sneed v.....	619
Parsons et al., Jones v.....	100
People v. Coon et als.....	635
People v. Love et als.....	520
People v. Garcia.....	531
People v. Stratton.....	242
People v. Holladay et al.....	300
People v. Foren.....	361
People v. Eastman.....	601
Polack v. McGrath et al.....	54
Poppe, Athearn v.....	631
Porter v. Blam.....	291
Preston, Walls v.....	59
Priest v. Bounds.....	188
Reed et als., Hutton v.....	478
Richardson et als., DeCastro v.....	49
Roach et al., Holm v.....	37

	Page.
Robles v. Clarke.....	317
Rollins et al., Lyle v.....	437
Rush, Streeter v.....	67
Scott, Brown v.....	189
Seale v. Emmons.....	293
Semple et als., Kimball v.....	440
Shear, Moss v.....	38
Sneed v. Osborn.....	619
Sonoma County, Crowell v.....	313
Spencer et als., Copper Hill M. Co. No.1, v.....	11
Spencer et als., Copper Hill M. Co. No. 2, v.....	18
Stratton People v.....	242
Streeter v. Rush.....	67
Tavis v. Ellis et als.....	520
Tewksbury v. O'Connell.....	262
Townsend, Greely v.....	604
Trinity County v. McCammon et als.....	117
Tuolumne County Water Co., Turner et al. v.....	397
Turner et al. v. Tuolumne County Water Co.....	397
Tyler v. Houghton.....	26
Union Water Co., Crary v.....	504
Uridias v. Morrell, No. 2.....	31
Wallace et als., Brennan et al. v.....	108
Walls v. Preston.....	59
Walsh, Bours v.....	631
Williamson et als., Carpentier v.....	154
Willson v. McEvoy et al.....	169
Wiseman v. McNulty et als.....	299
Wood et als., Lackman et al. v.....	147

APRIL TERM, 1864.

{12}

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
APRIL TERM 1864.

COPPER HILL MINING COMPANY v. JAMES SPENCER, ROBERT EPERSON, EUSTACE PARKER, HENRY ATWOOD, L. LUCE, HENRY LUCE, AND WILLIAM WHETTSTONE. (No. 1.)

MOTION FOR NEW TRIAL—STAY OF PROCEEDINGS.—The pendency of a motion for a new trial does not operate as a stay of proceedings, so as to deprive the Court of the power of vacating an order appointing a receiver made before the trial.

RECEIVER—VACATING ORDER APPOINTING.—The appointment of a receiver rests in the sound discretion of the Court upon a view of all the facts; one of which is, that the party asking the appointment should make out a *prima facie* case; and after an *ex parte* appointment has been made, the order may be vacated, either before or after the trial, upon a proper showing.

EFFECT OF MOTION FOR NEW TRIAL ON RECEIVER.—Where, pending an action, a receiver has been appointed, and on the trial judgment of nonsuit is rendered against the party at whose instance the receiver was appointed, a motion for a new trial suspends the operation of the judgment so as to prevent it from operating as a discharge of the receiver, unless an order is made discharging the receiver.

Larvey v. Wells, Fargo & Co., 4 Cal. 106, commented on.

APPEAL from the District Court, Sixteenth Judicial District, Calaveras County.

The facts are stated in the opinion of the Court.

W. L. Dudley, for Appellant.

By our statute, a receiver may be appointed by the Court, or a Judge thereof.

"1st. Before judgment, provisionally, on the application of either party, when he establishes a *prima facie* right to the property, or to an interest in the property which is the subject of the action, and which is in the possession of an adverse party, and the property, or its rents and profits, are in danger of being lost or materially injured or impaired."

"3d. In such other cases as are in accordance with the practice of Courts of equity jurisdiction." (Wood's Digest, Art. 878.)

It has been well settled by this Court that the removal of metals from a mine is "taking away the entire substance of the estate, and comes within that class of trespass in which injunctions are now universally granted." (*Merced Mining Company v. Fremont*, 7 Cal 321.)

Nothing has transpired subsequent to the appointment of the receiver to rebut the *prima facie* right of plaintiff to the mine.

The fact that on the trial of this cause the plaintiff became nonsuited, rebuts the *prima facie* right of plaintiff to the mine, is not tenable.

In *Wilson v. Corbier*, 13 Cal. 168, the Court says: "As a nonsuit determines *nothing*, the plaintiff may proceed, and under better proof, if he can procure it, try his case anew."

Again, we submit that the plaintiff having moved the Court to vacate said judgment of nonsuit, and grant the plaintiff a new trial, and served notice and filed statement to that end such motion operated as a stay of proceedings, extending through the whole case, until the motion could be heard and determined. (See *Lurvey v. Wells*, 4 Cal. 106.)

Taking this decision, which asserts that motion for new trial stays the operation of the judgment, how could the order

appointing a receiver be vacated until that motion be decided? If the judgment of nonsuit *did* determine rights in favor of defendants, were they not held in abeyance by this motion? Judgments may operate to put a party in possession of a mine, to restore metals taken therefrom, and in the hands of a receiver; but if any proceeding stays the operation of the judgment for *one* purpose, why not for *all*? If restitution of the mine cannot be obtained while motion is pending, how is the ore to be reached that has been taken therefrom? In Justices' Courts, where the powers of such Courts are defined by statute, a Justice of the Peace has the right to appoint a receiver in actions respecting mining claims, and to keep him in possession of the gold dust or metals as "long as such action may remain *undetermined* in any Court." If a Justice of the Peace can appoint a receiver for such purpose, and after the action has been tried and determined in his Court, and an appeal be taken to the County Court, the receiver still remaining in possession, then what justice or equity would there be in discharging a receiver after trial and judgment in the District Court, while an appeal was pending in the Supreme Court from such judgment?

If the first subdivision of Art. 878, sec. 143, is not broad enough to cover this case, then the third is; and we submit that it is more in consonance with equity and justice that the metals taken from the mining claim in controversy should be held by the receiver until this suit is determined, than that they should now be turned over to the defendants.

M. G. Cobb, also for Appellants.

The appellants contended that a motion for a new trial, for the time being, stays all proceedings in the Court below as effectually and fully as they are stayed by force of an appeal.

In *Hicks v. Michaels et al.*, 15 Cal. 108, the Court below, under the one hundred and sixteenth section of the Practice Act, had granted, upon a rule to show cause, a restraining order. The application was for an injunction. Subsequently,

upon a hearing under the rule to show cause, the Court refused the injunction and dissolved the restraining order.

The plaintiff then applied to the Judge to fix the amount of a suspensive appeal bond, stating that it was his intention to appeal from the order, and that he had taken the necessary steps for that purpose. The Judge refused the application. Plaintiff then applied for a *mandamus* to compel the Court below to fix the amount of a suspensive appeal bond, on an appeal from an order refusing to grant an injunction and dissolving a restraining order, etc.

Mr. Chief Justice Field says: "The restraining order expired by its own limitation. * * * The direction of the District Judge that the restraining order be dissolved, was unnecessary. It follows, then, that no injunction was granted in the case, but expressly refused. * * * Can an appeal from an order of this character, (refusing an injunction,) operate to create an injunction, or to prolong a restraining order, until the ruling of the Judge can be reviewed by the appellate Court? It is clear that no such effect can be given to an appeal, even when the most ample bond of indemnity is tendered. Where an injunction has been refused, there is nothing operative. A stay can only be sought of that which has an existence, and by its operation is supposed to work injury to the appellant. It is, therefore, from the nature of the case, only of orders or judgments which command or permit some acts to be done, that a stay of proceedings can be had. Nor can an appeal operate to create an injunction under any circumstances."

In *Wood v. Dwight*, 7 Johns. Oh. 295, an injunction staying execution at law was dissolved, and from the order of dissolution an appeal was taken to the Court of Errors. The defendant thereupon moved to proceed at law, notwithstanding the appeal, and in deciding the motion Chancellor Kent said: "That after an order dissolving an injunction, or discharging a party from a writ of *ne exeat*, was duly entered, no subsequent appeal by the dissatisfied party could of itself affect the validity of the order, or revive the process and give it force and

Copper Hill Mining Company v. James Spencer et al., (No. 1.)

effect. *An appeal only stays future proceedings in the Court; but here is no further proceeding. The order is perfect and finished eo instante that it is entered.*"

Upon the authority of these two cases, the appellants contend that the motion for a new trial in the case at bar operated as an effectual stay to the removal of the receiver.

George Cadwalader, for Respondent.

By the Court, SAWYER, J.

This action was brought on the 10th of July, 1862, to recover possession of a copper mine. On the 7th of August, the plaintiff filed an affidavit stating that "said defendants have taken from the copper mine in dispute some twenty or twenty-five tons of copper ore, and threaten to dispose of the same; and if a receiver is not immediately appointed, such threat will be carried into execution, and the said copper ore be lost to these plaintiffs." On the same day, on application of plaintiff, a receiver was appointed, and as so far as shown by the record, without notice to defendants. The cause was tried in January. On the 26th of that month, at the close of the plaintiff's testimony, the Court — being of opinion that plaintiff failed to show title — granted a nonsuit on motion of defendants. The defendants then moved that the order of August 7th, appointing a receiver, be vacated; and the motion, after argument, was taken under advisement. Afterwards, within the time prescribed by law, the plaintiff moved to set aside the nonsuit, and for a new trial. On the 30th of March, while the motion for a new trial was still undertermined, the Court entered an order vacating the appointment of the receiver, and from this order the present appeal is taken.

It is insisted that the pendency of a motion for a new trial, *proprio vigore*, stayed all proceedings, and that it was error to vacate the order appointing a receiver, pending the motion. Admitting that the proceedings were stayed generally by the motion, it does not follow that the Court could not vacate the order.

Copper Hill Mining Company v. James Spencer et al. (No. 1.)

The exercise of the power of appointing a receiver rests very much in the sound discretion of the Court, "to be governed by a view of the whole circumstances of the case, one of the circumstances being the probability of the plaintiff being ultimately entitled to a decree." (Adams' Equity, Ed. '59, p. 725, Note 1; Edwards on Receivers, 2.)

A *prima facie* right must be made out in the first instance. (Practice Act, section 143.) If it should subsequently appear that the appointment of the receiver was improvidently made, the Court would undoubtedly have power to vacate it. In this instance the Court, upon the trial, was satisfied that the plaintiff, upon his own testimony, failed to sustain the *prima facie* case made by his pleadings and affidavit. Upon such a state of the case, it was clearly competent for the Court to vacate the order, notwithstanding a motion for a new trial was pending, and admitting the effect of the motion to be to stay proceedings generally. The order might have been vacated before trial upon a proper showing, and with much greater reason after it had appeared upon the trial, to the satisfaction of the Judge, that there was no probability of an ultimate recovery in the action. The Judge does not appear to have vacated the order as a matter of course upon granting the nonsuit. He took the question under advisement, and it must be presumed that the propriety of continuing the receiver, under all the circumstances of the case, was fully considered. We cannot perceive, from anything shown by the record that the Court, in vacating the order, exceeded the bounds of a sound judicial discretion. We may add, it is not clear that the affidavit makes a sufficient *prima facie* case to justify the appointment of the receiver in the first instance.

We think the case of *Lurvey v. Wells, Fargo & Co.*, 4 Cal. 106, has been misapprehended by appellant's counsel. That case does not hold, as seems to be supposed, that at the moment a notice of motion for a new trial is served the Court loses all power over the case, except such as relates immediately to the determination of that motion, until such motion is finally decided. It simply holds that when a party, within

the proper time, gives his notice and takes the steps necessary to perfect his motion, his rights as to such motion are preserved, and the Court retains its jurisdiction to grant a new trial, even though there should be an adjournment of the term before the motion is brought to a hearing. This was the only question considered by the Court, and all that was decided. The Judge below in that case construed the decision in *Baldwin v. Kramer*, 2 Cal. 582, as holding that unless a motion for new trial is perfected and decided at the same term at which the case is tried, the Court loses all jurisdiction over the case, and cannot grant a new trial at a subsequent term, although the party has taken all the necessary steps within the time prescribed by the statute, and no *hiatus* has occurred in his proceeding. On this construction he dismissed the motion for a new trial, on the ground that he had lost jurisdiction over the case by the adjournment of the term pending the motion. On the appeal the only point to which the attention of the Judge who delivered the opinion of the Court was directed, was whether, by the adjournment, the Court had lost jurisdiction to entertain the motion for a new trial. The Court did not undertake, nor did it intend to say, that all proceedings were necessarily stayed, or that no other action could be taken in the case till the motion for a new trial should be decided. There was no such question in the case, and all that was said had a direct reference to the precise question then under consideration, and to nothing else. To extend the decision of the Court beyond the question considered, would be to repeat the error committed by the District Judge in that very case, in construing the decision in *Baldwin v. Creamer*.

The motion for a new trial doubtless suspended the operation of the judgment of nonsuit, so far as to prevent it from operating of its own vigor as a discharge of the receiver, and preserved the rights of the plaintiff acquired under the order appointing the receiver until the order was directly acted upon by the Court. But it did not suspend the power of the Court to determine, under the circumstances of the case developed on the trial, the propriety of continuing the order in force till

Copper Hill Mining Company v. James Spencer et al., (No. 2.)

the motion for a new trial should be finally determined. There is nothing in the case of *Lurvey v. Wells, Fargo & Co.*, when properly construed, inconsistent with the views here expressed. Judgment affirmed.

COPPER HILL MINING COMPANY v. JAMES SPENCER, ROBERT EPERSON, EUSTACE PARKER, HENRY ATWOOD, L. LUCE, HENRY LUCE, AND WILLIAM WHETTSTONE. (No. 2.)

MINING CLAIMS — VERBAL SALE OF.—The rule allowing mining claims to be transferred by a verbal sale and delivery of possession, only applies to cases where the grantor is in actual possession and can deliver possession to the grantee; and does not extend to cases where at the time of the sale the claim is in the adverse possession of third parties. In such cases, there must be a written conveyance to pass the title.

Table Mountain Tunnel Company v. Stranahan, 20 Cal. 198, commented on.

APPEAL from the District Court, Sixteenth Judicial District, Calaveras County.

The facts are stated in the opinion of the Court.

M. G. Cobb, for Appellants.

Appellants claim that, under the decisions of the Supreme Court in *English v. Johnson*, 17 Cal. 107; *Atwood v. Fricott*, 17 Cal. 43; *Table Mountain Tunnel Company v. Stranahan*, 20 Cal. 199, that going upon a mining claim, posting up written notices thereon at each end of the claim showing the extent of their ground and indicative of their intention to work, and actually working upon a part of their claim—provided all this is conformable to mining customs—is a possession of the claim as full and effectual as though the claim were surrounded by a fence; that such a possession under the same decisions can be transferred without any instrument of writing, to be held in precisely the same way by the grantee or transferee.

Under the decisions the appellants fail to see what particular efficacy there might have been in a deed over the parcel

transfer or surrender of possession in this case. The rule of law undoubtedly is that where an entry on land is made, *under color of title by deed*, the possession is deemed to extend to the bounds of the deed, although the actual settlement and improvements are only a small part of the tract. In such cases the law construes the entry to be co-extensive with the grant of the party, on the ground that *it is his clear intention to assert such possession*. (*Ellicott v. Pearl*, 10 Peters, 412.)

The Court, in *Ellicott v. Pearl*, 10 Peters, 441, Justice Story, says: "The assumption that there can be no possession *to defeat an adverse title* except in one or other of these ways—that is, by an actual residence or an actual inclosure—is a doctrine wholly irreconcilable with principle and authority. Nothing can be more clear than that a fence is not indispensable to constitute possession of a tract of land. The erection of a fence is nothing more than an act presumptive of an intention to assert an ownership and possession over the property. But there are many other acts which are equally evincive of such an intention of asserting such ownership and possession—such as entering upon land and making improvements thereon, raising crops thereon, felling and selling trees thereon, etc., *under color of title*."

In *Barr v. Gratz*, 4 Wheat. 228, the same Court, Justice Story, says: "Where two persons are in possession of land at the same time under different titles, the law adjudges him to have the seizin of the estate who has the older and better title."

In the case at bar the older and better title was in the plaintiffs, derived by them from the original locators, who located on the 29th of May, 1861.

Appellants understand the established doctrine of this Court now to be, that an entry on a mining claim under color of title by putting up notices or erecting metes or bounds, or by doing both, carries with it the possession of the whole claim to the extent claimed by the notices or defined by the metes and bounds erected, although the *actual possession* and

improvements are only on a small part of the claim, or even not on the claim at all, but in proximity thereto.

If plaintiffs' grantors or vendors could locate a claim and hold it by posting notices, under the mining customs of the country, and if their claim as thus located could pass to plaintiffs by a *transfer of possession merely* — that is, such possession as they had under their notices — it then makes no difference whether the defendants entered before or after the transfer to plaintiffs, or whether they were claiming to occupy adversely or otherwise.

The entry of defendants does not come within the rule as laid down in *Ellicott v. Pearl*, and cases there cited, and any claim or act on the part of defendants under such an entry could not constitute an adverse possession.

The defendants' entry was upon the plaintiffs' grantors' possession, as said before, as much so as if plaintiffs' mining claim had been surrounded by a fence; and no claim or subsequent act on defendants' part can or could exalt their occupancy into anything but a naked trespass.

The plaintiffs had a right to consider the entry and acts of defendants as amounting to an ouster, and they had the right to elect the point of time at which this ouster should take place.

They have fixed it in their complaint as being on the 1st of July, 1861, four days after the transfer of possession to them.

Ouster by election is created by acts, without actual force, and in themselves equivocal and not necessarily amounting to an entire and immediate ouster of the freehold, but which the owner may, if he pleases, treat as usurpations of his freehold for the sake of vindicating his title by an action at law.

In such cases, the act of entry being equivocal, and being either a trespass or a disseizin, according to the intent, the law will not permit the wrongdoer to qualify his own wrong, and explain it to be a mere trespass, unless the owner elects so to consider it. (*Prescott v. Nevers*, 4 Mason, 326; *Ricard v. Williams*, 7 Wheat. 60; *Robison v. Swett*, 3 Green, 316; *Allen v. Holten*, 20 Pick. 458.)

George Cadwalader, for Respondent.

The question reduced to its true import: Is a parol sale of a copper mineral ledge, unattended or followed by the transfer of possession, valid?

This proposition the appellant must sustain in this Court, for the surrender by the locator, and the receipt of stock, can hardly amount to anything more or less than a purchase by the plaintiff of mining ground for shares in its capital stock.

The locator says: "I have one hundred feet in the Copper Hill Claim, which I will surrender to you for one hundred shares of your stock." The stock is delivered, and the transaction is done. This *formula* appellant is obliged to urge is the legal equivalent of a conveyance of a bill of sale or a transfer of the actual possession from seller to buyer.

The decisions of this Court, through twelve volumes, were to the effect that mining claims in this State were real estate or in the nature thereof, and that to pass title thereto it either required a deed, a bill of sale, or some memorandum in writing. (*McCarron v. O'Connell*, 7 Cal. 153; *Merced Mining Company v. Fremont*, 7 Cal. 319; *McKeon v. Bisbee*, 9 Cal. 142; *Clark v. McElroy*, 11 Cal. 160; *Watts v. White*, 13 Cal. 324; *Merritt v. Judd*, 14 Cal. 64; *Boggs v. Merced Mining Company*, 14 Cal. 374.)

Then followed the decision of this Court in the case of *Table Mountain Company v. Stranahan*, 20 Cal. 198, holding for the first time that the right of a miner in his claim was of such a nature that it might be parted with without a deed, bill of sale, or memorandum in writing, *and by a transfer of the actual possession thereof from seller to buyer*. This was the extent of the rule laid down.

When it said that rights resting in possession might be sold by a transfer of that possession, and that the transfer of that possession would be evidence of a sale, and equally efficacious as a conveyance, it surely did not contemplate the converse of the rule being true—that a right to a piece of mining

ground not in possession might be sold or transferred by mere words. The transfer of possession imports some physical acts; the seller at the time must be in possession, he must give it up, and the buyer must take it. This done, the buyer becomes invested with the possessory right of the seller as fully as if a deed had been executed and delivered. The main question then is, What is evidence of the sale of a mining claim? because it is a question of evidence. We assert that there are only three ways in which such a sale can be proved:

1. By deed (which is the best way.)
2. By bill of sale.
3. By a transfer of the actual possession from seller to buyer.

Adverse counsel insists, however, there is a fourth mode, which is not by deed, nor by a bill of sale, nor by a transfer of possession, but by oral communication between seller and buyer, accompanied by the receipt of the consideration, and that the interests of the different parties in the claim in dispute passed to the plaintiff upon its stock issue to them.

It is scarcely conceivable that such a mode of conveyance of a copper ledge or a piece of mining ground can meet the sanction of this Court. Certain it is, that no decisions have at any time been made by this tribunal supporting such a doctrine, but all thereof are at war with it. A mining claim, whether real estate or not, approximates so nearly thereto as to draw to its government all the familiar rules of evidence relating to realty. Their possession is recovered in the action of ejectment; mortgages affect them in the same manner as they do real estate. Inherently they are valuable estates in law; to say that an oral sale thereof, when in the adverse possession of third parties, is valid, is to advance a doctrine that is dangerously false.

But the Court cannot fail to observe that the facts show that the defendants were in possession of the six hundred feet of ground before the plaintiff was created or acquired any interest or right in any part of the ground. Had the plaintiff

entered under a paper title, conveying to it the entire claim, its possession would not have embraced the ground in our possession at that time. (*Gunn v. Bates*, 6 Cal. 263.)

The rule is thus stated by Judge Story in *Ellicott v. Pearl*, 10 Peters, 412, who says: "The entry into possession of a tract of land under a deed containing metes and bounds, gives a constructive possession of the whole tract *if not in any adverse possession*, although there may be no fence or inclosure round the ambit of the tract, and an actual residence only on part of it."

And here we may observe with great propriety that the entry of the plaintiff on the 26th day of June, 1861, with the oral consent of the locators, did not give the plaintiff a greater possessory right than if it had entered under a conveyance from the same parties. The doctrine, however, of *Ellicott v. Pearl* and *Gunn v. Bates*, is expressly limited to cases where parties enter under a paper title, and there would seem to be no such thing as a constructive possession of ground given by mere words, and hence it follows that whatever possession the plaintiff got from the locators could not and did not embrace the land in the possession of the defendants; and thus the Court will see that in whatever aspect the case of plaintiff is viewed, there is still the incurable defect, the broken link in the chain of title, or a failure to show an interest in the subject matter of the action.

By the Court, SAWYER, J.

This is an appeal from a judgment of nonsuit and the order denying a new trial. The suit was brought to recover six hundred feet of mining ground. The evidence of the plaintiff shows that a party of miners, on or about the 1st of June, 1861, located, in the usual mode, three thousand feet or more in length on a copper ledge, and commenced the work of developing the mine; that from the 7th to the 10th of June — certainly as early as the 10th — the defendants also located, by putting up notices and immediately commencing work upon

it, that portion of the same lode now in controversy, and that they have ever since been in possession, claiming it under said location; that on the 26th of the same month the locators first named and their assigns, in pursuance of the statutes of California, organized themselves into a corporation under the name of the Copper Hill Mining Company, the present plaintiff; that the said parties then, to use their own phrase, "surrendered their claim to the corporation," and took stock in lieu of it. The language of all the witnesses on this point is nearly identical, and the following testimony of Mr. Brown will serve to express in the language of the witnesses all that was said in regard to the transfer of the title to the plaintiff: "I surrendered all my interests and those I was representing in and to said claim to corporation, Copper Hill Mining Company, plaintiff, and took certificates of stock in lieu. There were no deeds of this claim made to the corporation by any of the owners." The following is also stated in the records as an admission by plaintiff: "Plaintiff here admitted that no deeds or conveyances in writing were made to the corporation by any of the owners or holders of said mining claim; that all rights, claim, and possession of, in, and to said mining ground, whatever the same might be, are surrendered and given up to the company and merged in said corporation, such owners receiving from corporation certificates of stock according to the amount so surrendered." The foregoing facts and testimony, together with subsequent work and other acts of possession and ownership, on behalf of the corporation, on portions of the claim outside of the ground in dispute, constitute the evidence of title upon which plaintiff relied for a recovery.

The appellant claims that under the decision in *Table Mountain Tunnel Company v. Stranahan*, 20 Cal. 198, the evidence establishes a title sufficient to authorize a recovery. We think the principle announced in that case not applicable to the one under consideration. In the former case, the corporation had acquired the possession of the locators to the entire claim, and the defendants subsequently entered upon

the possession of the corporation. In the present instance, the defendants entered into the adverse possession of the disputed ground before the corporation was formed, and they were in such adverse possession at the time of the organization of the corporation and the so-called "surrender" of the claims to the plaintiff, and the acceptance of the stock in lieu thereof by the locators. The corporation did not succeed to *the possession* of the locators in that part of the lode in dispute, for the reason that it was then and it has ever since been in the adverse possession of the defendants. The entry of the plaintiff upon such portion of its grantors' claims as was at that time in the possession of such grantors, did not draw after it the possession of that portion of their original claim which was then in the adverse possession of the defendants. The locators could only surrender such possession as they had, and that, as shown by the plaintiff's own evidence, did not, at the time of the surrender, or at any subsequent time, extend to the mining ground in dispute. The *possession* of the ground in controversy having never been transferred to the plaintiff, it was necessary to show that the plaintiff had acquired *the title* of the locators under whom it claimed. The witnesses, with singular uniformity of expression, use the loose language: I "surrendered" my "claim" or "interest," "and received certificates of stock in lieu." They do not state what acts they performed which they regarded as constituting the "surrender." It is manifest, however, that these parties, like many others in like cases, were at the time of the transaction acting under the erroneous impression that because they constituted the stockholders of the new corporation, they were, therefore, as to this mining enterprise, identical with the corporation itself, and that their title to the mining claims vested in the plaintiff by virtue of the act organizing themselves into a corporation for the purpose of working the mine. By that act alone, they only created an ideal being capable of receiving a conveyance of their respective interests in the mine. It did not invest the corporation with the title to those interests. In all probability there was no

Tyler v. Houghton.

formal attempt or agreement to transfer the title. But place the facts appearing in the evidence in the light most favorable to the plaintiffs, and the most that can be claimed for them is, that in consideration of the receipt of the certificates of stock, there was an agreement and attempt to make an oral, verbal transfer to the plaintiffs of the respective interests of the locators in the mining ground at the time in the adverse possession of the defendants. We think that such a transfer is insufficient to pass the title. Under such circumstances a written instrument is necessary.

The appellant insists that the question as to the adverse possession of the defendants should have been submitted to the jury. The plaintiff's testimony clearly shows that the possession was adverse. The motion for nonsuit was made upon the close of plaintiff's testimony. It was not necessary to submit the question to the jury.

Judgment affirmed.

GEORGE W. TYLER v. J. F. HOUGHTON.

JURISDICTION OF SUPREME COURT.—Under the Constitution as amended, the Supreme Court has original jurisdiction to issue writs of mandamus certiorari, prohibition, and habeas corpus.

INTEREST OF TRUSTEE IN TRUST ESTATE.—A trustee of an express trust is a person having such beneficial interest in the trust estate, within the meaning of the four hundred and sixty-eighth section of the Practice Act, as to enable him to apply for a mandamus to compel the Surveyor-General to allow him to contest before him the application of a third person for the purchase of the land held in trust.

TRUSTEE—ACTION BY.—The trustee of an express trust may maintain an action to prevent waste or trespass upon the land held in trust, or to recover possession thereof, without joining with him his *cestui que trust*; and should he refuse to do so, his *cestui que trust* may compel him by action to do so.

STATE LANDS—CONTESTING PURCHASE OF.—It is the duty of the Surveyor-General to hear and determine all contests which may be brought before him by any person touching the right of the State to sell lands, or of the applicant to purchase the same, even though the contestant does not seek to purchase.

APPLICATION to the Supreme Court for writ of mandate.

In January, 1863, one Stayton was in the possession of a

Tyler v. Houghton.

tract of land in the County of San Joaquin, described as the northeast quarter of section twenty-seven, the west half of the northwest quarter of section twenty-six, the southwest quarter of the southeast quarter of section twenty-two, and the southwest quarter of the southwest quarter of section twenty-three, township four north, range five east, Mount Diablo meridian.

The land was inclosed by a substantial fence, and Stayton and his grantors had been in possession of the same for about eight years. At the time aforesaid, Stayton deeded the land to Geo. W. Tyler, in trust, to pay certain debts due from Stayton to one Ryer. Stayton continued to occupy the land until October, 1863, as the tenant at will of Tyler; when, without Tyler's consent, he surrendered possession of the same to Fisher & Co. Fisher & Co., soon after, induced Granger and two other persons in their employ to apply to the State Locating Agent to locate the land for them in lieu of the sixteenth and thirty-sixth sections. The Agent made the location in the name of Granger, and sent it to the Surveyor-General for his approval.

Tyler filed in the office of the Surveyor-General his protest against the approval of the location, and claimed to be allowed to contest before him the right of Granger to have the location approved.

Tyler did not claim to locate the lands himself, but merely claimed the privilege of contesting the right of the State to select these lands.

The Surveyor-General refused to allow the contest to be made.

Tyler & Cobb, for Applicant.

J. G. McCullough, Attorney-General, and Budd & Carr, for Respondent.

By the Court, SANDERSON, C. J.

This is an application for a mandamus to compel the

Tyler v. Houghton.

respondent, as Surveyor-General and Register of the State Land Office, to allow the petitioner to contest before him the application of one Granger for the purchase of certain lands in lieu of the sixteenth and thirty-sixth sections, under the Act of the 27th of April, 1863.

The first question presented for our determination is as to the jurisdiction of this Court in this class of cases. Under the new Constitution, it is claimed this Court has original jurisdiction in cases of mandamus, certiorari, and prohibition. Upon this point the language of the old Constitution was as follows: "And the said Court, and each of the Justices thereof, shall have power to issue writs of habeas corpus at the instance of any person held in actual custody. They shall also have power to issue all other writs and process necessary to the exercise of their appellate jurisdiction." The new Constitution reads as follows: "The Court shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and also all writs necessary or proper to the complete exercise of its appellate jurisdiction." It is clear that under the old Constitution this Court had no original jurisdiction except in cases of habeas corpus. The only change made by the new Constitution is the addition of the writs of mandamus, certiorari, and prohibition. These writs could be issued in aid of the appellate jurisdiction of the Court previous to the amendments to the Constitution under the general power conferred to issue all writs and process necessary to the exercise of its appellate jurisdiction. Therefore, there could have been no occasion to enumerate these writs for the purpose of enlarging the appellate powers of the Court. Thus the change, in the language of the Constitution, is made purposeless, unless we hold that the intention was to add to the original jurisdiction of the Court. And we think, although it might have been more clearly expressed, that such intention is apparent from the language used. The clause in question must be read as giving express power to issue the writs of mandamus, certiorari, prohibition, and habeas corpus, and *in addition thereto*, all writs necessary or proper to the complete exercise of its appel-

Tyler v. Houghton.

late jurisdiction. By this reading only can any design be accorded to the change which has been made.

The petitioner in this case holds the title or interest in the land in question, by virtue of which he claims the right to contest the application of Granger, as trustee of an express trust, and it is urged that he is not "the party beneficially interested," within the meaning of the four hundred and sixty-eighth section of the Practice Act, which prescribes by whom an application for a mandamus shall be made. That section requires the application to be made by "the party beneficially interested." It is the duty of a trustee to look after, guard, and protect the trust estate against all enemies; and it is not the policy of the law to place stumbling blocks in his path. On the contrary, it intends to afford every facility to that end. And especially is such the case under our system of practice. The sixth section of the Practice Act is in the following words: "An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person or persons for whose benefit the action is prosecuted. * * * ." That the trustee would be bound to bring an action to prevent waste or trespass upon the land in question, or ejectment to recover its possession in case of *ouster*, does not admit of doubt. On the contrary, should he refuse to do so, his *cestui que trust* may bring an action to compel him to do so. Such being the case, it is anomalous to say that he cannot apply for other relief, if necessary, in his own name. The application for a mandamus is a proceeding in the nature of an action; and in our judgment the sixth section of the Practice Act as much applies to the case of a mandamus as to any other which may arise under that Act. In our judgment, an executor or administrator, or trustee of an express trust, may invoke any remedy afforded by the law of the land, in their own names, without joining with them the person or persons for whose benefit they are acting, in all cases where such remedy is lawful and proper, and that they labor under no disability which would not attach to the parties for whom they act. It follows that the petitioner in the present

Tyler v. Houghton.

case is a party beneficially interested within the meaning of the four hundred and sixty-eighth section.

The petitioner does not himself, nor on behalf of his *cestui que trust*, seek a purchase from the State of the land in question; and it is next urged, on behalf of the Surveyor-General and Register of the State Land Office, that he is not authorized to entertain a contest between parties who are not both applying for a purchase of the land. We do not so read the statute. There is certainly no such restriction expressly imposed by the terms of the Act, and such a restriction is repugnant to the whole scope and design of the Act. The object of the Act, as expressed in its title, is to provide for the sale of lands belonging to the State. In order to effect this object, it is of primary consequence to ascertain what land belongs to the State. When application is made for the purchase of any given parcel of land, it is of first importance, alike to the interest of the purchaser and the State, to ascertain whether such land is subject to selection and location by the State. If it is not, the State can neither pass the title, nor can the applicant acquire any by the proposed action. It would be folly, therefore, on the part of the State and the purchaser, to avoid any contest which might throw light upon the question of title. Clearly it is the policy of the Act in question to invite rather than discourage contests of this kind. The State can gain nothing by selling land to which she has no title, and to decline a contest involving that title, from whatever quarter it may come, would be practicing a species of fraud upon her own citizens, for by such a course it may not unfrequently happen that she will sell land which does not belong to her, and involve the purchaser in litigation more costly than the land itself, to which its loss may be superadded. In our judgment, it is made the duty of the Surveyor-General to hear and determine all contests which may be brought before him touching the right of the State to sell, or the applicant to purchase, in the manner prescribed in the twenty-seventh section of the Act.

Uridias v. Morrell, (No. 2.)

Let a peremptory mandamus issue pursuant to the prayer of the petitioner.

JOSE G. URIDIAS v. JOHN C. MORRELL. (No. 2.)

TENANT AT SUFFERANCE.—By the common law, a tenant who holds over after the expiration of his lease, was regarded as a tenant at sufferance; but this estate was destroyed whenever the true owner made an actual entry on the lands and ousted the tenant.

TENANT HOLDING OVER.—Section thirteen of the Act concerning forcible entry and detainer, as amended by the third section of the Act of 1862, makes no change in the common law except in the fact that it dispenses with a formal entry, and substitutes therefor a written demand.

SAME—UNLAWFUL DETAINER.—A complaint in an action based upon said section, where eight months had expired after the expiration of the lease, which does not aver that the holding over on the part of the defendant was wrongful, nor that a surrender of the possession was demanded and refused within the year ensuing the lease, does not state facts sufficient to constitute a cause of action.

SAME—EVIDENCE EXTENDING LEASE.—An agreement made by the landlord with the tenant, after the expiration of the lease, that the tenant shall have possession of the premises one year longer, paying therefor a stipulated rent, to be paid if the land is included in a certain survey, vests in the tenant the present right to possess the lands until the expiration of the agreement, and if pleaded, is admissible in evidence as a defense to an action for holding over brought before the expiration of the time specified in the agreement.

PLEADING INCONSISTENT DEFENSES.—If inconsistent defenses are set up in an answer, the defect must be reached by motion to strike out or by demurrer; and if no objection be taken to the answer on this ground, defendant may on the trial rely on any of these defenses.

APPEAL from the County Court, Santa Clara County.

The facts are stated in the opinion of the Court.

S. O. Houghton, for Appellant.

In an action to recover possession from a tenant holding over, there should be some allegation charging not only that his lease has expired, but also that he continues in possession of the demanded premises wrongfully after a lawful demand has been made that he deliver up the possession. If the defendant is a tenant refusing to pay rent, a demand of rent was necessary to make his further holding illegal.

No such demand is alleged, nor is it alleged that the defend-

ant is holding over after the expiration of his lease without the consent of his landlord the plaintiff, or that his holding is wrongful.

The complaint shows defendant to have entered lawfully; the presumption of law is that his continued possession is also lawful; and to overcome such presumption there should be some allegation to show such holding to be wrongful.

The mere fact of a tenant remaining in possession after the expiration of the lease under which he entered, does not necessarily make such possessing wrongful, for it may be rightful through the mere acquiescence of the landlord, or may be with his consent. The complaint should state facts sufficient to show a right in the plaintiff to the possession of the premises sued for at the time of the commencement of the action.

In *Conway v. Starkweather*, 1 Denio, 114, it was held that: "When a tenant under a demise for a year or more holds over after the end of his term without any new agreement of his landlord, he may be treated as a tenant from year to year, and in all other respects as holding according to the terms of the original lease. He will be a tenant if the landlord either receives or distrains for rent after the end of the original term; and when he neither says or does anything, his acquiescence may perhaps be inferred from mere lapse of time."

From the allegations of the complaint, it appears that the defendant remained in possession eight months after the end of his original term, without any notice to quit being given; and if the acquiescence of the landlord can be presumed from his silence in any case, it most certainly can under circumstances such as these.

The defendant naturally supposed from his silence that the plaintiff consented to his retaining possession for another year upon the same terms as previously stipulated.

By remaining in possession, the defendant became liable to pay to the plaintiff the rent of the premises for that year at the rate reserved in the lease under which he entered; and as a result of this liability, he became entitled to the possession

for the same period as a tenant from year to year, and this tenancy could only be terminated by a notice to quit of one month, terminating with the end of the year, to wit: on the first of October, 1862. (Statutes of 1861, p. 514.)

This statute is the same as the New York revised statute, under which it was held that a tenant from year to year may be summarily removed upon *one month's notice to quit, terminating with the year*. (*Prouty v. Prouty*, 5 How. P. R. 81.)

In *Jackson v. Salmon*, 4 Wend. 327, it was held that when the defendant had hired the premises for one year, and continued in possession after that period, he was a *tenant from year to year*, and entitled to notice to quit.

The alleged notice here was premature, as was also the action. Even though the notice was good, the plaintiff's right of action did not accrue until the first day of October, 1862, the end of the current year.

In this complaint it appears that the possession is demanded against a tenant holding after the lease under which he entered has expired, and also the rent of the premises at the rate specified in said lease from the time of the expiration thereof. The only ground upon which an action can be maintained for the recovery of rent, is that the defendant is the tenant of plaintiff. Yet such facts as show rent to be due from the defendant to the plaintiff are not stated; nor are there such allegations in the complaint as show that defendant has forfeited his term by non-payment of rent after demand thereof.

Yocell & Williams, for Respondent.

The averments of the complaint are, and the proof shows, that the lease was for a certain and definite length of time. In such a case the tenant is bound to know when his term expires, and if he holds over after its termination, he is strictly a tenant at will, and would not be entitled to notice but for our statute, which treats him as a holding over tenant, entitled to three days' notice. (4 Kent, 114; Story on Contracts, sec. 934; Taylor's L. and T., 465; Forcible Entry Act, sec. 13.)

Urdias v. Morrell, (No. 2.)

No such continuing tenancy as is claimed by appellant will be presumed, unless there was payment and acceptance of rent after expiration of term, and there is no pretence of anything of the kind here. (Taylor's L. and T., secs. 58, 718, 468; 7 Cow. 747; 4 Wend. 327; 5 Wend. 26.) The defendant could not have supposed that plaintiff acquiesced in a new term, because negotiations were always pending as to character and term of lease, and amount of rent for a new term; and if he occupied during such period, it was with knowledge that the plaintiff could terminate his occupancy at any time by notice to quit, in the absence of a new contract.

By the Court, SHAFER, J.

This action is based upon the thirteenth section of the Forcible Entry and Detainer Act, as amended by the third section of the Act of 1862. The complaint alleges that the plaintiff demised the premises to the defendant for one year ensuing the first of October, 1860, at the yearly rent of two dollars per acre; that on or about the first of October, 1860, the defendant entered into possession of the premises under the lease, and that after the expiration of the term the defendant failed and refused to deliver the possession of the premises to the plaintiff, or to pay the rents therefor; and that when such delivery was demanded, in writing, on the third of June, 1862, the defendant neglected and refused to deliver. The complaint was filed July 16, 1862.

The complaint was demurred to on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and thereafter the case was tried upon the issues of fact. The verdict of the jury was for the plaintiff, and the defendant appeals from the judgment and from an order denying his motion for a new trial.

I. It is claimed that the order overruling the demurrer was erroneous.

It is urged that there is no allegation in the complaint that the holding over on the part of the defendant was wrongful,

and that in the absence of such allegation it must be presumed that the holding over was under some new and substantive agreement, or at least by leave and license of the plaintiff.

When a tenant holds over after the expiration of his lease, he is regarded by the common law as a tenant at sufferance; but this estate may be destroyed whenever the true owner shall make an actual entry on the lands and oust the tenant; for before entry he cannot maintain an action for trespass against the tenant by sufferance as he might against a stranger; and the reason is, because the tenant being in by lawful title, the law, which presumes no wrong in any man, will suppose him to continue upon a title equally lawful, unless the owner of the land, by some public and avowed act, such as entry is, will declare his continuance to be tortious. (2 Blk. Com. 150.)

Further: section thirteen, as amended by the Act of 1862, assumes the rule of the common law to be as above stated; for it provides that when a tenant holds over after the expiration of his term, that a demand for delivery of possession "may be made at any time within a year after the termination of the lease;" and if demand is so made, that thereupon the lessor may proceed to expel the tenant. The only change made in the common law by the Act of 1862 lies in the fact that it dispenses with formal entry and substitutes therefor a written demand.

The complaint does not show any renewal of the lease in terms, nor does it show a state of facts from which the law will intend a renewal, binding alike upon both parties. It does not state that the plaintiff received rent, neither does it state any other fact raising a presumption in law that the lease had been renewed; nor does it disclose facts amounting to an estoppel *in pais*; and if the fact that the plaintiff omitted for the period of eight months to make a formal demand for a delivery of the premises, imports that, *ad interim*, the defendant was in possession by license or acquiescence on the part of the plaintiff, still the license was a revocable one under the adjustments of the Act of 1862, and was revoked, in fact, by

the formal demand alleged, made, as it was, within the time which the Act prescribes.

II. The appellant further insists that the Court erred in refusing to admit evidence tendered by him in support of a special defense alleged in the answer.

The defense, as stated in the answer, is as follows: "The defendant avers that said plaintiff agreed to and with said defendant, on or about the first day of December, 1861, that he, said defendant, should and might have the possession of said premises for one year ending October 1, 1862; and to pay as rent therefor two dollars per acre; said rent to be paid at the harvest season of 1862, in the event that the final survey and confirmation of said Rancho of Milpitas should include said premises. And it was also then and there agreed between said plaintiff and defendant that if said final survey and confirmation should be so made by the United States District Court in San Francisco as to exclude said premises and throw them without the boundaries of said rancho, then that said plaintiff would not ask or receive from said defendant any rent for said premises for said year ending October 1, 1862."

The counsel of the respondent justifies the ruling of the Court excluding the evidence tendered in support of this defense, on two grounds:

First—That the contract set up was executory in its character.

Second—That the defense was inconsistent with other defenses asserted in the answer.

It may be admitted that the contract was executory in its character, still it vested in the defendant, *in presenti*, a right to possess the lands until October 1, 1862, and a right in the plaintiff to the stipulated rent, subject only to the contingency named in the contract. It was not an agreement for a lease to be executed before the defendant could possess his term, but was itself a lease in legal effect, and not executory in any sense except in the sense in which all leases are executory: that is, the right created by it remained to be *enjoyed*.

As to the second position taken for the respondent in sup

Holm v. Roach et al.

port of the Court's ruling, it is fully met by the decision in *Klink v. Cohen*, 13 Cal. 623: "If inconsistent defenses are set up, the defect must be reached by motion to strike out, or in some cases by demurrer; and if no objection be taken to the answer on this ground, defendant, on the trial, may rely on any of his defenses, as under the old system."

Judgment reversed and cause remanded.

Mr. Justice RHODES, having been of counsel, did not sit on the trial of this case.

CATHARINE HOLM v. JAMES E. ROACH AND P. W. ROACH.

FAILURE TO FILE BRIEFS.—Where a cause is submitted on briefs to be filed in a specified time, and no briefs are filed within the time, and the transcript contains no assignment of errors, the judgment will be affirmed.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

Plaintiff recovered judgment in the Court below, and defendants appealed.

George F. & Wm. H. Sharp, for Appellants.

J. B. Crockett, for Respondent.

By the Court, SANDERSON, C. J.

On the 24th of February, 1864, this action was submitted on briefs, to be filed in ten days by appellants and ten days thereafter by respondent. On the 14th of April, upon the application of respondent, ten days further time was granted. That time has more than elapsed, and no briefs have been filed, and the transcript contains no assignment of errors. For these reasons we affirm the judgment of the Court below.

Judgment affirmed.

Moss v. Shear.

JOSEPH MORA MOSS v. CHARLES SHEAR.

MERE PROFITS—VALUE OF IMPROVEMENTS.—A defendant in ejectment who desires to set off the value of his improvements against the mere profits, must assert his right by proper averments in his answer, or he is precluded from doing so at the trial.

TAX DEEDS—STRENGTHENING TITLE.—One who is under any legal or moral obligation to pay taxes cannot, by neglecting to pay the same and allowing the land to be sold in consequence of such neglect, add to or strengthen his title either by purchasing at the sale himself, or by suffering a stranger to buy and then purchasing from him.

SAME.—One who is under no legal or moral obligation to pay taxes is not precluded from purchasing at the tax sale, although in possession at the time the assessment was made or when the land was sold.

ASSESSMENT FOR TAXES—VALIDITY OF.—Under the Revenue Act of 1854, if lands were assessed to unknown owners, the Assessor must have stated in his list that the land was so assessed, because it was unoccupied and the owner was unknown, or the assessment created no charge upon the land, and no legal obligation was imposed on any one to pay the taxes.

SAME.—In order to impart any validity to the acts of an Assessor, the provisions of the statute must be strictly followed, and all its conditions fully complied with by him.

CHANGE OF COUNTY BOUNDARIES—LIEN OF TAX.—When, by a change of county boundaries made after land has been assessed for taxes, it falls into another county, the lien of the tax on the land still continues, and the Tax Collector of the old county may enforce the collection of the tax by sale.

TAX DEED—RECITALS OF.—It was not necessary under the Revenue Act of 1854 to recite in a tax deed the various acts showing a compliance on the part of the revenue officers with the several conditions of the statute. These acts, if inserted in the deed, are *prima facie* evidence; but if not inserted, may be proved *alunde*.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

George Cadwalader, for Appellant.

The plaintiff proves that at the time of the assessment the Bernals were the owners of the premises; that they failed to pay the taxes due; and that one **William M. Lent** purchased the premises, and thereby discharged the debt due by the Bernals to the State, and that as an equivalent therefor Lent received a conveyance of the property, which the Legislature, by the ninetieth section of the Revenue Law of 1854,

Moan v. Shear.

declared should be "*prima facie* evidence in all the Courts of this State of the conveyance of all the right, title, and interest in and to said property owned by the delinquent or delinquents at the time of the assessment."

The delinquents in this case were the unknown owners—the owners who in two ways had tried to evade the effect of the revenue law by neglecting to furnish the property as their own to the Assessor, and by refusing to pay the taxes when due.

The law, section sixty-four, enjoins the owner to pay the taxes upon his real estate, and goes so far as to declare that when the same are paid by the occupant he may recover the amount paid by action against the owner.

The same law, section seventy-six, says:

"In the same manner every person shall deliver up to the Assessor a just and true list of all property taxable by law."

While section eighty-two declares that:

"If the owner or owners of any property liable to taxation shall be unknown, or a non-resident, or absent, or refuse when called upon by the Assessor or his authorized deputy to give a list of his property, real or personal, subject to taxation, it shall be the duty of the Assessor or his authorized deputy in either or all the above enumerated cases, to make a list thereof from the best information he can obtain, and attach thereto such valuation as he may deem just, and enter the same upon his roll, *and the assessment thus made shall have the same force and effect as though it had been made by the owner or owners of all the property thus listed.*"

Again: we say, the owner having failed or refused to list his property—and the Assessor having listed it to unknown owners—such assessment, by force of the statute just cited, gave it the same force and effect against the property as if its owner had performed his duty to the State.

The land was in San Mateo County at the time of the assessment, and remained there until the 18th of April, 1857.

From such premises respondent's counsel argues that the Tax Collector of San Mateo County had no authority to sell

Moss v. Shear.

the land for the delinquent tax, it being in San Francisco County.

This we deny, for Blackwell, in his work on Tax Titles, observes, page 345:

“Where, after an assessment is made, the county in which the proceeding is had is divided, the Collector of the old county has power to sell land lying in the territory embraced in the newly created county. This is in conformity with the general principles of law in analagous cases.” (9 Watts & Sergeant, 80; 5 Watts, 87; 6 Watts, 435; 16 Ohio, 466; 17 Ohio, 135; 16 Mass. 86; 4 Mass. 389; 6 J. J. Marsh, 147; 4 Halstead, 357.)

It is contended by respondent's counsel that under the Revenue Law of 1854, an assessment of occupied lands to *unknown owners*, the State gets no lien on the land, and that a tax sale thereof would be void. We do not read the law so, nor do we believe such to be its spirit and intention. The question does not arise in this case, because there is no proof that the land was occupied at the date of the assessment; and because, as we have already seen, the Legislature of 1857 legalized the assessment. Yet, the proposition being argued by respondent's counsel, we submit the following remarks in regard thereto:

Under some of the old tax systems, (nearly all,) taxes were a personal charge, which some States enforced by confinement of the body, or seizure of the personal property of the delinquent, whose defenses were that the assessments were not in fact against him, and if they were that they were improperly made; and as they generally succeeded, to the great injury of the State, a new system was devised which made the tax upon real estate become a direct lien upon the same, only extinguishable by payment of the tax, either by a sale of the property or otherwise — and under it the question came up again whether an assessment to the wrong owner, or to no owner, exonerated the land from the tax. There is no doubt but what an assessment to the wrong owner, or no owner, releases the true owner from all personal obligation to pay the

tax, but not the land. (*Strauch v. Schoonmaker*, 1 Watts & Serg. 166; *Smith v. Northampton Bank*, 4 Cushing, 1; 10 Wendell, 346; 8 Ohio, 539; 20 Ohio, 556.)

Even under statutes that require Assessors to list land to the owner thereof, an assessment to the wrong owner is valid, without it is proved "*aliunde*" that the name of the true owner was known to the officer. (Blackwell on Tax Titles, 175; 6 N. H. 182; 1 Foster, 400; 13 Illinois, 716.)

In 3 Richardson, Law 27, the tax execution recited an assessment against "*the estate of Mrs. Hammond.*" This was the only informality in the proceedings, and it was insisted that the warrant ought to express upon its face the name of some person liable for the tax; that the heirs—if Mrs. Hammond were so liable in this instance—and their names ought to have been inserted. The Court held the execution valid.

H. O. Beatty, also for Appellant.

John B. Felton, for Respondent.

This case of *Blakely v. Beston*, 13 Ill. 714, upon which the appellant rests his whole argument, and from which he quotes the doctrine that "it does not necessarily follow that because a person is in possession of premises he is bound to pay the taxes assessed upon them," as well as the obvious corollary that in such case the tax deed should be admitted, and the holder thereof be permitted to show that though in possession he was under no obligation to pay, is certainly no authority for a case where the revenue law, as in 1854, imposed absolutely on the occupant the obligation to pay, the owner, as here, being unknown. We insist that under the law of this listing, the defendant, the party in possession, was necessarily bound to pay the taxes, and hence that he could not by any evidence remove that obligation.

It is true that in this case the land was not actually listed to the defendant, as it should have been, but was listed to "unknown owners;" but this cannot avail the defendant. It appears in proof, and is admitted by appellant in his brief,

Moss v. Shear.

that the defendant was in possession; it could not, then, have been properly listed to "unknown owners." Section sixty-five provides: "*Unoccupied* lands shall be listed in the name of the owner if known—otherwise as lands of persons unknown." It is only unoccupied lands that can be listed to "unknown owners." If, therefore, the defendant attempts to avoid the obligation to pay the taxes by appealing to the listing as not to himself, but to unknown owners, he meets a more hopeless difficulty; for the land being actually occupied was improperly listed to unknown owners, and his tax sale is void on that account. Thus, it appears that the defendant is attempting to take advantage either of his own wrong or of the wrong of the Assessor; for if the Assessor had done his duty the land would have been listed to him and be liable for the taxes; his only excuse for not paying them is that the Assessor did not list them to him, as we see he should have done. Inevitably, therefore, if the tax sale is not inoperative and void as to himself, because of his own neglect of duty, it is void altogether, because of the Assessor's neglect of duty.

We insist, therefore, that to have admitted the deed would have been error, because it was apparent to the Court that the defendant could not possibly have claimed title under it. No proof could have given validity to the deed. It seems hardly necessary to elaborate an argument as to the invalidity of a seizure and sale by a Sheriff beyond the limits of his county. It is true that by the Act of April 7, 1857, (p. 184,) the time for collecting taxes in the County of San Mateo was extended to June 15th. But the subsequent Act of April 18th, changing the limits of the county, made no provision for the collection beyond the new limits. Of course the change was a restriction of the jurisdiction of all the county officers to the new limits of the county. If the tax was properly assessed before the change of boundaries, the lien would possibly continue after the change. But its enforcement must be made, if at all, by the officers of the county within which the land is included. The absence of any provision for the collection of such a tax is *casus omissus* that would probably practically

prevent the collection of the tax; but all we contend for is that it certainly defeats the action of the Tax Collector in seizing and selling beyond the limits of his jurisdiction.

The next objection to the tax deed is its insufficient recitals. The deed, in order to be *prima facie* evidence of the conveyance intended to be effected by it, must, of course, contain the same recitals as are presented for the certificate. (See pp. 109, 110, of Acts of 1854.) The Act requires (p. 109) that "the amount of the assessment, and their nature," should appear. The amount and nature of the assessment can only mean the amount and nature of the tax levied and assessed upon the property; that is, the character of the sums which make up the amount of tax assessed against the property, the intention being, doubtless, that the validity of the tax and assessment should appear in the instrument. Nothing of this appears in the deed; not the several items of taxation; not the percentage of tax; not even the amount of assessment or the valuation of the property; but only the amount of assessment, with costs. Nothing appears on the face of the deed from which we can by any possible calculation arrive at the amount or nature of the assessment. This provision is dispensed with in the in other respects more elaborate recitals of the Act of 1857. But this Act of 1854 is very explicit in its requirements.

Again: the Act of 1854 provides that the recitals shall contain the date of the notice of seizure. But the deed fails to do so. The date of the seizure is recited, but not of the notice of seizure.

By the Court, SANDERSON, C. J.

This is an action for the possession of land and for the recovery of mesne profits. The complaint is in the usual form, not verified. The answer contains a denial of all the material facts stated in the complaint, and an averment of title in the defendant. The plaintiff recovered judgment for the posses-

sion of the land, and twenty-one hundred dollars rents and profits.

The defendant moved for a new trial, which was denied. The appeal is from the judgment and from the order denying a new trial.

I. In support of his case the plaintiff produced a patent from the Government of the United States, and several mesne conveyances, showing a regular chain of title from the patentees to himself, and proved that the land in controversy was included within the calls of the patent and mesne conveyances, and also proved the value of the use and occupation.

The defendant, by way of set-off to the plaintiff's claim for mesne profits, offered testimony as to the value of his improvements, which, upon the objection of the plaintiff, was excluded by the Court. This ruling of the Court is assigned as error.

No claim for improvements is made in the answer, and for that reason alone the testimony was properly excluded. A defendant in ejectment, who desires to set off the value of his improvements against the mesne profits, must assert his right by proper averments in his answer, or he is precluded from doing so at the trial. In such cases, the value of the improvements constitutes a counter claim, or set-off, and in order to make it available as a defense, it must, like any other new matter, be pleaded.

II. The defendant relied upon a tax title, in support of which he offered a tax deed from the Sheriff and ex officio Tax Collector to W. M. Lent. Then a deed from Lent to John P. Shear, and a lease from John P. Shear to himself. This evidence was objected to by the plaintiff, upon several grounds, and excluded by the Court. Which ruling is next assigned as error.

It appears from the tax deed, which is a part of the record, that the land was listed as the land of persons unknown by the Assessor, and that the same was sold for the taxes for the fiscal year 1856 and 1857. The testimony on the part of the plaintiff proved that the defendant had been in the occupation of the land since 1856. Under these circumstances it is

claimed by the plaintiff that the defendant could not strengthen his title, either by purchasing at the tax sale himself, or by suffering a stranger to buy, and then purchasing from him.

If the defendant was under any legal or moral obligation to pay the taxes, he could not, by neglecting to pay the same and allowing the land to be sold in consequence of such neglect, add to or strengthen his title by purchasing at the sale himself, or by subsequently buying from a stranger who purchased at the sale. Otherwise, he would be allowed to gain an advantage from his own fraud or negligence in failing to pay the taxes. This the law does not permit, either directly or indirectly. On the contrary, if the defendant was under no legal or moral obligation to pay the taxes, there is no principle of law or equity which precludes him from purchasing at the sale, although in possession at the time the assessment was made or when the land was sold. Blackwell, in his work on Tax Titles, at page 470, uses this language: "One in possession of a tract of land at the date of the assessment, may purchase at the sale, unless it appears that he was bound to pay the taxes; in which case he can acquire no title by his purchase." (*Piatt v. Sinclair's Heirs*, 6 Ohio, 227; *Choate v. Jones*, 11 Ill. 822.)

In the present case the taxes were assessed under the Revenue Act of 1854. (Statutes of 1854, p. 88.) The sixty-fourth section of that Act is in the following language: "Lands occupied by any person not the owner thereof shall be listed in the name of the owner, *if known*; otherwise, in the name of the occupant, who shall pay the taxes on the same; and for the taxes paid by such occupant he shall have his action against the owner." The sixty-fifth section of the same Act provides that "unoccupied lands shall be listed in the name of the owner, *if known*; otherwise, as lands of persons unknown * * *." Thus, the Assessor is required to list the land in the name of the owner, when known, whether the land be vacant or occupied; but when the owner is unknown he must list the land, if occupied, in the name of the occupant; if unoccupied, he must list it as the land of a

person unknown. This rule must be strictly followed by the Assessor, in order to impart any validity to the assessment. If the land is unoccupied and the owner unknown, both these facts must appear in the list made by the Assessor in order to make an assessment to an unknown owner valid. If the land is occupied and the owner unknown, both of these facts must appear in the list in order to make an assessment to the occupant valid; or, in other words, a vacancy as to possession, and an ignorance of the true owner, are conditions precedent to the validity of an assessment against an unknown owner; and, where the land is occupied, ignorance of the true owner is a condition precedent to the validity of an assessment against an occupant. If the land be listed to the owner, nothing more need be stated by the Assessor; but if it be listed in the name of an occupant who is not the owner, it must be stated by the Assessor to have been so listed because the owner was unknown to him; and if it be listed as the land of a person unknown, he must state the land is so listed because the owner is unknown and the land is unoccupied. Unless this care is observed the assessment has not been made according to law, and constitutes no charge upon the land, and no legal obligation is imposed upon any one to pay the taxes. In order to impart any validity to the acts of the Assessor, the provisions of the statute must be strictly followed, and all its conditions fully complied with by that officer. "In powers of this nature a *series of acts*, preliminary in character, are required by law to precede the execution of the power. Each and every step, from the listing of the land for taxation to the consummation of the title by the delivery of a deed to the purchaser, is a separate and independent fact. All of these facts, from the beginning to the end of the proceeding, must exist; and if any material link in the chain of title be wanting, the whole falls to the ground for the want of sufficient authority to support it." (Blackwell on Tax Titles, p. 84.)

From what has been said, it follows that the defendant, notwithstanding he may have been in the occupation of the

Moss v. Shear.

land at the time the assessment was made, (the land not having been listed in his name,) was under no obligation to pay the taxes, and therefore was not precluded from purchasing the tax title. Independent of this, it does not appear that the defendant was in possession at the date of the assessment. The witness who was examined upon this point says "that the defendant has been in possession *since* 1856." This language embraces no part of the year 1856. The assessment, if made at the time required by law, must have been made between the first Mondays of March and August of the year 1856. In either aspect, therefore, the defendant was not precluded from buying at the tax sale.

The land was assessed for the taxes in question in San Mateo County, and was sold by the Tax Collector of that county, and the deed in question made by him. It was proved by the plaintiff that the land, at the time this action was brought, was in the County of San Francisco. The present boundaries between the two counties were established by Act of the Legislature on the 18th day of April, 1857, and the tax sale was made in June thereafter. These facts are the foundation of the second objection to the deed, which is to the effect that the sale was illegal, admitting that all the previous proceedings were regular. If the land was in San Mateo County at the date of the assessment, a subsequent change in the county boundaries, resulting in a change or transfer of the land to another county, could not defeat the lien of the assessment, nor divest the Tax Collector of San Mateo of the power to enforce the collection of the taxes by sale of the land. Upon this point, Mr. Blackwell, in his work on Tax Titles, at page three hundred and forty-five, remarks: "When, after an assessment is made, the county in which the proceeding was had is divided, the Collector of the old county has power to sell land lying in the territory embraced in the newly created county," and cites *Devor v. McClintock*, 9 Watts & S. 80; and adds: "This is in conformity with the general principles of law in analogous cases." The next and last objection to the deed is that it does not

Moss v. Shear.

contain the necessary recitals. This objection, in our judgment, is also untenable. It is not necessary, under the Act of 1854, to recite in the deed the various acts which show a compliance, on the part of the revenue officers, with the several conditions of the statute. These acts are only required to be recited in the certificate of purchase. Their omission from the deed only affects the question of proof. If inserted in the deed, the deed becomes *prima facie* evidence of the truth of the recitals, and the burden of showing that the law has not been complied with in the preliminary steps is cast upon the adversary party. But if omitted, the party offering the deed must prove, *aliunde*, all that is necessary to the validity of the sale. The statute does not prescribe the form of the deed, but simply authorizes the execution of a deed of conveyance in *fee simple* to the purchaser; and its sufficiency must be tested by the principles of the common law. "Any deed which, according to the rules of the common law, would be sufficient to transfer the title of the former owner and vest the estate in the purchaser, is regarded as an operative mode of conveyance, provided it recites the power under which it was made, and is accompanied by proof that the law was strictly complied with." (Blackwell on Tax Titles, page 435; *Chandler v. Spear*, 22 Vermont, 388; *Brown v. Hutchinson*, 11 Ib. 569; *Spear v. Ditty*, 8 Ib. 419; *Bank of Utica v. Mersean*, 3 Barb. 528.)

It is not pretended that the deed, tested by the rules of the common law, is insufficient. It is good as an ordinary conveyance, and contains a recital of the power under which it was made. This is all that was necessary to entitle it to be read in evidence. In order to render it of any avail, the defendant would have been compelled to follow it up with other evidence, showing that the law had been strictly complied with. We cannot presume that he was unable to do this, and declare that therefore the deed was properly excluded.

The judgment is reversed and a new trial ordered.

Mr. Justice SHAFER expressed no opinion.

MARIA L. P. DE CASTRO v. JAMES RICHARDSON, JONATHAN RICHARDSON, JOHN WHISMAN, G. RICH, CHARLES RICE, MINERVA RICE, JOEL LEVINE, GEORGE CHARLESTON, DANIEL FRY, EMELINE CREWS, CALEB CREWS, H. M. HENDERSON, A. JEFFREY, HUGH BROWN, HENRY RINGSTAFF, W. D. HUDSON, MATHEW W. DIXON, JAMES CREWS, ANDREW WHISMAN, STEPHEN J. LANE, AND GEORGE GLEASON.

AMENDMENT OF RECORDS OF COURT.—Where an order has been made extending the time allowed by statute to prepare a statement on motion for a new trial, and the term has adjourned, the Court has no power at a subsequent term to amend the order, so as to make it include a notice of intention to move for a new trial, unless a motion to amend has been made at the term during which the order was entered and continued, or unless the record discloses that the entry does not correctly give what was the order of the Court.

SAME.—The power of a Court to amend the record after the adjournment of a term only extends to the correction of a mere clerical error.

STRIKING OUT STATEMENT.—If the notice of intention to move for a new trial is not given within the statutory time, and no waiver of the failure to give the same is shown, the Supreme Court will, on motion, strike the statement from the transcript.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

This was an action of ejectment to recover possession of a tract of land in Santa Clara County.

Plaintiff recovered judgment in the Court below, and defendants appealed. The other facts are stated in the opinion of the Court.

J. Clarke, for Appellants.

S. O. Houghton, for Respondent.

By the Court, RHODES, J.

The appeal in this case is taken from the judgment and from the order denying the defendants' motion for a new trial. The verdict for the plaintiff was rendered on the 10th day of September, 1862, and on that day the Court made an order "that

De Castro v. Richardson et als.

the defendants have thirty days time within which to prepare a statement on motion for a new trial in this cause, and, in the meantime, proceedings on the part of the plaintiff be delayed." On the 9th day of October the defendants served the plaintiff with a notice of motion for a new trial. The plaintiff gave notice to the defendants on the 25th of December, that he would, on the 5th day of January, 1863, move the Court to strike out their motion for a new trial, on the ground that no notice of motion had been served or filed within the time prescribed by law. On the 27th of December, the defendants served the plaintiff with a notice that on the first day of January next, at the opening of the Court, they would move the Court "to amend and correct the entry in the minutes of the Court of the order made by said Court on the 10th day of September, 1862, relative to a motion for a new trial, by inserting after the words 'thirty days within which,' the words 'to give notice of intention to move for a new trial and.' Said motion will be made upon the affidavit of Alexander Campbell, a copy of which is hereunto annexed." At the January term, 1863, the motion of the defendants was called up, and the Court ordered that the entry in the minutes of the 10th of September be amended so as to read as follows: "On motion of the counsel for the defendants in this cause, it is ordered that the defendants have thirty days time within which to give notice of intention to move for a new trial and to prepare a statement on motion for a new trial in this cause, and that, in the meantime, proceedings on the part of the plaintiff be stayed."

At the May term, 1863, the motion for a new trial was argued by the counsel for the respective parties, and on the 26th of May, the Judge of said Court, at chambers, denied said motion, and this order appears to have been entered upon what the clerk entitles a "settled statement on motion for a new trial." The statement does not appear to have been settled by the Judge, and there is no certificate that it was either settled or agreed to by the parties, and it does not appear to have been filed until the 2d of June, 1863, for the only entry

in respect to filing is that which follows the order of the Judge denying the motion for a new trial, and which is as follows: "Filed on return, this 2d day of June, 1863. James A. Clayton, Clerk."

The plaintiff now moves this Court to strike from the transcript the statement on the ground that the notice of the motion for a new trial was not filed or served within five days after the verdict was rendered, and that no order of the Court or Judge was made, extending the time for giving the notice.

This brings up for consideration the legality of the order of the Court, made at the January term, 1863, amending the order entered at the previous term. The order, as first entered, gave the defendant thirty days in which to prepare his statement on motion for a new trial, and the amended order gives them that length of time in which to give notice of intention to move for a new trial, as well as to prepare the statement.

The motion and the order were, "to amend the entry in the said minutes." It is not stated in the motion, nor recited in the amended order, that the Court did, at the September term, grant the defendants the thirty days in which to give the notice, and there was nothing in the record at the September term showing that the Court did give or intended to give the defendants the time for that purpose.

It is said in *Blackamore's Case*, 4 Coke's Report, 156: "So at common law, the Judges might as well amend their judgment as any other part of their record, etc., in the same term, for during the term the record is in the breast of the Judges, and not in the roll. * * * But at the common law the misprision of clerks in another term in the process was not amendable by the Court, for in another term the roll is the record * * *." This well established rule of the common law was affirmed at an early date in this State. (*Baldwin v. Kramer*, 2 Cal. 582.)

Mr. Chief Justice Murray, in delivering the opinion of the Court in *Carpentier v. Hart*, 5 Cal. 406, said: "We have repeatedly held that after the adjournment of the term the Court loses all control over cases decided, unless its jurisdic-

De Castro v. Richardson et al.

tion is saved by some motion or proceeding at the time, except in the single case provided by statute, where the summons has not been served, in which the party is allowed six months to move to set the judgment aside." This doctrine has been too frequently affirmed by this Court to be now called in question. (*Suydam v. Pitcher*, 4 Cal. 280; *Robb v. Robb*, 6 Cal. 21; *Morrison v. Dapman*, 3 Cal. 255; *Shaw v. McGregor*, 8 Cal. 521; *Bell v. Thompson*, 19 Cal. 706; *Lattimer v. Ryan*, 20 Cal. 632.)

In this case, the judgment was rendered and the term had expired, and consequently the Court had no power, at a subsequent term, to amend the order made at a previous term, unless a motion had been made or some proceedings instituted at the previous term to procure the amendment to be made, and the motion or proceedings had been continued to that term. If the Court has the power that the entry of the amended order would imply, and if the amended order had been entered at the September term, and the defendants had relied upon it, and had given their notice of intention to move for a new trial within the thirty days allowed, the plaintiff might at the next term have moved the Court and procured an amendment, striking off the allowance of time for giving the notice, when the defendants would have been deprived of the benefit of their motion for a new trial, without any fault on their part. By reason of the want of power in the Court to make the amendment after the expiration of the term, the amended order is void.

A proper observance of this rule will not in any manner derogate from the power of Court to make an order *nunc pro tunc*, or to correct a mere clerical error in an order or proceeding, where a fit case for the exercise of such authority arises. It is a general rule that a mere clerical error is amendable. (See Tidd's Prac., 4th Am. Ed., 1855, p. 161, note B.) At common law, when the proceedings have been entered of record the Courts would allow of no further amendments, but by the statute of jeofails and amendments, a still further right of amendment was given. The making up of the judgment roll

is the equivalent, under our Practice Act, of the entry of record at common law. We have directly adopted the English statutes, in respect to amendments, to a very limited extent, but our Courts have gone much further than our statutes, and have adopted them indirectly as rules of practice. It was found necessary to pass the statute (of 14 Edw. III, Stat. 1, C. 6,) to avoid the consequences of "misprision of the clerk in writing one syllable or letter too much or too little," which was afterwards, by construction, extended to a *word*, but our Courts have exercised that power very amply "in furtherance of justice." But at common law, and under the statutes of joefails and amendments, and by the practice of our Courts, the order *nunc pro tunc*, or the amendment of the clerical error, could not be made unless there was something in the *record* to amend by. (*Blackamore's Case* above cited; Tidd's Prac., 4th Am. Ed. 713; *Morrison v. Dapman*, 3 Cal. 255; *Swain v. Naglee*, 19 Cal. 127.)

In *Morrison v. Dapman*, the judgment was rendered, to be levied *de bonis testatoris*, and, on motion, it was at a subsequent term amended, so as to be levied *de bonis propriis*; but the Supreme Court held that the power to amend *nunc pro tunc*, was "confined to cases where the record discloses that the entry in the minutes does not correctly give what was the judgment of the Court;" and in *Swain v. Naglee*, the Court say that "all Courts have the power to amend clerical errors, and to enter a judgment *nunc pro tunc*, when the record itself discloses the error."

There is no pretence that it appears anywhere in the record that, at the September term, time was extended for the defendants to give the notice of the motion for a new trial; and under the above rule, an order *nunc pro tunc*, granting time for that purpose, could not be legally made at a subsequent term. This disposes of the notice, and as a consequence, the motion for a new trial fails for the want of a notice to support it. The plaintiff has not by any means consented to the motion's being entertained, but on the contrary, he moved that it be stricken out, because notice had not been given as required by law.

Polack v. McGrath et al.

The statement, also depending upon the notice of the motion, must fall with it.

This leaves for examination only the judgment roll. The statement not being settled or signed by the Judge, is not and does not purport to be a statement on appeal, and cannot avail the defendants for any purpose.

Upon examination of the judgment roll, we see no error therein sufficient to entitle the defendants to a reversal of the judgment.

Judgment affirmed.

Mr. Justice SHAFER expressed no opinion.

MARY POLACK v. PETER McGRATH AND JAMES F. DONLEN.

FORCIBLE ENTRY OR UNLAWFUL DETAINER.—P. had possession of a lot of land by having it inclosed with a fence, but did not reside on it, nor have a house on it. M. and D. entered into possession, and built a house on the premises and moved into it. Five days afterwards, an agent of P. went to the premises and told M. and D. that he had come there to take possession for P. They replied that it would be very foolish to give up the lots after making improvements on them; that they would not leave, and that it would take a pretty good force to put them off; that they had paid their money for the lots, and they would be d——d if they would leave. To another agent of P., M. and D. used substantially the same language. *Held*, that this did not amount to a forcible entry or unlawful detainer, and that the evidence was insufficient to authorize P. to maintain the action, and that the Court should have granted a nonsuit; *held*, further, that such acts amounted merely to a trespass and ouster of P., for which ejectment was the proper remedy.

APPEAL from the County Court, City and County of San Francisco.

The facts are stated in the opinion of the Court.

E. A. Lawrence, for Appellants.

The Court clearly erred in refusing the nonsuit, for the following reasons:

Plaintiff had not shown an *actual possession* in herself.

(Forcible Entry Act, section 9.) The counterpart in the present case is *Frazier v. Hanlon*, 5 Cal. 156-160. This case is affirmed in *House v. Keiser*, 8 Cal. 499; *Cummings v. Scott*, 20 Cal. 84; 23 Cal. 526; *Dickinson v. Maguire*, 9 Cal. 46; *Scarlet v. Lamarque*, 5 Cal. 63; *Moore v. Goslin*, 5 Cal. 266.

The fence alone did not constitute possession. (*Hutton v. Schumaker*, 21 Cal. 453.)

Plaintiff has not shown a forcible entry made by defendants. The complaint alleges a forcible entry as the *gravamen* of the charge. *Unlawful holding* is not alleged as a substantive cause of action, but merely as a continuation or consequence. The complaint was the same in *Preston v. Kehoe*, 15 Cal. 318, where it is held that force being alleged must be proved, and will not be inferred from mere refusal to deliver possession. The same was also held in *Frazier v. Hanlon*, on petition for rehearing, 5 Cal. 159, 160.

Spencer, Reichert & Jarboe, for Respondent.

The Court properly refused the nonsuit, if there was any evidence tending to prove the case. (*Cravens v. Dewey*, 13 Cal. 42.)

The Court, although it will review proceedings by the Court below so far as to reverse a judgment for errors in law occurring at the trial, or for erroneous instructions, will not set aside a judgment and verdict given upon conflicting evidence, nor reverse a decision of the Court below denying a motion for new trial when there has been a conflict of testimony.

The decisions of this Court upon this subject are uniform. The discretionary power of the Court below will not be interfered with, unless it appears that there has been a great abuse of that power. Now, there was a conflict of testimony upon every point raised in the case, and upon this conflicting testimony the jury found for plaintiff, and the Judge refused to review the action of the jury for that reason. (*Peters v. Foss et al.*, 16 Cal. 357; *McCloud v. O'Neill*, 16 Cal. 397.) See,

also, *Burnett v. Whitesides et al.*, 15 Cal. 36, where the Court says: "Where the verdict is supported by any evidence we will not interfere with the order of the Court refusing a new trial, unless we are convinced there was an abuse of the legal discretion of the Court." (See, also, *Walton v. Maguire*, 17 Cal. 92.)

The ruling of the Court upon this point, we think, disposes of one ground of defendant's motion for new trial and of appeal.

By the Court, CURREY, J.

The plaintiff brought her action of forcible entry and detainer against the defendants to obtain the restitution of a certain parcel of land in San Francisco, and for the recovery of damages for the alleged forcible and unlawful entry upon the land, and the forcible and unlawful detention thereof. The plaintiff alleges in her complaint that at and for a long time before the defendants entered, she was and had been in the actual, peaceable, and quiet possession of the land, and was still entitled to the possession thereof; and that while she was so in the possession of the same land, the defendants, on a day named, "with force and arms, and with strong hands and multitude of people, unlawfully and forcibly entered on said described premises, and with force and violence put out and expelled said plaintiff therefrom, and took possession of the same; and that said defendants have ever since forcibly and unlawfully detained, and still do forcibly and unlawfully detain possession of said premises from this plaintiff, to her damage, etc."

The defendants meet the averments of the complaint by a specific denial, and affirmatively allege, that "they have the legal right to the present possession of said premises, and are the owners thereof."

Testimony was introduced on the trial in the County Court, going to establish the possession of the premises by the plaintiff for a long time anterior to and also when the defendants

entered thereon. But she did not have a house on the premises, nor reside thereon; nor did she otherwise have the actual possession than by a fence that formed a complete inclosure of the same. The evidence showed that the defendants entered within this inclosure on or about the 24th of October, 1862, and were there in possession from thence to the time of the trial of the action.

On the 29th of the same month, the agent of the plaintiff went to the premises and told the defendants that he had come there to take possession for the plaintiff; and he testified that Donlen said "it would be very foolish to give up the lots after his making improvements on them;" and referring to both defendants, he also testified that "they said they would not leave the lots, and it would take a pretty good force to put them off; they had paid their money for the lots, and they would be damned if they would leave; * * all this was said in good humor; I saw no weapons." The defendants were shovelling sand at the time; and the witness was unable to obtain possession of the premises.

Another witness testified that between the 24th and 30th of October, he had demanded possession of the premises for plaintiff, from McGrath, who said he had bought the lot and paid for it, and did not intend to leave it; and then, speaking of the two defendants, he said: "They were annoyed and angry, and I was unable to obtain possession."

Von Schmidt, who was a witness for plaintiff, testified that there was no house on the premises until the 24th of October, 1862; that at that time he saw the defendants engaged in passing lumber through the fence, and that this was done peaceably.

This was all the evidence touching the question of a forcible entry or a forcible or unlawful detainer.

When the plaintiff had rested her case, the defendants moved the Court to order the plaintiff nonsuited on the grounds, viz:

"First—Plaintiff has not shown a sufficient possession to maintain this action.

“Second—Plaintiff has not shown an unlawful entry by defendants.

“Third—Insufficiency of proof to maintain this action.”

The Court denied the motion, and the defendants excepted.

The defendants then introduced evidence which they claimed justified their possession of the premises, and afterward the cause was submitted to the jury, who rendered a verdict for plaintiff. A motion was made for a new trial, which was denied, and this appeal is from the judgment entered on the verdict, and from the order denying a new trial.

The point to be resolved is, whether the evidence in the case sustained the allegations of the complaint of the forcible entry of the defendants into the premises, and the unlawful detainer thereof by them.

Assuming that the plaintiff had the actual possession of the premises as the owner of the same when the defendants entered thereon and ousted her, it is to be ascertained whether the remedy sought is the proper one for the injury sustained. The law has provided various remedies for the recovery of the possession of lands to which one may be entitled, and of which he may have been tortiously or wrongfully deprived. He may be entitled to maintain ejectment, or an action of forcible entry and detainer, but he cannot maintain the latter unless the facts and circumstances of the case bring it within the provisions of the Act providing the remedy for that species of wrong. In this case the complaint, which is well drawn, is for a forcible entry and a forcible and unlawful detainer.

It is laid down in Bacon's Abridgment, that a “forcible entry must regularly be with a strong hand, with unusual weapons, or with menace of life or limb;” and Sir William Blackstone's definition is, that a forcible entry or detainer is committed by violently taking or keeping possession of lands or tenements with menaces, force, and arms, and without the authority of law. (4 Black Com. 148.)

The evidence in the case failed to establish the allegations of the complaint. The most that the acts of entry and detainer of the defendants upon the premises amounted to

Walls v. Preston.

was a trespass and ouster of the plaintiff, for which she may have, if she have the better right, her action of ejectment.

It would not be sufficient to charge the defendants with having entered *vi et armis*; and the words "with strong hand" mean something more than a common trespass. (Per Lord Kenyon, C. J., in *Rex v. Wilson*, 8 T. R. 357.)

If there was any evidence showing that the entry of the defendants was forcible, or with strong hand, or with multitude of people, or if it appeared therefrom that they detained the premises by force, or uttered threats calculated to deter the plaintiff or her agents from entering upon the land, we should not disturb the verdict and judgment. We think the Court ought to have granted the nonsuit upon the evidence as it stood when the motion therefor was made; and this error was not cured by any evidence subsequently given in the cause.

The judgment is reversed and the cause remanded.

Mr. Justice SHAFTER expressed no opinion.

BENJAMIN WALLS, ADMINISTRATOR OF THE ESTATE OF MANUEL VERA, DECEASED, v. WILLIAM PRESTON.

STATEMENT OF GROUNDS FOR NEW TRIAL.—If the grounds upon which a party relies for a new trial are not designated, either in the notice or statement, a new trial should be denied.

SAME — WAIVER OF.—Where the attorneys of both parties appear in open Court, and by consent argue a motion for a new trial, this consent, even if it is a waiver of a notice of intention to move for a new trial, is not a waiver of a statement in some proper form of the grounds of the motion.

ASSIGNMENT OF ERRORS.—A statement on appeal is of no avail, unless the grounds upon which a party intends to rely are therein set forth.

ERRORS — HOW REVIEWED.—Error in law, occurring at a trial, may be reviewed upon a bill of exceptions, as well as upon a motion for a new trial.

LEASE — RENT PAYABLE IN PART OF CROP.—An agreement in writing between two parties, by which the party of the first part demises and leases unto the party of the second part land (describing the same) for a term specified, and the party of the second part agrees to cultivate and plant the land at his own expense, and deliver on the premises, to the party of the first part, one sixth of all the crops as soon as harvested, and not to underlet the premises or yield the possession to any person other than the lessor,

Walls v. Preston.

without the lessor's consent in writing, is a lease, and not a contract for the services of the party of the second part, for which he is to receive as compensation a portion of the crops he may produce.

APPEAL from the County Court of Solano County.

The lease mentioned in the opinion of the Court was executed by both Manuel Vera and Preston, the defendant. December 1st, 1861, Vera died, and Walls was appointed administrator of the estate on the 23d day of May, 1863.

On the 23d day of October, 1863, Walls, as administrator, commenced an action before a Justice of the Peace, in Solano County, against Preston, to recover possession of the lands, under the thirteenth section of the Forcible Entry and Detainer Act, as amended in 1862. Plaintiff claimed that Preston was holding over after the termination of his lease.

The case was appealed to the County Court. On the trial in the County Court, plaintiff offered in evidence the lease; defendant objected to its reception, because it was irrelevant, and was not a lease, but a contract to cultivate land for a specific portion of the crop raised. The Court sustained the objection, and plaintiff excepted. A bill of exceptions was drawn up and signed by the judge, and is copied into the transcript.

Defendant recovered judgment in the Court below, and plaintiff appealed.

The other facts are stated in the opinion of the Court.

S. G. Hilborn, for Appellant.

The Court erred in refusing to admit the lease in evidence, in proof of the allegation of the complaint. (Act of Forcible Entry and Detainer, section 13; Wood's Digest, 469; *Demarest v. Willard*, 8 Cowen, 206; *Evertson v. Sawyer*, 2 Wend. 507.)

The point of objections to the lease is not sustained by the authorities cited. Defendant is estopped to deny the lease. Be the contract what it may, it confers upon him the absolute right to the land during the term.

Walls v. Preston.

M. A. Wheaton, for Respondent.

The paper marked "Exhibit B" was inadmissible, it not being a lease as called for by the complaint. (*Bernal v. Hovious*, 17 Cal. 541; *Putnam v. Wise*, 1 Hill, 235; *Dinehart v. Wilson*, 15 Barb. 595; *Caswell v. Districh*, 15 Wend. 379.)

Even if the complaint had been differently framed, Preston's occupation would be no more than that of a mere servant, and this action would not lie. (*Bernal v. Hovious*, 17 Cal. 541.)

By the Court, RHODES, J.

The motion for a new trial was properly overruled. The plaintiff failed to designate the grounds upon which he relied, either in his notice or statement. It is stated in the bill of exceptions that the plaintiff in open Court moved for a new trial, and that the motion was entertained by consent. Even if the consent of the parties could be deemed a waiver of a notice of intention to move for a new trial, it did not waive the statement, in some proper form, of the grounds of the motion. (See *Stata*. 1863, p. 643.) There is nothing upon which the Court below can act on the hearing of the motion, unless the grounds of the motion are designated.

The statement on motion for a new trial is of no avail as a statement on appeal, for the reason that the grounds upon which the plaintiff intends to rely are not therein set forth. This leaves for examination the errors appearing upon the judgment roll, and the only ones assigned are those set forth in the bills of exceptions.

The point mainly relied upon by the appellant is the error of the Court in excluding as evidence the instrument offered as a lease of the lands in controversy, executed by the plaintiff's intestate and the defendant. The alleged error can be reviewed upon a bill of exceptions as well as upon a motion for a new trial. (*Rice v. Gashire*, 13 Cal. 53; *Brown v. Tolles*, 7 Cal. 399.) In many cases it is preferable, and we think it the better practice, that the party complaining of the exclu-

Walls v. Preston.

sion of legal and competent testimony, or of the admission of that which is illegal or incompetent, should take his exception by bill or otherwise, and assign the error on appeal from the judgment, instead of incurring the labor and expense of attempting to procure a new trial, and of making up for this Court a record, the large portion of which would serve, perhaps, in no manner to explain the errors assigned.

The plaintiff contends that the instrument offered in evidence by him is a lease, and the defendant insists that it is a cropping contract, which constituted the parties tenants in common of the *land* and of the *crops* during the time mentioned in the instrument.

The plaintiff's intestate, Manuel Vera, "demised, leased, and, to farm, let" the premises unto Preston, "to have and to hold" the same from the first day of December, 1861, to the first day of October, 1863; and Preston covenanted not to "underlet the said premises, or yield the possession thereof to any" but Manuel Vera, without his consent in writing, and to properly cultivate and plant the land at his own cost and expense, and to deliver thereon to Manuel Vera, on the premises, one sixth of all the crops as soon as harvested. Is this instrument a lease, or is it only a contract for the services of Preston, to be performed on the land, and for which he is to receive as compensation a portion of the crops he may produce?

It is competent for the parties covenanting for the use, occupation and cultivation of land, and the payment therefor out of the crops produced, to execute a lease in the usual form, or they may enter into an agreement constituting them tenants in common of the crops, and at the same time may provide that the owner or the occupant may hold the possession of the land, or that both may be tenants in common of the land during the time mentioned in the agreement. It is the general rule that, where a term is created, the possession given to the occupant, and the produce agreed to be paid is to be paid *as rent*; then the instrument is regarded as a lease. (Taylor, Land. and Ten. sec. 24.) It is also a general rule that

where the occupant covenants to deliver to the owner a portion of the crops, the agreement is held to be a cropping contract—a letting upon shares—and the owner and occupant are tenants in common of the crop. (*Putnam v. Wise*, 1 Hill, 247; *Bernal v. Hovious*, 17 Cal. 544.)

In the last two cases, and the authorities therein cited, there was no question as to which of them (the owner or the occupant) was entitled to the possession of the land under the agreement.

The character of the instrument must be determined upon a consideration of all its terms and provisions, and the Court will give it such a construction as will carry into effect the intention of the parties, without regard to the technical terms employed. Although words are used which, if disconnected from other parts of the instrument, would import a lease, they will not be so construed if the evident intention was merely to make a cropping contract. Nor, on the other hand, will the instrument be so construed as to deprive the occupant of the position of a tenant of the land, if from the whole instrument it is apparent that the parties intended he should enjoy the exclusive possession of the premises.

In *Putnam v. Wise*, Mr. Justice Cowen says: "The true test seems to lie in the question whether there be any provision, in whatever form, for dividing the specific products of the premises. If there be, a tenancy in common arises, at least in such products as are to be divided;" and that case is cited on that point, with approbation, in *Bernal v. Hovious*, 17 Cal. 544.

The doctrine was deduced by the learned Judge from what he understood to be the test adopted by Mr. Chief Justice Nelson, in *Caswell v. Districh*, 15 Wend. 379, and that principle has been acted upon and affirmed, almost without question, in a number of cases in New York. (*Dinehart v. Wilson*, 15 Barb. 595; and *Harrower v. Heath*, 19 Barb. 337.) In all the cases in New York, affirming on this point *Putnam v. Wise*, and in *Bernal v. Hovious*, the question was merely who was entitled to the possession of the crop, not whether the owner or the occupant was in possession of the land, not whether the

relation of landlord and tenant existed between the parties, though that question was incidentally discussed.

The two principles deducible from those cases are these: First—If the agreement contains terms which by themselves would import a lease, and other terms which provide for a division of the crops, and it is doubtful which it is—a lease or a cropping contract—it will be deemed a cropping contract, by reason of a division of the crops; and second, where the agreement provides for a division of the crops between the owner and occupant, they are held to be tenants in common of the crop. It cannot be maintained, upon those authorities, and certainly not upon principle, that a lease, in the usual form of a demise, for a term of years, with covenants sufficient to give the lessee the exclusive possession of the land during the time, and to require him to yield up the possession at the end of that term, shall not be a lease, and the occupant shall not be a tenant, but shall be a mere servant of the owner, because the parties have made provision for a division of some portion or all of the crops that may be produced. The term *division*, as applied to the crops, has no more forcible signification in aid of the interpretation of the instrument, than has the word *demise*, when employed in connection with the land.

Mr. Justice Cowen, in *Putnam v. Wise*, cites with approbation, Woodfall, (Land. and Ten.,) who says that the most proper and authentic form of words may be overcome by a contrary intent appearing in the deed of demise. No reason can be assigned, why the same rule of construction should not be applicable to the words providing for a division of the crop.

In *Stewart v. Doughty*, 9 Johns. 108, the Court held that the instrument that by its terms would have amounted to a cropping contract, was a lease, because the premises were let for a term certain; and in *Putnam v. Wise*, it was said that the last case was "very much shaken, if not entirely overturned," by *Caswell v. Districh*, for in the last case the demise was for a year, certain.

In *Harrower v. Heath*, 19 Barb. 337, the Court held, upon the authority of the cases according with *Putnam v. Wise*,

that the parties were tenants in common both of the *land* and the *crops*; but in that case the parties agreed that the owner should have the use of certain portions of the premises for certain purposes, and the whole instrument showed that the parties contemplated a *joint occupation*; and it may be remarked that the right to the possession of the land, as between the owner and occupant, was not in any manner in issue.

The object of Courts in adopting rules of construction, is only to furnish means to so interpret the agreement as to ascertain the intention of the parties. The object is not to make a contract for the parties, nor to vary the terms of the covenants they have entered into; nor is it to arbitrarily insert a covenant they have not agreed to.

Where it plainly appears that the parties have made a lease, the Court will not declare it *not* to be a lease simply because the parties have inserted a covenant that more appropriately belongs to a contract of a different character. In the cases we have cited, the Courts were endeavoring to ascertain the intention of the parties; and having ascertained it, they declared the rights of the parties under the contract, as they made it, so far as the same were in issue.

There is certainly no rule of law, so absolute in its nature, as to prevent the occupant of land, under a contract which constitutes him a tenant in common with the owner in the crops, from having as entire a control over the premises during the term, if the parties so agree, as a tenant covenanting to pay a money rent would have. In other words, from being a tenant of the land under a lease, and at the same time a tenant in common of the crop, or of some part of it. Such agreements are constantly made, and it never occurs to the parties, and they do not intend, that the tenant is changed into a servant of the lessor, because the lessor receives a portion or all of his compensation, for the use of the land, in some uncertain quantity of the products of the land.

In *Chandler v. Thurston*, 10 Pick. 205, where the contract was very similar to that in *Putnam v. Wise*, the Court said
VOL. XXV.—5

the contract "may be regarded either as a contract to perform labor on the land of the plaintiff remaining in his own possession, and to receive his pay in produce, or as a hiring of the land for a term of time, rendering a rent payable in produce," and in considering the case the Court treated the occupant as a tenant of the land; and the same was the case in *Lewis v. Lyman*, 22 Pick. 437, and in many other cases. We can see nothing incompatible in the tenant of the land under a lease, being at the same time a tenant in common of the crops; and there never would have been any doubt upon this point, had not the Judges in New York, in passing upon questions concerning the rights of the parties to the possession of the crops, uttered dicta which seemed to determine the point against the occupant.

"A lease," as defined by Bouvier, "is a contract for the possession and profits of land on one side, and a recompense of rent, or other income, on the other;" or "it is a conveyance of lands and tenements to a person for life, for years, or at will, in consideration of a return of rent or other recompense." In *Hunt v. Comstock*, 15 Wend. 667, where Comstock purchased a tract of land from Hunt, and gave him a mortgage, and "let" to him the house and garden with certain privileges, the Court adjudged it to be a lease, though there was no reservation of rent. If a reservation of rent, or some benefit or recompense equivalent to rent, is deemed necessary, in order to constitute a contract a lease, the covenant to pay or deliver a portion of the crop, amounts in every sense to a recompense for the use and occupation of the land, as fully as would a covenant to pay money, or a certain amount of the crops, or to improve the premises, or keep them in repair, or to pay the taxes, or perform labor for the lessor, all of which have been held good, as a reservation of rent. It is apparent from the opinion of the Court in *Caswell v. Districh* — the case upon which the extreme doctrine in New York was founded — that the Court did not intend to destroy what was plainly a lease, and convert it into a mere contract for work and labor, because it provided for a division of the crops; for Mr. Justice

Streeter v. Rush.

Nelson, in delivering the opinion of the Court, says: "This view of the contract should be maintained, unless otherwise clearly expressed;" and in commenting upon *Stewart v. Doughty*, he regarded the agreement of the lessee, to pay a share of the specific crops, as an agreement to pay rent in kind.

It clearly appears to us that the parties in this case intended to make a lease, and that the instrument executed by them was a lease; that its effect as such was not destroyed by their having contracted for the payment to the lessor of a portion of the specific crops to be produced, and that that covenant was an agreement to pay the rent of the premises out of the crops.

The judgment is reversed and the cause remanded for a new trial.

JOHN STREETER v. HIRAM RUSH.

Liquidated Damages — Penalty.— Streeter sold to Rush his butcher shop, tools, etc., at Suisun, and in his contract of sale, entered into this covenant with Rush: "I also bind myself in the sum of five hundred dollars to said Rush, not to go into the butchering business in said Suisun, without the consent of said Rush, in any manner whatever." *Held*, that the five hundred dollars mentioned in the covenant, are to be regarded as liquidated damages, and not as penalty.

Id.— The question whether a specified sum mentioned in a contract, to be paid by either party in the event of its violation, is liquidated damages, or a penalty, must be determined by the intention of the parties, to be ascertained from a consideration of the whole contract.

APPEAL from the District Court, Seventh Judicial District, Solano County.

The following is the contract of sale executed by Streeter to Rush:

"Know all men by these presents, that I, John Streeter, of the Town of Suisun, in the County of Solano, and State of California, of the first part, for and in consideration of the sum of eight hundred dollars, lawful money of the United States, to me paid by Hiram Rush, of the same town and State, of the second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant

Streeter v. Rush.

and convey unto the said party of the second part, his executors, administrators, and assigns, the following property, to wit: (Here follows a description of the property.) And I do for myself, my heirs, executors, and assigns, covenant and agree to and with said party of the second part, his executors and assigns, to warrant and defend the sale of said property, goods, and chattels, hereby made unto the said party of the second part, his executors, and assigns, against all and every person and persons whatsoever.

"I also bind myself in the sum of five hundred dollars to said Rush, not to go into the butchering business in said Suisun, without the consent of said Rush, in any manner whatever.

"Witness my hand and seal, the 29th day of August, 1862.

"JOHN STREETER." [SEAL.]

The defendant asked the Court to give the jury the following instruction, which was refused, and defendant excepted.

"The instrument in evidence is an agreement of Streeter to pay Rush five hundred dollars, if he (Streeter) should engage in the butchering business in any manner in Suisun; and if the jury believe from the evidence that he has so engaged in the butchering business, they must allow the defendant the full amount of his five hundred dollars damages."

The jury found a verdict in favor of plaintiff for the amount due on the notes, without making any deduction for the five hundred dollars.

Defendant appealed.

The other facts are stated in the opinion of the Court.

M. A. Wheaton, for Appellant.

When from the nature of a contract it is not practicable to ascertain the amount of damages sustained by a violation of it, the sum named by the parties as such damages will be held to be liquidated damages. (*Williams v. Dakin*, 22 Wend. 201; *Holmes v. Holmes*, 12 Barb. 147; *California Navigation*

Streater v. Rush.

Co. v. Wright, 6 Cal. 258. See, also, *Coffee v. Meiggs*, 9 Cal. 363; *Baldwin v. Bennett*, 4 Cal. 392.)

The sum in which a person binds himself not to engage in any particular business in a particular place, is liquidated damages. (*Green v. Price*, 13 M. & W. 695; *Smith v. Smith*, 4 Wend. 468.)

Whitman & Wells, for Respondent.

The contract on which the counter claim is based is, in partial restraint of trade, not void on that account, but good or bad as founded on an adequate consideration, and as reasonable in itself. They are supported by the modern authorities, and we do not question their validity; but we do urge that the very circumstance is a ground for a lenient construction of its provisions, that the party having bound himself (for *bond* is the word used, and that word imports a penalty) not to engage in the business in Suisun as against Rush, simply imports that he will not do so in such a way as to damage Rush. The contract, it seems, is personal only, and if Rush should retire from the business, or cease to have any determinate interest in enforcing the contract, it might well be questioned whether he could enforce a claim for other than nominal damages. So, too, if Rush should, in the course of his business, hire the plaintiff as a butcher, could he enforce the penalty against him? Or if Rush should sell out his butchering business, and retain this contract, it would be a harsh construction that would expose the party to the penalty. We say harsh, because the presumption would be that the contract was only made to protect Rush while in the business, and that not against the plaintiff, as a person following the same trade merely, but added to that, one who just retiring from business, could, by resuming it, prevent the plaintiff from obtaining the custom relinquished by defendant. A reasonable view of the contract, its character, and object, we submit, would hold to a personal contract for the benefit or protection of Rush.

The question of liquidated damages is admitted to be one of construction, and for that purpose we urge the subject of the contract, the situation of the parties, the usages of trade, to which they are supposed to refer, and the circumstances of their conduct: all necessary and proper elements in deciding the question.

The case is not one where there is any real difficulty in assessing damages; proof of the business, its diminution, and the extent of that diminution, can be readily made. Few cases of damage are presented capable of easier proof than the one at bar. The case, then, comes within the fifth rule laid down by Mr. Greenleaf, (2 Greenleaf on Evidence, section 213,) and is not within any rule laid down by that author that would make this a matter of liquidated damages.

By the Court, RHODES, J.

The plaintiff sold to the defendant his butcher shop, the fixtures and tools, and certain personal property connected with the business, receiving therefor two promissory notes of the defendant; and in his contract of sale he entered into this covenant with the defendant: "I also bind myself in the sum of five hundred dollars to said Rush not to go into the butchering business in said Suisun, without the consent of said Rush, in any manner whatever." The plaintiff now sues on the notes, and the defendant offers to set off the sum of five hundred dollars due him by reason of the plaintiff having engaged in the butchering business contrary to his covenant.

The only question in the case arises upon the refusal of the Court to give the third instruction asked for by the defendant. The question is this: Is the sum of money expressed in the covenant to be considered as a penalty, or is it to be held as liquidated damages?

This subject has been a fruitful source of discussion in numerous cases, and it is impossible to reconcile all of them; but while there has been a conflict among them on some points, there are certain rules in which they all agree. The intention

of the parties to the agreement is the point of inquiry, and is to be ascertained from a consideration of the whole instrument; and when ascertained, it is to be adopted by the Court, and full effect given to it, unless it is contrary to law. In construing the instrument, resort must be had to the signification of the terms employed by the parties, and to the rules of law, in view of which the parties are presumed to have contracted. If the parties agree upon the payment of a certain sum, whether in terms as a penal sum or not, if it can be plainly understood that the gross sum was intended as a security for the payment of a less sum, it will be held as a penalty; and it is also a general rule, that if the parties agree that the sum shall be paid as liquidated damages, the Court will so regard it, unless it clearly appears that it was intended merely as a security for the payment of damages that might be considered liquidated and certain in amount.

Where the contract contains both the terms, "penalty," and "liquidated damages," as applied to the gross sum to be paid, or equivalent terms, or where it contains neither of those terms, the Court will ascertain the intention of the parties from the whole instrument, as it would in case of any other agreement. (Sedgwick on Measure of Damages, 417 to 442.) If the damages for the performance or non-performance of the act stipulated to be done or not to be done by the party agreeing to pay the gross sum, can be ascertained with certainty, or have been agreed upon between the parties, then, as in the case where the parties have denominated it a penalty, the Court will consider it as a security; but if they are "wholly uncertain, and incapable of estimation, otherwise than by mere conjecture," as was said in *Williams v. Dakin*, 22 Wend. 201, the gross sum will be regarded as liquidated damages. This is a rule by which to ascertain the intention of parties in cases of doubt, and not to enlarge or limit the intention, when expressed or clearly ascertainable without its aid. Courts are not authorized to put a different construction upon a contract from what the parties intended it should bear; nor are they warranted in adding to it a further term, or in striking there-

Streater v. Rush.

from a term the parties have employed; nor are they justified in attempting to modify or reform a contract under the vague notion of relieving a party from the hardships of an agreement into which he has willingly and knowingly entered. Parties are more competent to make their own bargains than Courts are to make bargains for them.

In this case the plaintiff evidently intended to sell, and the defendant to purchase, the good will of the plaintiff's business; and the plaintiff agreed that if he entered into the business at the same place, without the defendant's consent, he would pay the defendant five hundred dollars. The agreement was not that the plaintiff would pay the damages that the defendant should actually sustain, for they knew that damages for such a breach of contract were uncertain and matter of mere conjecture, and they therefore preferred to establish their own measure of damages; and for that purpose they fixed upon the sum of five hundred dollars, to be paid by the plaintiff to the defendant, if the plaintiff should engage in the butchering business at Suisun without the defendant's consent. That sum is, by agreement of the parties, liquidated damages.

The Court has no greater power to relieve the plaintiff from the payment of that sum because it may exceed the damages actually sustained, than it has to discharge the defendant from the payment of the two notes in suit for the reason that they may exceed the value of the property sold to him. It only remains to add, that the Court erred in refusing to give the third instruction asked by the defendant.

Judgment reversed and the cause remanded for a new trial.

SAWYER, J., dissenting.

I regret that I am unable to agree with my associates in their construction of the covenant in question in this suit. It is in the following words: "I also bind myself in the sum of five hundred dollars to said Rush not to go into the butchering

Streater v. Rush.

business in said Suisun, without the consent of said Rush, in any manner whatever."

This, in my opinion, is in the nature of a penalty, and not a covenant for liquidated damages. The principles of construction announced in the prevailing opinion, generally meet my approbation. But on one point I think a qualification is required, and *that* is the point upon which the construction of this covenant turns. Quoting from the decision in *Williams v. Dakin*, 22 Wend., a leading case in the United States on the subject, the opinion says: "But if they (the damages) are wholly uncertain, and incapable of estimation, otherwise than by mere conjecture," the gross sum will "be regarded as liquidated damages." This would, doubtless, be strictly true as applied to the covenant under consideration in that case, and uncertainty in the amount of damages is one element to be considered in the construction of such covenants when the language is doubtful. But it is not of itself a controlling test.

In the case referred to, the contract was for the sale of a newspaper establishment, and the good will and patronage of the paper; five hundred dollars was paid for the type and material, and three thousand dollars for the patronage and good will of the business. There was a covenant not to print or publish in Utica, or suffer to be printed or published in any building owned by the grantor in Utica, for a specified time, any other paper of the character designated. For the faithful performance of their covenants the parties bound themselves in the sum of three thousand dollars. "Then followed a stipulation that the said sum of three thousand dollars should be and was thereby *fixed and settled as liquidated damages, and not as a penal sum* for any violation of the covenant," etc. Here there would seem to be little need of calling in the aid of rules of construction to ascertain what the parties intended by their covenant. Yet it is in construing the foregoing covenant that the Court used the language quoted by Mr. Justice Rhodes. The Court also laid some stress upon the fact that the parties had fixed upon the precise sum (three thousand dollars) as the liquidated damages which was paid

for the "patronage and good will" of the paper; and in that case, although the Judges and a majority of the Senators held in accordance with the covenant, that the sum should be regarded as "*liquidated damages*," and "*not a penal sum*," five Senators voted the other way.

But in the case now under consideration the covenant contains no such express and decided declaration of the intention of the parties to make the sum "*liquidated damages, and not a penal sum*," as is found in *Williams v. Dakin*. The language quoted from the opinion in that case, I think, to render it applicable generally, requires qualification; and the required qualification is found well expressed by Mr. Sedgwick, in his work on the Measure of Damages, last ed. p. 442. After a full discussion of the numerous cases on the subject, he lays down five propositions, deducible from those cases which he thinks are to govern whenever a question arises as to whether a sum named in the covenants is to be regarded as a penal sum, or as liquidated damages. The fifth proposition is as follows: "That when, independently of the stipulation, the damages would be wholly uncertain, and incapable or very difficult of being ascertained, except by mere conjecture, then the damages will be usually considered liquidated, *if they are so denominated in the instrument.*"

The qualification at the close of the proposition is an important one; and the covenant in *Williams v. Dakin* contained the qualifying terms, while that in the case under consideration does not. The amount is not denominated liquidated damages in the covenant in this case. There is no direct express covenant to pay that particular sum of money. It is undoubtedly a proper case for the parties to stipulate for liquidated damages, but the question is, Have they done so? I think not. They certainly have not done so in express terms, nor by an express covenant to pay that particular sum. The defendant bound himself "in the sum of five hundred dollars" not to do a particular act, but did not agree to pay that particular sum upon a breach of the covenant, whether

the actual damages sustained should amount to that sum or not.

I have examined a large number of cases, and have not found one where the sum stated has been held as liquidated damages, unless it was expressly stated to be liquidated, or there was an express covenant to pay a specific sum of money on the doing or not doing of the things provided for. On the contrary, I find many cases where a sum expressly stipulated to be liquidated damages has been held to be penal only, notwithstanding an express stipulation to the contrary; and generally, the fact that the damages are uncertain has been brought in to aid a stipulation for liquidated damages, or an express covenant to pay a specific sum on the delinquency of the party against the ordinary presumption that such sums are penal merely, and in some cases where it would seem that no such aid should be required.

It is also a rule that, "When it is doubtful on the face of the instrument whether the sum mentioned was intended to be stipulated damages, or a penalty to cover actual damages, the Courts hold it to be the latter." (Sedgwick on Dam., same ed. 440, note 1, p. 441, note 1; *Bagley v. Peddie*, 5 Sandf. 192.)

In the case under consideration, the most favorable construction for the appellant that can be put upon the covenant is, that there is a reasonable doubt as to the intent of the parties. Such being the case, under the last rule stated it should be construed as a penalty. But to my mind the language is not doubtful. The form of the covenant is much more analagous to the form used in cases of penalty than in cases of liquidated damages. There is no covenant to pay the specific sum of five hundred dollars whether the actual damages amount to that sum or not, and there is no express statement that the same is to be liquidated damages.

I am of the opinion, under the rules of construction established by the numerous cases upon this subject, that the covenant under consideration should be regarded as stipulating for a penal sum, and not for liquidated damages.

Middleton et al. v. Findla.

JOHN MIDDLETON AND SAMUEL P. MIDDLETON v.
JAMES FINDLA.

NAME OF GRANTOR IN DEED.—If the grantor's true name is recited in the body of a deed, and he also acknowledges it by his true name, the fact that he signs it by a wrong name does not invalidate the conveyance.

AUCTIONEERS—THEIR COMPENSATION FOR SERVICES.—One representing himself as the owner of real estate, who employs an auctioneer to sell the same under an agreement that in the event of a sale the auctioneer shall receive for his services a percentage on the amount bid, cannot, after a sale by the auctioneer, avoid paying him for his services because the purchaser refuses to take the property, owing to a real or alleged defect in the title.

NOTE.—The auctioneer in such case is entitled to compensation for his services, unless there is a special agreement that it shall depend on the consummation of the sale.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

J. B. Crockett, for Appellant.

The rule appears to be well settled that a broker is not entitled to commissions unless a sale is effected and completed, provided the failure does not arise from the conduct of the seller. (*Blanc v. Improvement Bank*, 2 Robinson, La. 63; *Didion v. Duralde*, 2 Robinson, La. 163; *De Santos v. Taney*, 13 La. 151; *McGavock v. Woodlief*, 20 How. U. S. 221; *Pricket v. Badger*, 37 Eng. Law and Eq. 428; *Broad v. Thomas*, 7 Bing. 99; *Read v. Riven*, 10 Barn. & Cress. 438.)

This appears to me to dispose of the case. But I invoke, also, another principle. The right to commissions depends on the fact whether or not the respondents have done all they agreed to do, as the condition on which commissions were to accrue. They say they have; because, as they aver, they only undertook to find a purchaser willing to take the property at the stipulated price, and that they found such a purchaser, but he refused to take it from no fault of theirs. Now, however they understood the contract, it is quite evident the appellant did not so understand it. His understanding

was that he was to pay no commissions unless the sale was actually *completed*.

The rule I invoke is, that performance of a condition precedent must be shown with such certainty that the Court may judge whether the *intent* of the contract has been fulfilled. (1 Chit. Plead. 32; Com. Dig. Tit. Pleader, C. 58.)

Haight & Pierson, for Respondent.

The rule is very well stated in the case of *Glentworth v. Luther*, 21 Barb. 145: "One who is employed as a broker to sell real estate, in the nature of things, can do nothing more than to find a party who will be acceptable to the owner, and enter into a contract of purchase with him; unless the owner makes him more than a mere broker by giving him a power of attorney to convey the property, and then the agent would cease to be broker and become the attorney.

"A broker becomes entitled to his commissions whenever he produces to his principal a party with whom the owner is satisfied, and who contracts for the purchase of the property at a price acceptable to the owner.

"If, after that, the purchaser refuse to perform because of the false representations of the owner respecting the property, this will not deprive the broker of his commissions."

By the Court, CURREY, J.

From the pleadings and evidence in this case it appears that in September, 1862, the respondents were partners, doing business in the City of San Francisco as auctioneers and brokers, and that the appellant, who was the owner of a storehouse and lot of land in that city, employed them to advertise and sell this property for him. The contract between the parties was, in effect:

First — That the storehouse and lot should not be sold for a less sum than twenty-two thousand five hundred dollars.

Second — That if the property was sold for that sum only,

Middleton et al. v. Findla.

the appellant would pay the respondents for their services the sum of five hundred dollars, and the expenses of advertising the sale.

Third — That if the property was sold for a sum exceeding twenty-two thousand five hundred dollars, the appellant would pay the respondents the sum of two and a half per cent of the amount of the price for which the same should be sold, and the expenses of advertising the sale.

In pursuance of this contract the respondents advertised the property for sale at auction, and afterward sold the same to one Goldstein, who was the highest bidder therefor, for the price of twenty-four thousand and fifty dollars. Before the sale it was announced by the respondents, in the presence of the appellant, to the persons in attendance, that the purchaser would be required to deposit ten per cent of his bid immediately after the property was struck off to him, and that the title would be subject to legal investigation.

The terms of payment at which the appellant, by his agents, the auctioneers, offered the property for sale were half cash, and the balance in three years at one per cent per month.

The purchaser, instead of depositing ten per cent of the purchase price, deposited only five hundred dollars, with which the respondents were satisfied, as he was regarded by them as a person able at any time to respond to his engagements.

The abstract of the appellant's title to the property was placed in the hands of Goldstein's legal adviser for examination, who afterward decided and reported the title defective, because the copy of one of the deeds under which the appellant claimed, and which purported in the body of it to have been made by *Edward Jones*, appeared in such copy and in the book of records as signed by *Edmund Jones*. By the certificate of the proof of the execution of this deed, it appears that the execution thereof was by *Edward Jones*. Because of the supposed defect, Goldstein refused to complete the purchase; and after this, about the 10th of October, 1862, the appellant

Middleton et al. v. Findla.

made out and tendered to him a deed for the property, duly executed, but Goldstein still refused to accept the deed and complete the contract on his part. Before the deed was so tendered, one Wood applied to the appellant to purchase the property at the sum of twenty-four thousand dollars, and after the refusal on the part of Goldstein the appellant contracted to sell it to Wood for that sum, and afterwards, on the 24th of October, conveyed the same premises to him by deed, which was recorded. Upon discovering that appellant had sold to Wood, the respondents returned to Goldstein the five hundred dollars received from him. The respondents then demanded payment of the commission of two and a half per cent, on the twenty-four thousand and fifty dollars bid by Goldstein, and the expenses of advertising the property for sale. The appellant refused payment, and the respondents brought their action for the recovery thereof. The cause was tried by the Court without a jury, and a finding and judgment was rendered for the respondents against the appellant for the amount. A motion was made for a new trial and denied.

The ground on which the appellant relies for a reversal of the judgment is that the evidence did not justify the finding and judgment, and that therefore the judgment is contrary to law.

There seems to be no material conflict in the testimony of the witnesses, and the question is directly presented whether the pleadings and evidence justified the finding of the Court and the judgment thereon entered.

There was a memorandum of the sale sufficient to obviate any objection that might have arisen under the Statute of Frauds as to the binding effect of the contract of sale and purchase; and so the counsel for the parties have seemed to consider the matter in all the stages of the case.

The property was offered for sale by the respondents, in pursuance and fulfillment of their engagement with the appellant, and upon the implied assurance on appellant's part, to the person who might desire to purchase, that the title was

good and valid; and in order to give the purchaser, whoever he might be, an opportunity to examine the title, it was announced at the sale that the property would be sold, "subject to legal investigation"—which means in such cases neither more nor less than that the purchaser would buy with the privilege reserved on his part to decline the bargain if he discovered on examination of the abstract that the title of the vendor of the property was defective. The purchaser in such a case would not be justified in making a captious objection to the title, because perhaps he might, after the property had been struck off to him, repent his bargain—but having purchased on condition that the title was good, he must abide his agreement, if in fact the title be free from valid objections.

Upon offering the property on the terms mentioned, a purchaser appeared who agreed to pay for it the sum of twenty-four thousand and fifty dollars. By this agreement he became bound to pay this sum unless it was ascertained as a truth that the appellant's title was defective.

In determining upon questions of title, mere possibilities, it has been said, are not to be regarded; the Court which is called upon to decide must govern itself by a moral certainty, for it is impossible in the nature of things that there should be a mathematical certainty of a good title. (*Lyddal v. Weston*, 2 Atkyns, 19; *Hillary v. Waller*, 12 Vesey, 239; *Sperling v. Trevor*, 7 Vesey, 498.)

It appears from the testimony of one of the respondents, and also from that of the appellant, that the only objection made by the purchaser to the appellant's title was that there was a discrepancy between the name of the grantor as written in the body of one of the deeds constituting appellant's chain of title, and the name as subscribed to it; and it appeared also by the testimony that the proof of the execution of the deed, as found upon the record, was that it was executed in fact by *Edward Jones*. *Edward Jones* was the person through whom, it would seem from the case, the appellant claimed title, and he it was who executed the deed by the name of *Edmund Jones*, as shown by the certificate of the proof of the execu-

tion thereof. If the record contained a true copy of the deed, and of the certificate of the proof of the fact of its execution, as we must presume it did in the absence of the deed itself, then its execution by *Edward Jones* was established, notwithstanding the use by him of another Christian name than his own, and the alleged defect was harmless. (*Addy v. Grix*, 8 Vesey, 504; *Harrison v. Harrison*, 8 Id. 185; *Baker v. Denning*, 8 Adol. and Ellis, 94; *Merchants' Bank v. Spicer*, 6 Wend. 446; *Brown v. Butchers' and Drovers' Bank*, 6 Hill, 443.)

No other objection seems to have existed on the part of the purchaser, and the one made being invalid, the sale of the premises to him became effectual and complete as a contract of sale. This being so, the right of the respondents to compensation for their services at the rate stipulated, follows of course.

But, independent of the fact that the sale of the property became discharged of the condition that postponed the time for the consummation of the contract between the vendor and vendee, we are of opinion the right of the respondents to the commission agreed upon for their services did not depend upon the fact that the title was good and valid. The contract between the parties was not that the respondents should take any risk as to the validity of the appellant's title. In the case of the *Monte Allegre*, 9 Wheat. 644, Mr. Justice Thompson said: "A merchant who employs a broker to sell his goods, knows or is presumed to know the state and condition of the article he offers for sale;" and upon the same principle he is presumed to know whether or not he has title. So when one employs an agent to sell real property which he represents he owns, he cannot, in the absence of an agreement to that effect, deny to his agent compensation for his services in making a sale because the title may prove defective and thereby defeat the sale. This would not be reasonable, but would be unjust.

Then when a person representing that he is the owner of property, places it in the hands of an agent to be sold, and the agent makes a sale of it in accordance with the instructions of his principal, or in pursuance of the terms of the agreement between them, he is entitled to compensation for his labor.

Brown v. Martin et al.

The amount of the compensation will depend upon the contract, if there be one in respect to it; or in the absence of any agreement on the subject, it will be measured by the value of the services rendered.

When the sale was made by the respondents, as appears by the evidence, their work was done, and they were entitled to the wages they had earned. (*Glentworth v. Luther*, 21 Barb. 147; *Bernard v. Minnot*, 34 Barb. 93.)

Mr. Justice SHAFTEE expressed no opinion.

JOHN M. BROWN v. CHARLES MARTIN, JULIANA MORELTA, AND WILLIAM ROBSON.

COMPLAINT—AMBIGUITY OR UNCERTAINTY IN.—A complaint in ejectment which avers that on a day named "the plaintiff was, and ever since has been, and still is the owner in fee simple, seized and possessed," etc. . . . "That" on a day thereafter named, "and while the plaintiff was so the owner in fee simple, seized and possessed, defendants entered and ousted him, and from thence hitherto have and still do withhold the same," etc., is good, unless demurred to on the ground that it is ambiguous, unintelligible, and uncertain.

DEMURRER—STATUTE OF LIMITATIONS.—The defense of the Statute of Limitations cannot be made by a demurrer which states in general terms that the complaint does not state facts sufficient to constitute a cause of action. **SAME.**—In order to enable a party to avail himself of the defense of the Statute of Limitations by demurrer, the statute should be distinctly stated in the demurrer.

APPEAL from the District Court, Seventh Judicial District, Marin County.

This action was commenced on the 26th day of January, 1863. The complaint alleged that the ouster took place on the second day of January, 1858.

Defendant Martin demurred to the complaint, because it did not state facts sufficient to constitute a cause of action. The Court overruled the demurrer. The defendants then filed the following answer:

"The said defendants, for answer to the allegations of the complaint in this cause, say, that the said Plaintiff is not and

Brown v. Martin et al.

never was the owner in fee simple, or otherwise, nor is he nor was he ever seized or possessed of the land described in the complaint in this cause, or any part thereof. The defendants do not deny that they have occupied and possessed the said lands as alleged in the complaint, and they allege that they, the said defendants, own and are entitled to the possession of said land."

The pleadings were not sworn to.

Plaintiff recovered judgment in the Court below, and defendants appealed.

The other facts are stated in the opinion of the Court.

A. T. Wilson, for Appellants.

This Court has held and decided, some half dozen times, that when the complaint shows that the Statute of Limitations has run against the claim sued on, the objection may be raised by demurrer.

If it can be raised by demurrer, it must be under subdivision six of section forty of the Practice Act, for it can come in under no other head, if, when the complaint itself shows that the statute has run, that objection may be raised under subdivision six of section forty, then the objection is not waived by a failure to take it in that way, but may be raised either by motion in arrest or on appeal.

We might, we suppose, rest with safety on the repeated decisions of this Court upon the point, especially under the decisions of this Court in *Ellison v. Halleck*, 6 Cal. 386, (see last clause of opinion, found on page 394,) but will offer a few suggestions showing, as we think, not only that the objection *may* be taken by demurrer when the complaint shows that the statute has run, but that, consistently with the provisions of our Practice Act, it can only be taken by demurrer, motion in arrest, or appeal. We cannot under our statute, as at common law, plead *any* matter showing a default, but are restricted (see section 46) to, first, a denial of the allegations of the complaint; and second, to a statement of *new* matter constituting

a defense. One of the main ends intended to be obtained by our code, was brevity, and as a means, the avoidance of repetition, especially in pleading; and hence, the limitation in answering to denials and allegations of *new* matter in avoidance; for what good end could be attained in setting out in the answer the very matter alleged in the complaint?

When the statute has run, but the complaint is so drawn as not to show that fact, then allegations in the answer showing the running of the statute, would be properly *new* matter. New matter is that which the complaint does not touch upon. It is that matter the burden of proof of which lies in the defendant. (*Bridges v. Paige*, 13 Cal. 640; *Percy v. Sabin*, 10 Cal. 22; *Glaxie v. Clift*, *Id.*) Third—By this standard, any allegations in our answer of facts showing that the statute had run, would not be new matter, for those facts *are* set out in the complaint, and the defendant would not have had to prove them. See *Hentsch v. Porter*, 10 Cal. 558, where the limitation in answering to *new* matter is distinctly and emphatically stated. The complaint should be looked upon as the careful, deliberate, and well considered statement of the facts of the plaintiff's case, and when not distinctly and positively denied, they are taken to be true, and a point of departure in the investigation of the cause. When, then, facts are required to be set out, and when so set out and uncontradicted are for every purpose to be taken as true, then we ask the necessity or the sense of requiring the defendant, or even *permitting* the defendant, in order to have the benefit of such facts, to set them out in his pleading?

It seems clear to us that if a defendant were to set up in his answer a fact distinctly set out in the complaint, the Court, on motion, would order it to be stricken out as irrelevant or redundant. On motion to strike out matter from an answer as irrelevant or redundant under section fifty-seven of the Practice Act, what is the test by which the question of relevancy or redundancy is tried? Is it not this: whether it *denies* any allegation of the complaint, or confesses and avoids it? Would it not be a queer way for a defendant to take

Brown v. Martin et al.

advantage of a distinct and substantive defense which the complaint itself shows for him, to deny, or confess and avoid it, that the defendant is restricted either to denying or confessing and avoiding in pleading? (See Practice Act, sec. 46, and *Percy v. Sabin*, 10 Cal. 27.)

It was said, and a case was cited on the oral argument to show, that a different rule holds in New York. On examination since, we have found that their law *sustains our view*. Our Practice Act in relation to pleading is a transcript of the New York code, except that in New York there is a distinct provision in the code that the defense of the Statute of Limitations must be set up in the answer. The inference is obvious, that the codifiers and Legislature understood that without such a provision such defense need not or would not be so taken. (See New York Code, Voorhies' edition, sec. 74, page 64.) Again: our practice is a purely statutory one, and every question of practice must be tried by the provisions of the Practice Act. This is pointedly enacted by statute, (see Practice Act, sec. 37,) when it is said, that "all the forms of pleadings in civil actions, and the rules by which the sufficiency of the pleadings shall be determined, shall be those prescribed by this Act;" (and see *Payne v. Treadwell*, 16 Cal. 243.)

Now, our Practice Act makes no distinction between the Statutes of Limitation and any other defense; and hence, the practice being uniform, if we must plead the statute in order to take advantage of it when the complaint shows that it has run, we must also plead any other and every other defense to have the advantage of it, even when the complaint shows the defense to exist; and as our practice is uniform, if we are bound to plead the statute at law, we are equally so in equity.

George Cadwalader, for Respondent.

In *McDonald v. Bear River Company*, 18 Cal. 238, it was held that "the question of the Statute of Limitations cannot be raised on appeal, *unless presented in some form on the trial below, even though it be pleaded.*"

Upon the merits of the question, we say No; because we

Brown v. Martin et al.

do not believe that a demurrer, to the effect that the complaint does not state facts sufficient to constitute a cause of action, properly raises the question whether the Statute of Limitations is a bar to an action for the recovery of the possession of a tract of land.

The decisions of this Court have avoided land cases, and are confined to actions upon written contracts; and yet the last decision of this Court, which was in *De Uprey v. De Uprey*, 23 Cal. 352, it was held that to raise the bar of the statute required a special demurrer.

The allegation of *seizin* and ouster in a complaint in ejectment are not required to be proved as made; and whatever their date, they are considered as supported by proof of title in plaintiff and possession in defendant, at any time before commencement of suit.

Thus, in *Stark v. Barrett*, 15 Cal. 365, Mr. Chief Justice Field said: "The variance between the date of the alleged *seizin* and right of possession of the plaintiff on the 1st day of January, 1857, and the date of the conveyance to him, May 22d, 1858, is immaterial—the latter being previous to the commencement of the action. In our practice, to enable the plaintiff in ejectment to recover, it is only necessary to establish his right of possession and the occupation of the defendant at that time."

In *Yount v. Howell*, 14 Cal. 465, it was said: "The variance between the date of the alleged *seizin* and possession of the plaintiff in the complaint, January 1st, 1852, and the date of the patent, December 18th, 1857, is of no consequence—the latter being previous to the commencement of the action—and the motion for a nonsuit on that ground was properly denied. The rule of the common law in relation to the proof of a legal estate, and the right of entry at the date of the demise laid in the declaration, has no application under our system. The action of ejectment at common law proceeded upon a fictitious demise; and hence, it became necessary to show title in the lessor of the plaintiff at the date of the alleged demise. In our system the fiction has no existence;

in our practice it is sufficient if it appear that the plaintiff was entitled to the possession of the premises at the commencement of the action, and the date of the alleged seizin or possession and ouster become material only when the question of *mesne profits* is involved."

And so it appears that the date of the seizin and ouster in our complaint are not material facts; for in contemplation of law they only mean that before the commencement of the suit that we had the right to the possession of the demanded premises. This being so, it is evident that the Statute of Limitations cannot take its base of attack from them; and hence, we say that the complaint is good.

The rule of pleading and of evidence is different in actions upon written contracts, whose date must be proved as alleged.

The Court, in *Barringer v. Warden*, 12 Cal. 311, took a departure from the established rule of decision, when it held that our practice was in closer assimilation to the practice in Courts of equity than those of common law, and thereupon holding that inasmuch as in Courts of equity the bar of the Statute of Limitations could be invoked by demurrer, the same could be done under our system in law cases.

If they were correct in their premises, they certainly meant to carry the rule to its logical conclusion, and did not intend that it might be raised by a general demurrer, which failed to state or allude to the Statute of Limitations.

A demurrer in equity was required to state the particular ground of objection. (Adams' Eq. p. 691.)

The Statute of Limitations is nothing more or less than a personal privilege, which, if not set out in precise terms and insisted upon, is waived. It is a kind of a personal exemption from a debt or legal duty given by statute. When pleaded, it goes in abatement of the action; and here, it may be observed, that all the decisions of this Court appear to have overlooked the forty-fourth section of the Practice Act, which declares: "When any of the matters enumerated in section forty do not appear upon the *face of the complaint*, the objection may be taken by answer."

Brown v. Martin et al.

The face of our complaint shows a cause of action; therefore the objection thereto raised under section forty does not apply. It is the back of the complaint, not its face, that shows the point made by appellant's counsel.

By the Court, SANDERSON, C. J.

This is an action of ejectment, and the appeal stands upon the judgment roll alone. Two points are made by counsel for appellant:

First—That it appears upon the face of the complaint that the plaintiff was in possession of the premises in controversy at the time the action was commenced.

Second—That the complaint does not state facts sufficient to constitute a cause of action.

I. The allegations of the complaint are: "That on the 1st day of January, 1858, the said plaintiff was and ever since has been, and still is the owner in fee simple, seized and possessed, etc. * * * That on the 2d day of January, 1858, and while the plaintiff was so the owner in fee simple, seized and possessed, defendants entered and ousted him, and from thence hitherto have and still do withhold the same, etc."

It is true, as claimed, that the foregoing allegations show that the plaintiff is *still possessed* of the premises; but the learned counsel for appellant must see that they also show that the plaintiff was dispossessed on the 2d day of January, 1858, by the defendants, who have ever since withheld possession. All that need be said upon this point is, that had counsel interposed a demurrer to the complaint in the Court below on the ground that the same was ambiguous, unintelligible, and uncertain, it is possible the Court would have sustained the demurrer, in which event the plaintiff would have been allowed to amend so as to remove the ambiguity. No demurrer was interposed for this cause, and under the forty-fifth section of the Practice Act the objection is deemed to have been waived. It is, therefore, too late to make the objection for the first time in this Court.

II. It is next claimed that under a demurrer which merely states in general terms that the complaint does not state facts sufficient to constitute a cause of action, the defense of the Statute of Limitations may be made. The late Supreme Court held, in several cases, that the defense of the Statute of Limitations could be interposed by demurrer, and the ground of the decision was, that the pleadings under our system more nearly assimilate equity than common law pleadings under the former system, and that in equity the defense of the Statute of Limitations could be made by demurrer. In a demurrer to a bill in equity, under the former system, it was usual to state, in addition to the cause of demurrer, the particular grounds upon which the alleged cause was based; and if the Statute of Limitations was relied on as a cause of demurrer, it had to be specially so stated. Nor could the aid of the Statute of Limitations be invoked by demurrer unless it appeared upon the face of the bill that the cause of action was barred. The form of demurrer under the old chancery system runs thus: "This defendant doth demur in law to the said bill, and for cause of demurrer sheweth that it appears by the said bill that, etc."—stating the ground upon which the defendant relies.

It was undoubtedly the design of the framers of the new system to make the pleadings conform, so far as possible, to the old chancery, rather than the common law forms, for the obvious reason that the former are better adapted to the new system, which requires the pleader to state the facts constituting his cause of action or defense in ordinary and concise language. (Practice Act, sections thirty-nine and forty-six.) This design is further apparent from the fortieth, forty-first, and forty-fourth sections of the Practice Act. The fortieth states the several causes for which the defendant may demur, provided they appear upon the face of the complaint. If they do not appear upon the face of the complaint the forty-fourth section provides that they may be stated in the answer. But whether stated in the demurrer or in the answer, the forty-first section provides how they shall be stated, and requires

Brown v. Martin et al.

the grounds, not the causes or objections, to be distinctly specified. Whether the causes of demurrer enumerated in section forty are assigned in a demurrer or in an answer, their legal character is the same, and they are matters of demurrer strictly. Dilatory pleas, *eo nomine*, are unknown to our system. Such pleas are, in our system, made causes of demurrer, and when relied on the grounds upon which they are founded must be distinctly stated, without regard to where or in what pleading the objection is interposed. That is to say, when a cause of demurrer is assigned, the reason or the ground of it must also be stated. For example: "The defendant demurs to the complaint for the following causes appearing upon the face thereof, to wit: First—The Court has no jurisdiction of the subject matter of the action, because the amount in controversy is less than three hundred dollars, to wit: one hundred dollars. Second—The plaintiff has not legal capacity to sue, because he is less than twenty-one years of age, to wit: eighteen years. Third—The complaint does not state facts sufficient to constitute a cause of action, because the cause of action therein alleged has not accrued within five years next preceding the filing of said complaint." Such is the form of demurrer contemplated by our system of pleading, and such was the usual, though, perhaps, not always absolutely necessary form in the old chancery practice. To the extent of making it absolutely necessary, our system has improved on the old, by providing that the demurrer may be disregarded unless the grounds are specified as above.

The forty-fifth section provides that unless the causes of demurrer are assigned in the foregoing manner, either by demurrer or answer, they shall be deemed waived, except the objection to the jurisdiction of the Court, and the objection that the complaint does not state facts sufficient to constitute a cause of action. These excepted objections may, therefore, be made at any stage of the proceedings; but when made, they are to be made in the manner and form prescribed by the forty-first section, for that section refers to all causes of demurrer, and makes exception in favor of none. These two objec-

Brown v. Martin et als.

tions may be taken *in limine*, or in support of a motion for a nonsuit, or in arrest of judgment, or on appeal; but whenever taken, and wherever taken, they should be taken as provided in sections forty and forty-four; and the grounds of the objection should be stated, as provided in section forty-one, under penalty of being disregarded as therein provided.

The forty-first section reads as follows:

"Sec. 41. The demurrer shall distinctly specify the grounds upon which any of the objections to the complaint are taken. Unless it do so it may be disregarded."

We are aware that the foregoing section has been practically ignored heretofore, and it has been held sufficient to state the causes of demurrer, in the general terms prescribed in the fortieth section. Admitting that a rule of practice, so long followed and sanctioned by the Courts, ought not to be disturbed, we still think that it should be restricted in its operation, rather than extended. To say the least, the last clause in the forty-first section places it in the discretion of the Court to say whether a demurrer which does not distinctly specify the grounds of the objection shall be disregarded. Therefore, in view of the practice which has prevailed heretofore, we do not hold that it is necessary to specify the grounds of the objections in all cases, but we do hold that if it is not done it is in the discretion of the Court to disregard the demurrer; and this Court will not entertain a question on demurrer founded upon the Statute of Limitations, unless the statute be distinctly stated in the demurrer, and unless that demurrer be interposed in the Court below.

In conclusion, we recommend to the profession the practice suggested in this opinion.

Judgment affirmed.

Mr. Justice SAWYER delivered the following dissenting opinion, in which Mr. Justice SHAFTER concurred.

While we admit that the law *ought* to require a party who

Brown v. Martin et al.

relies upon the Statute of Limitations to specifically point out this objection in his demurrer, we feel compelled to dissent from the conclusion reached in the second point of the prevailing opinion in this case, on the ground that the construction of the provision of the Practice Act relating to demurrers appears to us to have been long since settled the other way.

Sections forty and forty-one of the Practice Act are, in respect to the point under consideration, substantially the same as sections one hundred and forty-four and one hundred and forty-five of the New York code. Under those provisions it was held by the Supreme Courts of New York at a very early day, and before their adoption in California, that it was a sufficient specification of the sixth ground of demurrer to state, in the language of the Act, "that the complaint does not state facts sufficient to constitute a cause of action." And this construction was approved and established by the Court of Appeals of New York as early as 1851. (*Haine v. Baker*, 1 Seld. 359.)

As long ago as October, 1856, the question was raised in this State, and the Supreme Court, after intimating that as an original question they might, perhaps, have given a different construction to the provisions under consideration, held that as the Courts of this State had adopted and followed the construction of the Courts of New York, they would not change it. In discussing the question the Court say: "In mere matters of practice involving no principle, it would be safer to acquiesce in a rule which has been established for several years in the inferior Courts of this State, the abrogation of which might introduce confusion and operate hardly on litigants." (6 Cal. 393.) It is now nearly eight years since that decision was announced, and we are not aware that it was ever afterward questioned by the late Supreme Court. The reasons then given operate with much greater force now, after the construction has been so long acquiesced in by the highest Court in the State. As a general proposition, the Court do not now propose to overrule this construction. But it seems to us that the conclusion reached does overrule it, as to a particular class of cases. It has been held in a number of instances that the

Miller v. Board of Supervisors of Sacramento County.

defendant may take advantage of the Statute of Limitations by demurrer, when it appears on the face of the complaint that the cause of action is barred. If so, the objection to the complaint on this ground must fall under the sixth subdivision of section forty: "That the complaint does not state facts sufficient to constitute a cause of action." We do not perceive any satisfactory ground upon which the Court can make a distinction between the ground of demurrer we are now considering and any other falling under the same head, where the statute itself does not seem to us to have made any. If the Court in its discretion may make one exception, we do not see why it may not another; and thus by extending the exercise of this discretion, overrule the previous decisions upon the provisions under consideration as to every case. With due deference to the opinion of our associates, we are unable to regard the case as one for the exercise of a judicial discretion. It seems to us to be a question of construction; and when the construction has been once settled, and for a long time acquiesced in, it becomes practically a part of the statute itself; and it ought not, in our opinion, to be changed except by legislative action. For these reasons we dissent.

J. E. MILLER v. THE BOARD OF SUPERVISORS OF SACRAMENTO COUNTY.

CERTIORARI.—The amended Constitution confers upon the Supreme Court original jurisdiction to issue writs of certiorari.

OFFICIAL BONDS.—In the matter of the approval of the bonds of officers, Boards of Supervisors exercise judicial functions.

RESIGNATION OF OFFICE.—One who has been elected to an office cannot resign the same until the time has arrived when he is entitled by law to possess the same, and he has taken the oath and given the required bond, and entered upon the discharge of its duties.

SAME.—An attempt by one elected to an office to resign the same before he has qualified and entered upon the discharge of its duties, is abortive and ineffectual.

REJECTION OF OFFICIAL BONDS.—A Board of Supervisors has no jurisdiction to reject an official bond, except for the reasons that it is not in form and substance in compliance with the requirements of the statute, or is not executed by sufficient and responsible sureties; and the Supreme Court will

Miller v. Board of Supervisors of Sacramento County.

review on certiorari and annul an order of a board rejecting a bond for any other than one or more of said reasons.

CERTIORARI to the Board of Supervisors of Sacramento County.

The facts are stated in the opinion of the Court.

H. H. Hartley, for Petitioner.

Upton and Estee, for Respondent.

By the Court, CURREY, J.

The petitioner, John E. Miller, was elected at the general election of the year 1863 to the office of Public Administrator of Sacramento County, for the term to commence on the first Monday of March, 1864, and a certificate of his election was duly issued to him by the proper officer. On the first Monday of March, 1864, before Miller had taken the oath of office or executed the proper bond, with sureties, he tendered, in writing, to the Judge of the County Court of the county, his resignation of the office to which he had been elected, which was accepted by such Judge, and by him transmitted to the Board of Supervisors, and the same was placed on file with the Clerk of the Board. Afterward, on the 15th of March, the petitioner gave notice, in writing, to the Supervisors that he withdrew his resignation, and at the same time exhibited to them proof that he had duly taken the official oath required by law, and tendered to the Board his official bond, executed in the amount and form prescribed by law, which was received and filed with the Clerk of the Board. The Board met on the 5th of April, and proceeded to consider the matter in relation to the resignation of Miller; and, upon motion of one of its members, the same was in form accepted, and so entered in the minutes of their proceedings; and on the following day the Board met again and rejected the bond, for reasons specially assigned. The reasons so assigned were not because the bond was not in substance and form in compliance

with the requirements of the statute in such cases made and provided, nor because the sureties were not sufficient and responsible; but, in effect, because the petitioner had resigned the office. Immediately before the petitioner gave the Board notice of his withdrawal of his resignation he applied to the County Judge and requested to be permitted to withdraw his resignation, and the Judge consented thereto and advised him that, as his resignation had been transmitted to the Board of Supervisors, to notify the Board of his withdrawal of it.

In the petition presented to this Court, the petitioner complains that the Board of Supervisors, by their action rejecting the bond for the reasons by them assigned, acted in violation of law and exceeded their jurisdiction, to the manifest injury of the petitioner; and he therefore prays this Court to order that a writ of certiorari be issued to said Board to certify up to this Court for review their records and proceedings in the premises, that this Court may render such judgment concerning the matter as may be proper in the case.

This writ was granted without any prejudice to any defense the Board of Supervisors might have made upon the return of an order to show cause why the writ should not be granted. The Board has caused to be certified and brought before the Court all their proceedings; and upon the record thus made up it is maintained, on behalf of the Supervisors:

First—That this Court has not jurisdiction to grant a writ of certiorari, except in aid of its appellate jurisdiction.

Second—That if the Court has such jurisdiction, the case exhibited by the record does not show that the Board of Supervisors exceeded their jurisdiction by performing the acts of which the petitioner complains.

I. The Constitution as amended provides that the Supreme Court shall "have power to issue writs of mandamus, certiorari, prohibition and habeas corpus, and also all writs necessary or proper to the complete exercise of its appellate jurisdiction." (Art. VI, Sec. 4.) This section of the Constitution as it stood before it was amended, after enumerating the appellate powers of the Supreme Court, provided that it

Miller v. Board of Supervisors of Sacramento County.

should have power to issue all writs and process necessary to the exercise of its appellate jurisdiction. The change effected by the amendment seems to have been designed to enlarge the powers of the Court by conferring upon it original jurisdiction in the particulars specified in the fourth section of the Sixth Article. The language of this section is too clear and explicit to leave it open to any other construction, however much the Court might be disposed to decline this new jurisdiction, in view of the inconveniences and embarrassments that may attend its exercise. (*Tyler v. Houghton*, 25 Cal. 26.)

II. The main point in the case is involved in the second objection, namely: that from the record certified to this Court it does not appear that the Board of Supervisors exceeded their jurisdiction in accepting the resignation of the petitioner and in the rejecting of his bond filed with the Board.

The writ of certiorari shall be granted in all cases where an inferior tribunal, Board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, Board, or officer, and there is no appeal, nor in the judgment of the Court any plain, speedy, and adequate remedy. This is so provided by the four hundred and fifty-sixth section of the Practice Act; and the only question to be considered under the authority of this statute is, whether the case presented by the record before us embodies the elemental conditions authorizing the issuing of the writ in the first place; and the giving of judgment, either affirming, annulling, or modifying the proceedings of the Board, in the second place; for the power of review possessed by the Court in this case cannot be extended further than to determine whether the Board has regularly pursued its authority, (Practice Act, Section 462,) and to give judgment either affirming, annulling, or modifying the proceedings of the Board. (Practice Act, Section 463.)

By the twenty-fourth section of the Act providing for the government of the County of Sacramento, passed April 25th, 1863, (Laws 1863, p. 512,) the Board of Supervisors are required to fix the amount of the official bonds of the several county officers, and such bonds are to be approved by such

Miller v. Board of Supervisors of Sacramento County.

Board in open session, which fact is required to be entered in the minutes of their proceedings and indorsed on the bond by the Clerk, and it shall then be approved by the County Judge. In the matter of the approval or disapproval of the bond, the Board exercises judicial functions. (*Robinson v. Board of Supervisors of Sacramento*, 16 Cal. 208, and cases therein cited; *People v. El Dorado County*, 8 Cal. 61; *People v. The Supervisors of Marin County*, 10 Cal. 344.)

The act performed by the Board of Supervisors, alleged to have been an excess of their jurisdiction, consisted in determining, in effect, that the petitioner had resigned the office to which he was elected, and in rejecting the bond for that reason, and because of a previous attempt on his part to sell the office. Whatever may have been the truth as to such attempt, and however open to animadversion, conduct of this kind may be, that was a question with which the Board had no authority to deal, and the inquiry must be narrowed down to the point whether the petitioner had resigned the office to which he was elected by the people of the county, and whether his resignation was a subsisting fact at the time the Board acted. If this inquiry be answered in the negative, then the Board, according to the case cited from 10 Cal. 344, exceeded its jurisdiction in treating the alleged resignation as effectual, and rejecting the bond tendered and filed for the reasons by them assigned.

At the time the petitioner undertook to resign the office of Public Administrator he was not in fact invested with that office. Before he could become so he was required by law to take the constitutional oath, and execute with sureties a proper bond to be approved by the Board. Had these things been done within the ten days allowed for the purpose, he would have become the Public Administrator of Sacramento County, and fully invested with the office. Having the mere naked right to the office of Public Administrator, the taking of the constitutional oath of office and executing the bond prescribed were conditions which, fully completed, were essential to the constituting of the petitioner such officer.

Miller v. Board of Supervisors of Sacramento County.

The first section of the Act concerning Public Administrators is as follows: "There shall be elected at the general election in and for each of the counties of this State, by the electors thereof, a Public Administrator, who shall continue in office for the term of two years, and until his successor is elected and qualified." (Wood's Digest, 51.)

There can be but one incumbent of the office of Public Administrator at the same time, and he who held the office prior to the first Monday in March remained the incumbent on that day, notwithstanding the petitioner was then entitled to the office upon taking the oath and filing the necessary bond. The petitioner's term, or the term for which he was elected, commenced on the first Monday of March; but that fact alone could not constitute him the incumbent of the office, because an incumbent is one who is in the present possession of an office. (Webster.) An officer is one who is lawfully invested with an office; and an office is a right to exercise a public function or employment and to take the fees and emoluments belonging to it. (7 Bac. Ab. 279; title—Offices and Officers.)

The twenty-third section of the Act concerning office is as follows: "Every office shall become vacant upon the happening of either of the following events before the expiration of the term of such office: 1. The death or resignation of the incumbent. 2. The removal of the incumbent from office. 3. The confirmed insanity of the incumbent, etc. 4. A conviction of the incumbent of a felony, etc. 5. A refusal or neglect of the person elected or appointed to take the oath of office, as prescribed in the seventeenth section of this Act; or when a bond is required by law, his refusal or neglect to give the bond within the same time in which he is required to take the oath of office. 6. The ceasing of the incumbent to be a resident, etc. 7. The ceasing of the incumbent to discharge the duties of the office for the period of three consecutive months, except, etc. 8. The decision of a competent tribunal declaring the election or appointment void, or the office vacant." (Laws of 1863, p. 389.)

By reference to these subdivisions of section thirty, it will

be observed that the term "incumbent" refers to him alone who has become qualified and has entered into the possession of the office; and that the person who has been elected or appointed to an office, who refuses or neglects to take the oath of office, or to give a bond when required, within the time prescribed by law, is not denominated an incumbent; and nothing is said as to the resignation of any other than an incumbent of the office.

In *The People v. Van Horne*, 18 Wend. 518, Mr. Chief Justice Savage said: "An office cannot be said to be vacant while any person is authorized to act in it, and does so act." And in reference to a statute like the first section of our Act concerning Public Administrators, he said: "In such cases there is, in fact, no vacancy, because the officers of the preceding year hold the offices until others are chosen or appointed in their places and have qualified."

If the petitioner had not become the incumbent of the office which he was elected to fill, he had no office to resign; and though he may have supposed he had, yet that did not alter the fact, and his attempted resignation and the acceptance of it by the County Judge was abortive and ineffectual.

The petitioner having taken the oath and filed the bond required by law, the Board of Supervisors ought to have approved it, if no other objection stood in the way than those assigned for rejecting it. We think the Board, by their action, which we are called upon to review, exceeded their jurisdiction. (*People v. Supervisors of Marin County*, 10 Cal. 344.) For the correction of this error there is no appeal, nor in our judgment, any plain, speedy, and adequate remedy other than by certiorari.

It is therefore ordered and adjudged that the proceedings of the Board of Supervisors of Sacramento County, in holding that the petitioner had resigned the office of Public Administrator, and in rejecting his bond filed, be annulled and held for naught.

Mr. Justice SAWYER expressed no opinion.

Jones v. Parsons et al.

**SYLVANUS JONES v. JAMES PARSONS, ADMINISTRATOR
OF THE ESTATE OF THOMAS C. BRUNTON, DECEASED,
THE PHOENIX WATER COMPANY, C. DORSEY, AND
ABNER REED.**

MORTGAGE OF INTEREST OF ONE OF SEVERAL PARTNERS.—If two or more persons are partners in the ownership and management of real estate, and owe partnership debts, and one of the partners mortgages his interest in the property to secure his individual debt, the mortgagee acquires only the mortgagor's interest in the surplus after the payment of the partnership debts; and if these debts equal or exceed the value of the property, and it is afterwards sold by the partners to pay the partnership debts, the mortgagee, as against the purchaser, holds no interest in the property, liable in equity to be sold, and the mortgage cannot be foreclosed.

PARTNERSHIP DEBTS—SALE OF PROPERTY TO PAY.—The purchaser of partnership property, who pays or becomes liable for partnership debts, equal in amount to the value of the property, has a valid defense against a suit in equity, brought to foreclose a mortgage executed by one of the partners for his individual debt on his interest in the partnership property.

APPEAL from the District Court, Fifth Judicial District, Toulumne County.

The note given by Brunton to Jones, the plaintiff, on the 7th of November, 1857, and to secure which he executed the mortgage, was for the sum of two thousand two hundred and forty-three dollars and eighty-nine cents, and was payable three years from date.

In October, 1860, Brunton died, and James Parsons was appointed administrator of his estate.

This action was commenced October 24th, 1862. The defendant, Reed, was made such, because he had purchased the property at a tax sale, and had obtained a tax deed. He demurred to the complaint, and the demurrer was sustained.

The defendants set up in their answer, that at the time of the execution of the mortgage the ditches were the partnership property of Brunton, Parsons, and Gleason; that the partnership was largely indebted in an amount exceeding the value of its property, and that the partnership property was sold for the purpose of liquidating the partnership debts, and settling up the affairs of the partnership.

The other facts are stated in the opinion of the Court.

Jones v. Parsons & c.

Coffroth & Spaulding, for Appellants.

The mortgage was notice to all parties after it had become a matter of record; and the titles of subsequent purchasers are subject to the lien created by the mortgage.

Dorsey purchased long after the recording of the mortgage.

We claim that the partnership indebtedness should have been disregarded and an absolute decree of foreclosure and sale made. If not, then the plaintiff is certainly entitled to a decree for the foreclosure of the mortgage, and sale of the mortgaged interest *subject* to the payment of the partnership indebtedness still remaining unpaid.

W. P. Barber, for Respondents.

The Court decided correctly; the appellant being only an individual creditor of one of the copartners, could not ask any relief against the property until the *copartnership* debts were paid; and the property failing to pay the copartnership debts, there was no surplus left to satisfy individual creditors.

This principle is fully recognized in all standard works on partnership, (Collyer on Part. p. 122, section 125 and notes,) and attaches as well to real as personal property. (Ib; 5 Metcalf, 562-585; *Buchan v. Sumner*, 2 Barb. Ch. R. 198; *Hozie v. Carr*, 1 Sumner, 181; 1 American Lead. Cases, 487-489.)

This question has also been expressly decided by this Court. (*Chase v. Steel*, 9 Cal. 64; *Conroy v. Woods*, 13 Cal. 626.)

In *Jones v. Thompson*, 12 Cal. 198, the Court say: "The interest of each is only the residuum of the property left after the settlement of the firm debts, and that the rights of firm creditors and the several partners are paramount to the claims of separate creditors of the firm." (See, also, Collyer on Part. sections 135, 136, 154; 1 Story's Eq. Jur. sections 674, 675.)

This appears to be the rule both at common law and in equity, and the present is a suit in equity. If a party attach or levy upon the individual interest of a copartner, he takes it subject to the payment of copartnership debts; and there is no reason why a mortgage should possess greater effect.

Coffroth & Spaulding, in reply.

The interest of one partner may be sold on execution against him for his separate debts. (*Kirby v. Schoonmaker*, 3 Barb. Ch. R. 46; *Jones v. Thompson*, 12 Cal. 191; 2 McCord's Ch. R. 302.)

If such interest can be sold on execution, *why* should not a decree of sale be made upon a mortgage of that interest?

At the date of the mortgage the copartnership was administering its own affairs, and consequently no lien had attached or could attach in favor of partnership creditors in the absence of any judgment in their favor. (*Kirby v. Schoonmaker*, 3 Barb. Ch. R. 46; *Conroy v. Woods*, 13 Cal. 633.)

Until a lien is obtained by the partnership creditors, either by judgment or attachment, the partners have power to make any *bona fide* sale of the property they think proper; and either of them may mortgage his interest in the real estate. (*Conroy v. Woods*, 13 Cal. 633; Collyer on Part. pp. 121, 122; *Greenwood v. Broadhead*, 8 Barb. 594; *Ketchum v. Durkes*, 1 Barb. Ch. 480.)

By the Court, RHODES, J.

Thomas C. Brunton, made to the plaintiff his promissory note, on the 17th of November, 1857, and to secure its payment, at the same time executed a mortgage of the undivided third of the Yorktown and Sonora Water Ditches. The plaintiff now seeks to foreclose the mortgage against the administrator of Brunton (now deceased) and Brunton's vendee. The Court rendered judgment against the administrator, but refused to foreclose the mortgage. The plaintiff appeals from that portion of the judgment refusing to foreclose the mortgage and from the order refusing a new trial.

It appears from the record that on the 4th of May, 1857, Brunton and Parsons were the joint owners of the Yorktown Ditch, and on that day they, with Gleason, purchased the Sonora Ditch, and Brunton and Parsons then conveyed to

Gleason the undivided third of the Yorktown Ditch, whereby the three persons became equal owners in the two ditches, and they formed a partnership, the ditches forming the main part of the partnership property. Brunton and Parsons put into the firm the Yorktown Ditch on their part, against the purchase money paid by Gleason on the Sonora Ditch.

The parties continued as partners, holding the two ditches, until the 13th of July, 1859, when they dissolved partnership; by an agreement in writing, and in order to pay the partnership debts, therein stated to be twenty thousand dollars, Brunton and Parsons conveyed to Gleason their interest in the ditches, and Gleason agreed to pay the debts. In April, 1860, Gleason conveyed the ditches to the defendant Dorsey, and subsequently Dorsey conveyed the same to the Phoenix Water Company.

Gleason sold the property for the purpose of paying the partnership debts—Dorsey agreeing to pay the same. Gleason paid some portion of the partnership debts out of his own means. At the date of the plaintiff's mortgage the partnership debts amounted to twenty or twenty-five thousand dollars, and the indebtedness continued down to the sale to Dorsey, when the debts amounted to about twenty-five thousand dollars, of which amount five thousand dollars was owing by the partnership to Gleason. The value of all the partnership assets at the dissolution, amounted to about twenty thousand dollars, the water ditches constituting the bulk of the property claimed by the partners as partnership property.

The plaintiff contended, that the ditches were not partnership property, but that Brunton, Parsons, and Gleason were merely partners in the use and management of the ditches. There was no finding of facts filed by the Court, but the issue, as to their being partnership assets, was directly presented by the defendants, and the judgment of the Court, refusing to foreclose the mortgage, could not have been rendered upon any other issue in the cause, nor without finding that fact for the defendants. There was evidence in the cause showing that the partners intended to put in the ditches as capital stock,

and hold them as partners, and the whole evidence was sufficient to have warranted the Court in finding as a fact, that they did hold the ditches in that capacity.

The remedies that the plaintiff was entitled to, at law, or in equity, were quite different, though the final result might be the same whichever tribunal he might resort to. If he had reduced his original debt against Brunton to judgment at law, during the time Brunton held his interest in the ditches, he could have levied his execution upon Brunton's interest in the ditches, and sold the same in satisfaction of his judgment. This point was so held in *Phillips v. Cook*, 24 Wend. 389.

In that case, Mr. Justice Cowen, upon a full and able review of the authorities, clearly settled that question, and says there was no good reason for holding the contrary in any case, but that every reason was in favor of the judgment creditors having that right at law. The interest that might have been sold under such proceedings was not the undivided third, nor any specific portion of or in the property, but it was only the undefined surplus interest of Brunton in the partnership property that might remain to him after all the debts owing by the partnership, and by him to his partners, on the partnership account, have been paid. (Collyer on Part. sec. 822, and notes; Story on Part. sec. 261; *Washburn et al. v. Bank of Bellows Falls*, 19 Verm. 278.) In *Pierce v. Jackson*, 6 Mass. 242, the Court say that "a creditor of one of the partners cannot claim any interest but what belongs to his debtor, whether his claim be founded on contract made with his debtor or on a seizing of the goods on execution." And the Court held that the interest of the debtor partner, is the balance coming to him on the settlement of the partnership debts. The creditor purchases at the execution sale at his own risk, for a Court of law is incompetent to take the account and ascertain the surplus, but the parties interested must resort to a Court of equity for that purpose.

The same result would accrue in case of the sale under execution of the legal interest of a partner, in the partnership real estate, as in the personal property. The partners are

regarded at law as tenants in common, but in equity the property is treated as vesting in them, in their partnership capacity, the beneficial interest being held by them in trust until the partnership account is settled and the partnership debts are paid. (*Dyer v. Clark*, 5 Metc. 582; *Howard v. Priest*, 5 Metc. 582; Coll. on Part. sec. 185, and notes.)

The trust in favor of partnership creditors is worked out in equity, through the medium of the trust existing between the partners, each partner having the right to demand that the partnership property shall be applied to the payment of partnership debts, and that he shall be reimbursed out of such property for the debts paid by him, as well as his contribution to the capital stock. The creditor of a separate partner, purchasing under his execution, the legal title in the real estate held by his debtor, would take the title as the debtor partner held it, subject to all the liens and trusts with which the title then stood chargeable.

The plaintiff contends that, as he would have the right at law, to sell under execution, the interest of his debtor in the partnership property, he therefore must necessarily have the right to foreclose his mortgage. No point is made in respect to the plaintiff's receiving his mortgage *bona fide* and without notice, actual or constructive, of the partnership rights in the property; and there being no evidence upon that question, it will not enter into the consideration of the case. If he had procured a judgment at law, before the sale to Gleason, and under his execution, had sold the undivided third of the two ditches, held by legal title by Brunton, then he would have held the property as Brunton held it; that is to say, he would have acquired the legal title, charged with the liens and trusts in favor of the remaining partners and the partnership creditors, and the debts equalling the value of the property, the beneficial interest acquired by the execution purchaser, would have amounted to nothing.

The case before us is this: Three partners hold in common the legal title to certain property; the property is partner-

ship property; the partnership is indebted in an amount equal to, if not exceeding, the value of the assets; one of the partners, for the purpose of securing his individual debt, mortgages to his creditors the undivided third of the partnership property; the whole partnership property is afterwards sold by the three partners, to pay the partnership debts; and now the individual creditor seeks to foreclose, in equity, his mortgage in satisfaction of his debt. The questions arising upon this state of facts are not now for the first time presented in the Courts of this State. In *Conroy v. Woods*, 13 Cal. 626, which was a suit in equity, the Court held that the rights of the partnership creditors, in respect to partnership property, were prior to those of individual creditors; and Mr. Justice Baldwin, in delivering the very able opinion of the Court, quotes with approbation Story on Part. sec. 97, which expressly affirms that doctrine.

In that case defendant Woods was proceeding under his execution, for an individual debt, to sell the property which had belonged to the partnership, but which had been sold to one of the partners, on dissolution, on his agreeing to pay the partnership debts, and the Court ordered the funds to be first applied to the payment of the partnership debts. The lien in that case was acquired by operation of law; in this case it was voluntarily given by the debtor partner. Has a lien voluntarily given any superiority over one acquired by law? We think it clearly has not. The lien by mortgage is in no respect better than would have been the lien of a judgment rendered at the time of the execution of the mortgage, or the lien of an attachment levied at that time on the assets of the partnership.

Whatever the rights of the parties may be at law, and admitting in its full force the doctrine of *Phillips v. Cook*, 24 Wend. 389, there never was any doubt that a Court of equity can restrict a party to such rights and remedies as he ought to possess, in view of the relation which he occupies in regard to the partnership assets, or that the Court will so administer the

partnership assets, that the partnership creditors shall be first paid. (*Conroy v. Woods*, 13 Cal. 626.)

The plaintiff has sued in equity, and the defendants are entitled to invoke for their protection, the rules and remedies peculiar to that Court, and they having made it appear that the partnership debts equalled the partnership assets at the date of the mortgage, and of the sale of the partnership property, and that the sale was made to pay the debts, it results, according to the rules of that Court, that the vendees of Brunton, held no interest in the partnership assets liable in equity to be sold for the payment of his individual debts.

It will be observed that in *Conroy v. Woods*, the partnership property had been sold to pay the debts of the partnership, and the Court held that in equity the priority of the lien of the partnership debts, still continued as against a creditor of an individual member of the partnership. That rule would not prevent the creditor of an individual member of the partnership, any more than a creditor of the partnership, from impeaching the *bona fides* of the sale.

Our view of the rights of the respective parties, may be illustrated by supposing that the plaintiff had proceeded to foreclose before the sale of Brunton. In such case, it would clearly be competent to the partners and their creditors, who might intervene to secure the payment of the partnership debts due them, to allege and prove that the mortgaged property was partnership property, and that it was necessary it should be employed in the payment of partnership debts, accruing previous to the mortgage, and thereupon to have the same appropriated to that object.

The right still subsists after a sale of the property is made, as in this case, and may be asserted in defense of a suit in equity, brought by a separate creditor, to subject the property to the payment of his debt, the purchaser, for that purpose representing both the partners and the creditors, whose debts he has paid or become responsible for.

The sale by Brunton and Parsons to Gleason, and by him to Dorsey, having been made to pay the partnership debts,

Brennan et al. v. Wallace et al.

whether regarded as two sales, or as amounting to only one transaction, will be upheld in equity; and it will carry the same consequences as would a sale ordered by a Court of equity, in proceedings instituted for the purpose of administering the partnership assets, for the benefit of the creditors. That Court simply orders that to be done which the parties themselves should have done. If, in such case, a separate creditor should intervene, his claims will be deferred to the prior claims of the joint creditors.

The Court proceeded properly in refusing to enter a decree of foreclosure.

The view we have taken of the principal question in the case, renders it unnecessary to consider the other points raised by the appellant.

Judgment affirmed.

JAMES BRENNAN AND JOHN McHUGH v. JAS. WALLACE, MARY WALLACE, AND DANIEL SHEEHAN.

HOMESTEAD — ABANDONMENT OF.—If both husband and wife removed from a homestead acquired and held under the law as it existed before the amendments of 1860, whether the removal was only temporary, or was an abandonment of the homestead and intended to be permanent, are questions of fact to be determined by the Court from all the evidence.

IDEM — EVIDENCE OF ABANDONMENT.—The declarations of the husband in relation to an abandonment of a homestead, acquired before the amendments of 1860 to the homestead law, and before a declaration of homestead had been filed under said amendments, are admissible in evidence in an action against both husband and wife, where the fact of abandonment is in issue.

IDEM.—A declaration of abandonment of a homestead, acquired by actual occupancy previous to 1860, made and acknowledged by both husband and wife, and recorded before any declaration of homestead had been made, is admissible in evidence, as a fact tending to show an actual abandonment.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

John F. Swift and *Selden S. Wright*, for Appellants.

Brennan *et al.* v. Wallace *et al.*

We contend that the declaration of abandonment was inadmissible for any purpose.

That it could not show or *tend* to show an actual abandonment, and no other kind of an abandonment could help the plaintiff's case.

That a *declaration of abandonment* could be applicable alone *after* the filing of the original declaration.

In the case before us, the declaration was filed not until April, 1862, when the declaration of abandonment was made in August, 1860.

The purpose of such declaration as provided for in the Act, was to work an estoppel against the husband and wife *after* they had acquired their rights under the amendments of 1860.

It made no difference, after these rights were so held, whether the declaration was true or not true; it made no difference whether they actually abandoned or not; they might continue to use the homestead as such in fact, yet they would be estopped by this declaration of abandonment.

On the other hand, before the amendment of 1860 took effect, a simple declaration of abandonment, without an actual abandonment, would amount to nothing.

More particularly is it inadmissible against Mrs. Wallace, who is a married woman, and cannot be estopped by any mere declarations, however made, unless in requirement of law. The same would exclude the declarations of Wallace, as testified to by the witness O'Farrell.

These declarations ought to have been excluded as testimony in this cause. Having been admitted, this Court cannot say how much weight it has had in influencing the conclusion of the Court below in its findings of fact.

Apart from this declaration, the testimony establishes the fact that Wallace went away for his health with the intention of returning, and that he carried that intention into effect.

B. Tobin, for Respondents.

By the Court, CURREY, J.

This action was brought to recover against James Wallace the amount due on a promissory note by him made and delivered to the plaintiffs on 28th of December, 1860, payable twelve months after that date, and to foreclose a mortgage executed by him on the same day on a certain piece of land in San Francisco, to secure the payment of the note. Mrs. Wallace was not a party to this mortgage.

The defense made is that the mortgaged premises were the homestead of the defendants at the time the mortgage was executed and so remained at the commencement of this action. A great amount of evidence was produced at the trial, upon which the Court rendered judgment against the defendant James Wallace, and a decree for the foreclosure of the mortgage and the sale of the mortgaged premises. Thereupon the defendants moved for a new trial and it was denied.

The defendants have assigned several causes as grounds why, as they claim, the judgment should be reversed.

First—Because of the insufficiency of the evidence to justify the findings of the Court and the judgment entered in the cause.

The specific causes assigned under the general ground stated are in substance as follows: First—That the evidence failed to show that the defendants removed from the mortgaged premises with the intention to abandon them as their homestead, or that they intended to permanently reside elsewhere. Second—That the evidence did not establish the fact that defendants did not reside on the premises when the note and mortgage were made, nor that they did not then intend to re-occupy the same premises as their homestead. Third—That the evidence showed that long before the note and mortgage were made, and from thence to the time of the trial, the premises were defendants' homestead. Fourth—That the evidence showed that the absence of defendants from the premises was but temporary, and was occasioned by the bad health of the defendant James Wallace, while it did appear from the evi-

dence that defendants' intention always was, during their absence, to return to the premises.

Testimony was given by several witnesses on the trial, showing that the defendants were induced to remove to Contra Costa on the account of the infirm condition of the defendant James Wallace, and it clearly appeared, and was not attempted to be controverted as a fact, that from the month of February, 1860, to November, 1862, the defendants lived upon a farm in Contra Costa County, where they were engaged in the business of farming, during which period the note and mortgage were executed and delivered. It was proved on the trial that the defendants resided on the mortgaged premises and occupied the same as their homestead from some time in 1851 until they removed to Contra Costa, early in 1860. Whether they intended to reside in that county permanently was a question to be determined, if it was of any particular importance, from the evidence before the Court; and so, too, whether they intended to abandon their homestead—the mortgaged premises—was a fact to be ascertained from the evidence. If the Court was authorized in finding that defendants abandoned their homestead before the mortgage was executed, then it is a matter of no moment what cause induced them to the step, nor whether or not they intended to reside permanently in Contra Costa.

In *Cook v. McChristian*, 4 Cal. 26, the Court say the homestead is the dwelling place of the family, and that by the common law such residence would raise the presumption that the premises so held were the homestead; and in *Harper and Wife v. Forbes*, 15 Cal. 203, the Court held that occupancy of premises by the husband with his family is presumptive evidence of their appropriation as a homestead, and that the removal of the husband with his family from the premises thus appropriated is in like manner presumptive evidence of their abandonment as a homestead. When a fact is established by the proved existence of facts and circumstances from which it is presumed, it becomes conclusive unless rebutted by other evidence in the cause. In the case last cited the Court, in under-

Brennan et al. v. Wallace et als.

taking to enumerate circumstances from which the presumption of abandonment, when once established, might be rebutted, say "it must appear that the removal was temporary in its nature, made for a specific purpose, with the intention of re-occupying the premises. The necessities of the family, their maintenance, their health, or the education of the children, may often require a temporary change of residence. In such cases the premises will still retain their original character as a homestead."

There can be no disputing the fact that the premises in controversy became the homestead of the defendants many years before their removal to Contra Costa County, and continued their homestead until their removal; and it may be it so remained some time thereafter, because their change of residence may have been intended to be but temporary; but whether their intention to return to the premises as their homestead existed at the date of the note and mortgage, was a question to be decided by the Court that tried the cause. If the decision that the premises were at that time abandoned as a homestead was warranted upon a fair consideration of the evidence, notwithstanding the necessities which induced the defendants' removal, and notwithstanding they may have intended at that time that their absence should be but temporary, this Court would not be authorized, in the proper exercise of its revising powers, to disturb the judgment.

The evidence shows that on the 8th of August, 1860, the defendants executed and acknowledged before a Notary Public an instrument in writing declaring that they abandoned all claim to the premises as a homestead. The note and mortgage, as already appears, were executed and delivered on the 28th of December following; and it can hardly be supposed that this written instrument, declaring that the defendants abandoned all claim to the premises as a homestead was without its effect in inducing the plaintiffs to accept the mortgage as security for the amount specified in the note; but whether this was the fact or otherwise, the solemn declaration of the parties that they abandoned all claim to the premises as a

homestead furnished the Court with cogent evidence of their intention, and we think authorized the finding of the issue on that point against the defendants.

The declaration of homestead executed and acknowledged by James Wallace on the 21st of March, 1862, though it may have been effectual as a claim of homestead from that time, could not rescue the property from the lien of the mortgage created thereon more than a year before then, and at a time when the premises had lost, by abandonment, the character of the homestead of the defendants.

Second — The appellants make the point that the judgment is against law, because the Court found as a conclusion that the mortgaged premises were not the homestead of defendants when the mortgage was executed and delivered.

This point is essentially involved in the question already considered and is disposed of by our determination of that question.

Third — The appellants' third ground of objection to the decision and judgment is that the Court erred: 1st. In permitting the declarations of the defendant, James Wallace, to be given in evidence against both defendants, notwithstanding the objection thereto made on behalf of Mrs. Wallace; and 2d. By permitting to be read in evidence against both defendants the declaration of abandonment of all claim of homestead right of the defendants in the mortgaged premises, notwithstanding the defendants' objection thereto.

The question by which the evidence was elicited as to Mr. Wallace's declaration, was as to what he said about the homestead right in the premises at the time the mortgage was executed. This question was objected to on behalf of Mrs. Wallace, on the ground that the declaration of her husband was not competent to bind her. The Court overruled the objection and she excepted.

The answer of the witness was, that there was something said about a prior mortgage, and that as he, Wallace, lived across the Bay, he had no claim to the mortgaged premises as a homestead. The witness then stated in substance that about

the month of September, 1861, he told Wallace that his wife spoke of setting up a claim of homestead to the premises, when Wallace repudiated the idea.

The question involved in this point is one of importance, and not entirely free of embarrassment. In a number of cases, heretofore decided, the homestead has been regarded as of the nature of an estate held in joint tenancy by the husband and wife, (*Taylor v. Hargous*, 4 Cal. 268; *Holden v. Pinney*, 6 Cal. 235; *Revalk v. Kraemer*, 8 Cal. 73; *Estate of Buchanan*, 8 Cal. 509; *Estate of Tompkins*, 12 Cal. 125,) and that there could be no abandonment of the homestead except by their joint action; and hence it is sometimes argued, that as the homestead could not be aliened or abandoned except by the concurrent action or conduct of the husband and wife, it follows as a logical sequence from the premises that the act or declaration of one of the spouses to show an alienation or abandonment could not affect the other, or have the effect to extinguish the homestead quality that had become incorporated into the property once dedicated as a homestead by actual occupancy. There is much force in this reasoning, if the premises assumed be true.

In *Gee v. Moore*, 14 Cal. 474, Mr. Chief Justice Field said there was nothing in the nature of the homestead right which justified its designation as the joint estate of the husband and wife, with the right of survivorship, as had been held in former cases; and he declared that such a doctrine never met the approbation of the profession and was not warranted by any language of the Constitution or the statute; and he then says: "The estate rests where it existed before the premises were appropriated as a homestead. The appropriation of them confers a right upon the wife to insist that their character as a homestead shall continue until she consents to their alienation, or another homestead is provided, or they are otherwise abandoned." And in *Guiod v. Guiod*, 14 Cal. 507, the same learned Judge said: "The statute confers upon the wife no right to the homestead, independent of the husband, which she can enforce against his consent. It affords protection to him, and

only through him to the wife and children. It does not purport to interfere with the natural dependence of the latter upon the former. She is bound by her marital obligations to live with him, and when he changes his place of residence she must accompany him. * * * As by his act the premises were originally impressed with the character of homestead, so by his act they may be abandoned as such."

The question of the abandonment of the homestead in this case was a matter in issue and to be passed upon by the Court from all the evidence—consisting of acts and declarations of the defendants, and mostly those of the husband. His declarations made during his residence in Contra Costa, and especially at the time the note and mortgage were executed, might properly be regarded as of the *res gestæ*, and considered as a part of the series of acts and circumstances, which, it was claimed on the part of the plaintiffs, went to establish the fact of abandonment of the mortgaged premises as the homestead of the defendants.

If the wife was bound by the acts of her husband (whom she accompanied in his removal to Contra Costa County) showing or tending to establish an abandonment of the homestead—a fact which seems to result from the doctrines laid down in *Gee v. Moore* and *Guiod v. Guiod*—then there seems to be no valid objection to proving his declarations for the purpose of showing his intention by his removal to abandon his homestead which he was about to mortgage to secure the note then made and delivered. This disposes of the first alleged error specified in the third point made by the appellants in their assignment of errors, and we next proceed to consider the second objection therein specified.

The respondents produced in evidence the instrument in writing bearing date the 8th day of August, 1860, and to which we have already referred, executed and acknowledged by the defendants before a Notary Public, and which was recorded, by which they declared they abandoned all claim to the premises as a homestead. The appellants objected to this evidence when it was offered, on the ground that so far as

ship property; the partnership is indebted in an amount equal to, if not exceeding, the value of the assets; one of the partners, for the purpose of securing his individual debt, mortgages to his creditors the undivided third of the partnership property; the whole partnership property is afterwards sold by the three partners, to pay the partnership debts; and now the individual creditor seeks to foreclose, in equity, his mortgage in satisfaction of his debt. The questions arising upon this state of facts are not now for the first time presented in the Courts of this State. In *Conroy v. Woods*, 13 Cal. 626, which was a suit in equity, the Court held that the rights of the partnership creditors, in respect to partnership property, were prior to those of individual creditors; and Mr. Justice Baldwin, in delivering the very able opinion of the Court, quotes with approbation Story on Part. sec. 97, which expressly affirms that doctrine.

In that case defendant Woods was proceeding under his execution, for an individual debt, to sell the property which had belonged to the partnership, but which had been sold to one of the partners, on dissolution, on his agreeing to pay the partnership debts, and the Court ordered the funds to be first applied to the payment of the partnership debts. The lien in that case was acquired by operation of law; in this case it was voluntarily given by the debtor partner. Has a lien voluntarily given any superiority over one acquired by law? We think it clearly has not. The lien by mortgage is in no respect better than would have been the lien of a judgment rendered at the time of the execution of the mortgage, or the lien of an attachment levied at that time on the assets of the partnership.

Whatever the rights of the parties may be at law, and admitting in its full force the doctrine of *Phillips v. Cook*, 24 Wend. 389, there never was any doubt that a Court of equity can restrict a party to such rights and remedies as he ought to possess, in view of the relation which he occupies in regard to the partnership assets, or that the Court will so administer the

partnership assets, that the partnership creditors shall be first paid. (*Conroy v. Woods*, 18 Cal. 626.)

The plaintiff has sued in equity, and the defendants are entitled to invoke for their protection, the rules and remedies peculiar to that Court, and they having made it appear that the partnership debts equalled the partnership assets at the date of the mortgage, and of the sale of the partnership property, and that the sale was made to pay the debts, it results, according to the rules of that Court, that the vendees of Brunton, held no interest in the partnership assets liable in equity to be sold for the payment of his individual debts.

It will be observed that in *Conroy v. Woods*, the partnership property had been sold to pay the debts of the partnership, and the Court held that in equity the priority of the lien of the partnership debts, still continued as against a creditor of an individual member of the partnership. That rule would not prevent the creditor of an individual member of the partnership, any more than a creditor of the partnership, from impeaching the *bona fides* of the sale.

Our view of the rights of the respective parties, may be illustrated by supposing that the plaintiff had proceeded to foreclose before the sale of Brunton. In such case, it would clearly be competent to the partners and their creditors, who might intervene to secure the payment of the partnership debts due them, to allege and prove that the mortgaged property was partnership property, and that it was necessary it should be employed in the payment of partnership debts, accruing previous to the mortgage, and thereupon to have the same appropriated to that object.

The right still subsists after a sale of the property is made, as in this case, and may be asserted in defense of a suit in equity, brought by a separate creditor, to subject the property to the payment of his debt, the purchaser, for that purpose representing both the partners and the creditors, whose debts he has paid or become responsible for.

The sale by Brunton and Parsons to Gleason, and by him to Dorsey, having been made to pay the partnership debts,

Trinity County v. McCammon et al.

a Board of Supervisors, and by the votes of McCammon and Quine, (Price voting against it,) made an order for the purchase of a building from defendant Edgcomb for a Court-house, and also directed the Auditor to draw his warrant on the Treasurer for the sum of about three thousand eight hundred dollars in favor of Edgcomb, payable out of the building fund, for the same; that three appraisers had been appointed to view and appraise the building, and had reported that it was unsuitable for the purpose of a Court-house; that the purchase was about to be made, and the warrant about to be issued by the Auditor and paid by the Treasurer. The usual prayer for an order enjoining the purchase, and the issuing and payment of the warrant, was inserted.

The complaint was filed on the 21st day of December, 1863, and on the same day an injunction was granted by the County Judge. The defendants Edgcomb, McCammon, and Quine, answered, and on the 23d day of January, 1864, moved to dissolve the injunction before the District Judge at chambers. The motion was denied.

George Cadwalader, for Appellant.

The bill is radically defective in joining a charge against one of the Supervisors for usurpation of office, and a charge against the Board that they had agreed to purchase unsuitable county buildings.

E. F. Allen, District Attorney, for Respondent.

The two chief points in this case are: First — John McCammon is not a Supervisor of this county, and by falsely pretending to be, he is trying to get the Building Fund paid over to James Edgcomb for a building that would be utterly worthless to the county for a Court-house, and if the money once passes out of the county's possession, no matter what the final decision may be on the hearing of the case, the cash would be out of reach or hope of recovery.

By the Court, SHAFER, J.

This is an appeal from an order refusing to dissolve an injunction.

The injunction was improperly granted, and therefore the Court erred in overruling the motion to dissolve. The difficulty with the case made in the complaint is, that it has not too little, but too much strength.

Assuming the allegations of the complaint to be true, McCammon is Supervisor, neither *de jure* nor *de facto*; on the contrary, he bears no other character than that of a naked usurper. As to Quine, the complaint charges that he is a member of the Board, and the affidavits used in support of the motion to dissolve do not deny the averment. As to Edgcomb, he is not represented in the complaint as having, or as pretending to have, any official character whatever, but he is brought in simply as the owner of a building which he is seeking to sell to the county for a Court-house.

As to defendant Musser, the complaint charges that he is County Treasurer of Trinity County, and as such has in his possession the money belonging to the "Court-house Fund."

It is further stated that, at the filing of the complaint, the Board of Supervisors of the County of Trinity was in fact composed of the defendant Quine, and A. G. Price and Henry Martin, neither of whom is made a party.

The bill, then, was filed for the purpose of restraining Edgcomb from selling his building to the County of Trinity, and to restrain one Supervisor only, out of three, from making the purchase.

To guard against the purchase effectually, the action should have been brought against two members of the Board at the least. The co-operation of McCammon with Quine in the matter of the threatened purchase, does not vary the matter, for McCammon was a mere pretender by averment, and in view of the Act of March 31, 1857, (Wood's Dig. 697,) we consider that he was a pretender in fact.

At the expiration of the time for which McCammon was

elected to the office of Supervisor, his right ended; and further, he was stripped of all color of right thereafter by the act and operation of a public law. The impotency of Quine to buy could not be aided by the alleged alliance between him and McCammon.

But if the charges were made against those who constitute the Board of Supervisors, in an action brought for the purpose of restraining them from making the purchase in question, there is great doubt whether the action could be maintained. Boards of Supervisors under the general law (Wood's Dig. 694, sec. 9) have no power to purchase real property on behalf of the counties they represent, except where the value of the property has been previously estimated by three disinterested persons appointed for that purpose by the County Judge. This important check has not been removed by the Act of 1863, (Stats. p. 55,) authorizing the Board of Supervisors of Trinity County to levy a tax for a county "Building Fund." It is true that in that case three persons were appointed by the County Judge to estimate the value of the building in question; but instead of reporting an estimate of value they reported that the building was in their judgment wholly "unsuitable for a Court-house." Under such circumstances the members of the Board of Supervisors would themselves be as powerless to make the purchase as any or all of the present defendants.

The bill, then, cannot be maintained, for the reason that the purpose of Quine and McCammon to purchase in the name of Trinity County the building named, for a Court-house, is one that is impossible of accomplishment. No irreparable damage, and no damage at all, can result to the county if Quine and McCammon are left to follow their own devices. (*De Witt et als. v. Hays*, 2 Cal. 463; *Robinson v. Gaar*, 6 Cal. 275.) There is no defect so fatal as a want of power.

From what has been said, it follows that, if Quine and McCammon should make the purchase of Edgcomb, and draw on the Treasurer in his favor for the purchase money, the order would be void on its face, as having been drawn by parties

who have no control over the public money. And should the Treasurer pay the money on such order, the county would have a perfect remedy at law by action on his official bond.

The order appealed from is reversed, and the Court below is directed to dissolve the injunction.

By the Court, SHAFER, J., on petition for modification of opinion.

Since the decision of the appeal taken in this action a petition has been presented on the part of the appellant, asking not for a rehearing, nor for any modification of the judgment, but for a modification of the opinion, on the ground that the opinion is to some extent *obiter*; and on the further ground that the Court has misapprehended the contents of the report made by the committee appointed by the County Judge to pass on the value of the building owned by Edgcomb, and which he proposed to sell to the county.

In so far as the opinion passes upon any question not necessary to the decision of the appeal, it will interpose no obstacle to a re-investigation of such question upon its merits in any case that may hereafter come to this Court in which the point shall be directly presented. In so far as the misapprehension of the contents of the committee's report is concerned, the document, as such, was not in the transcript, and we were therefore justified in assuming that it had no contents, *aliunde* the contents set out in the proceedings. Any case coming here hereafter showing that the report comprehended topics other than those to which the present record confines it, will be a case, to that extent, different from the present, and of course one to which the opinion in this case cannot be considered as having any just application.

Petition denied.

Hicks v. Coleman et al.

**WILLIAM HICKS v. PERCY COLEMAN, C. E. CASTLE,
AND WILLIAM RANDOLPH.**

ADMISSIBILITY OF A DEED REFERRED TO IN ANOTHER DEED IN EVIDENCE.—If

a deed of land which does not contain a description of the land conveyed, but in the body of it refers to another deed for such description, is properly admitted in evidence, then the deed to which it refers is entitled to be received in evidence, for the purpose of showing a description of the land conveyed, without any proof of its genuineness, or that there was any such person as the one purporting to execute it, or that he had any title to the land described therein.

COPY OF DEED IN EVIDENCE.—A duly certified copy of a deed regularly recorded is admissible in evidence, under the Act of April 29, 1857, if it be shown to the satisfaction of the Court by the party offering it that the original is not under his control.

ENTRY ON A PORTION OF A TRACT OF LAND UNDER A DEED DESCRIBING ALL.—

One who enters into actual possession of a portion of a tract of land, claiming the whole, under a deed in which the entire tract is described by metes and bounds, is not limited in his possession to his actual inclosure, but acquires possession to the entire tract, if it was not in the adverse possession of any other person at the time of the entry.

SAME.—The rule in such cases is not limited to small tracts of land, such as are usually occupied and cultivated for farms.

CONVEYANCE OF LAND BY INDIANS.—A grant of land by the Mexican Government to a tribe of Indians, if of any validity, is for the benefit of the Indian community at large, and the individual members composing the tribe cannot make any valid conveyance of all or any portion of the same.

PRIOR AND SUBSEQUENT POSSESSORS UNDER COLOR OF TITLE.—One who enters upon a tract of land where there is no adverse possession, a portion of which is uninclosed, claiming the whole under a deed describing the entire tract, will prevail in an action to recover the land as against one who enters subsequently upon the uninclosed part showing color of title merely.

A RIVER AS A BOUNDARY LINE.—Where a river is named as a boundary line of a tract of land, the boundary line follows the meanderings of the stream; and where this boundary line is to run along a stream not navigable a given distance, the meanderings of the stream are to be followed until the required distance, when reduced to a straight line, is attained.

SURVEY OF LAND BOUNDED ON A STREAM.—If a deed conveys a given quantity of land, and describes it as bounded on a stream on one side, starting at a given point and running along the stream, without specifying the length of the lines, the required quantity of land is to be located by following the meanderings of the stream from the point named until, reduced to a straight line, the straight line will be of sufficient length to form one side of a square which would contain the required quantity, and then from the ends of this straight line projecting lines at right angles with the same to such distance as a line drawn from one to the other, parallel with the straight line, will include the required quantity between it and the stream.

SAME.—If the quantity of land and the length of the boundary line on such unnavigable stream is given, the meanderings of the stream are to be fol-

Hicks v. Coleman *et al.*

lowed until, reduced to a straight line, the same will be of the required length, and then lines are to be projected at its ends, at right angles with it, far enough so that a line drawn between the two, parallel with the straight line, will leave the required quantity between it and the stream.

MODIFICATION OF A JUDGMENT.—When the complaint, evidence as admitted, the verdict, and judgment are in harmony, but the judgment is erroneous by reason of a wrong construction given to the description of land in a deed in evidence, the Supreme Court cannot modify the judgment, but will refuse it and grant a new trial.

JOINT AND SEPARATE VERDICTS.—When several persons whose possessions are not joint, but separate, are joined as defendants in an action to recover land, and no demand is made at the close of the trial for separate verdicts, and no objection or exception is taken to the verdict on that ground in time to afford an opportunity to correct it, the defendants cannot afterwards object to a joint verdict and judgment.

INJURY BY JOINT VERDICT.—When no damages are claimed in an action to recover real estate, no injury can result from a joint verdict.

EXCEPTIONS TO CHARGE OF COURT.—Exceptions to the charge of a Court should point out the specific portions of the charge excepted to, and should be made at the time of the trial, before the jury retires.

APPEAL from the District Court, Seventh Judicial District, Solano County.

The following is a copy of the instrument to which reference is made in the deed from Shaddon to Hicks:

"Heleno, Chief of Indians, to Thomas Shaddon:

"NEW HELVETIA, 18th May, 1848.

"Before me, John Sinclair, Justice of the Peace of this District, and also before the witnesses whose signatures appear at the foot of this instrument, personally appeared Heleno, Chief of the Christian Indians called Moquelumnes, and declared that for himself, his heirs, and executors, and in the name of his tribe, their heirs, and executors, and all others who may claim through him or them, grants, bargains, and sells unto Thomas Shaddon, his heirs and assigns forever, a piece of land granted to them by his Excellency the Governor of the Department, Manuel Micheltorrena, as per title issued to them the 22d day of December, 1844, and delivered to Augustus Sutter, he being Justice of the Peace and Military Commandant of these frontiers at that date. Said land is part of the rancho called Rancho de los Cosumnes, and conceded as above declared,

Hicks v. Coleman et al.

consisting of one league (three miles) or five thousand square varas, (yards,) the boundaries of which are as follows: On the north or northwest the Cosumnes River; on the east or northeast by a line that starts from a point on the Cosumnes River called Paso Viejo, (Old Pass,) and runs in a line directly crossing the line of the river above referred to; on the south or southeast by a line that runs one league or five thousand varas parallel with the Cosumnes River; on the east or southeast by a line that runs one league or five thousand varas parallel with the line on the east or northeast.

"The said Heleno further declares that said property is entirely unincumbered by private or public claims of any nature, and in such conception now sells it to the said Thomas Shaddon at and for the sum of two hundred dollars, the receipt whereof he hereby acknowledges for himself and in the name of his tribe, freely giving up all his claim for himself and tribe, and guaranteeing to the said Shaddon that this sale shall prove certain, sure, and effectual.

"Witness whereof he hereunto sets his hand, date as before written.

"HELENO, X CHIEF.

"Witness: { J. A. SUTTER,
J. BIDWELL,
LEVI MCKINSTY,
THOS. M. HARDY."

Appellants during the trial offered in evidence certified copies from the office of the Surveyor-General of the United States for California of the petition of J. A. Sutter to Manuel Micheltorrena, Governor of California, for a grant to the Moquelumne Indians, with the map accompanying the same, and the grant of Micheltorrena to the Indians, dated December 22d, 1844.

The testimony was rejected on the objection of respondents.

Winans, Heydenfeldt, and Hartley, for Appellants.

The deed of Heleno to Shaddon is no evidence of title, because:

1. Its execution is not proved. (*Jackson v. Vail*, 7 Wend. 129.)
2. It is not shown that there was such a person as Heleno.
3. It is not shown that Heleno was Chief or member of the tribe of Mokelumne Indians.
4. It is not shown that Heleno or the Mokelumne Indians had any title.

The recitals in a deed are no evidence against those who are not parties to it. (*Carver v. Jackson*, 4 Peters, 83; 1 Greenleaf's Ev. sec. 23, *et seq.* and note.)

The Court erred in rejecting the evidence offered by the defence, being copies and translations of original papers showing the plaintiff's source of title.

If on account of the erroneous rejection of this testimony, it is to be considered on appeal, then it proves clearly that Micheltorrena did not grant the land to the Mokelumne Indians; that Micheltorrena did not intend to grant them the land; that the said tribe do not come within the terms of what is called the Micheltorrena general title.

If they are held to be within the general title, that has been decided to be void. (*United States v. Nye*.)

There was no authority on the part of Heleno to convey for his tribe or for himself.

Under the Mexican dominion, Indians were regarded as subjects, and no governmental organization among themselves was recognized. Tribes were held to occupy the status of families, but there was no admission of the "*imperium in imperio*." This is clearly evinced by the policy of granting them tracts of land for cultivation in the same manner and upon the same mode of application as were required from other inhabitants. It was not by treaty, but by simple grant to the family.

Under the system prevailing in the United States, an Indian can convey no title.

The Constitution and laws establishing the relations between the United States and Indian tribes are political laws, and

Hicks v. Coleman et al.

went into effect here upon the cession of this territory by Mexico. (*Jackson v. Porter*, 1 Paine, 472.)

Heleno's deed to Shaddon was therefore no color of title, and the plaintiff has no color of title. (*Livingston v. Peru Iron Co.*, 9 Wend. 520; *Jackson v. Porter*, 1 Paine, 457; *Sunol v. Hepburn*, 1 Cal.)

And the plaintiff must be confined to his actual *pedis possessio*. (*Ricard v. Williams*, 7 Wheat. 105.)

If the title be an absolute nullity, it will not serve as the foundation of an adverse possession. (*Livingston v. Peru Iron Co.*, 9 Wend. 511.)

Heleno's deed being absolutely void, and not merely voidable, it cannot afford color of title. (*Sunol v. Hepburn*, 1 Cal. 225; *Doe v. Turner*, 9 Wheaton, 541; *Pray v. Price*, 7 Mass. 338; *Frique v. Hopkins*, 4 Martin N. S. 224.)

Where a contract has reference to another paper for its terms, the effect is the same as if the words of the paper referred to were inserted in the contract. (*Adams v. Hill*, 4 Shipley, 215; *Buckley v. Blackwell*, 10 Ohio, 510.)

Upon the question of the survey of the land described in the instrument called the Heleno deed, appellant's counsel cited *Shelton v. Maupin*, 16 Miss. 124; *Budd v. Brooke*, 3 Gill. 198; *Hartsfield v. Westbrook*, 1 Hayw. N. O. 258; *Middleton v. Pritchard*, 3 Scammon, 510; *State v. Gilmanton*, 9 N. H. 461; *Lynch v. Allen*, 4 Dev. and Bat. 62; *Jackson v. Low*, 12 Johns. 254.

Robinson and Beatty, for Respondents.

It is well settled that when an entry is made by one under color of title by deed, his possession is deemed to extend to the bounds of that deed, though his actual settlement and improvements were on a small parcel of the tract.

As the method of surveying, the meanders of a river are always reduced to a straight line. (*Littlepage v. Fowler*, 11 Wheat. 219; *Craig v. Hawkins' Heirs*, 1 Bibb, 58; *Calk & Orear v. Stribling*, 1 Bibb, 122; *Bant's Heirs v. Calhoun*, 2 A. K. Marshall, 591.)

Hicks v. Coleman et al.

By the Court, SAWYER, J.

This is an action to recover a portion of a tract of land situate near the Cosumnes River, in Sacramento County. The entire tract claimed by Hicks is one league. The plaintiff introduced a certified copy from the records of Sacramento County, of a deed from Thomas J. Shaddon to himself; also, evidence showing that Shaddon had been since 1848, and was at the time of the execution of said deed, in the actual occupancy of a part of the premises described in the complaint and deed, claiming the whole; that he had an inclosure of fifteen or twenty acres near the river, with a house on it, in which he lived, and a corral; that the rest was open and unclosed; that he had cattle which roamed over the tract and adjoining country in connection with other cattle; that Shaddon, also, at the time the deed was executed, sold his cattle to Hicks; that Hicks bought for himself and his partner, one Martin, and had the deed made in his own name; that upon the execution of the deed from Shaddon, said Hicks and Martin entered upon the lands, receiving actual possession from Shaddon of that portion occupied by him; that they cut a ditch from a slough to the river, some eleven hundred yards, across the head of what was called "Shaddon's Pocket"—thus inclosing between the slough, river and ditch about a thousand acres—but the location of the "Pocket" with reference to the calls of the Shaddon deed is not distinctly shown; that Martin subsequently conveyed his interest to plaintiff; that at the time plaintiff and Martin entered no one occupied any portion of Shaddon's rancho; that Hicks has continued to occupy the parts upon which he entered ever since the time of his conveyance, in 1850. There was also some testimony tending to show that there was another fence along near the road crossing the tract, and that defendant Coleman's entry was within this fence; but the evidence on this point is not very satisfactory. Coleman entered sometime about a year before the trial, which was in 1858. Castle and Randolph entered upon portions of the land embraced in the calls of the

Hicks v. Coleman et al.

deed, but not upon any portion of the lands within any inclosure made by Hicks or Shaddon.

Plaintiff had judgment and defendants appeal.

The deed from Shaddon to Hicks, introduced in evidence, not including the instrument referred to for a description, is as follows:

“Know all men by these presents, that I, Thomas J. Shaddon, in consideration of five thousand dollars to me in hand paid, the receipt whereof is hereby acknowledged, bargain, sell, convey and deliver unto William Hicks, his heirs and assigns forever, all my right, title, claim and interest in the *property described in the foregoing instrument*, which is made a part hereof. And I, for myself, my heirs, etc., hereby warrant the title to said premises free from the claims of all persons claiming the same under me. Witness my hand and seal, this 30th day of September, A. D. 1860.

His

“THOMAS J. SHADDON. [L. s.]
mark.

“Witness: LLOYD TEVIA.”

This deed seems to have been written upon another instrument, which upon its face purports to be a conveyance from Heleno, Chief of Mokelumne Indians, to Shaddon of a league of land therein described. This instrument in the arguments of counsel has been designated as the Heleno deed, and is the paper referred to for a description in Shaddon's deed as the “foregoing instrument.” The first ten points made in the introductory brief of appellants relate to the objections presented in various forms to the introduction in evidence of this instrument, and in relation to other papers supposed to be referred to in it, and to its effect as evidence when introduced. The substance of the objections is, that there was no proof of its execution; that the original was not produced or accounted for; that it was not shown, that there was such a person as Heleno; or that he was Chief of the Mokelumne tribe; or that he had any authority to convey for his tribe or himself:

or that there was any title in him or in his tribe; or that he or his tribe had any possession, etc. The plain answer to all this is, that the instrument was not offered as a deed at all, nor was any title claimed under it as such. It was only introduced as a part of the deed from Shaddon to Hicks. The deed from Shaddon to Hicks was offered and read in evidence, and this instrument having been made a part of that conveyance for the purpose of inserting a description of the land which Shaddon designed to convey to Hicks by his deed, it was, as a matter of course, necessarily read as a part of Shaddon's deed. It did not matter, therefore, whether the paper was executed or not, or whether there was or not any such person as Heleno; or if so, whether he had any title to the land. The only use made of the Heleno deed in Shaddon's conveyance was to show what property he conveyed, and that was "the property described in the foregoing instrument." The only office the Heleno deed performs is, to furnish a description of the land, and for that purpose it is not a matter of the slightest consequence whether it was a genuine conveyance or not. If Shaddon's deed to Hicks was properly admitted, then the Heleno deed was properly read in evidence as a part of that instrument.

But it is also objected that the certified copy of Shaddon's deed was improperly admitted, for the reason that the original was not accounted for. The instrument was duly acknowledged and regularly recorded. The Act of 1857 concerning copies of certain instruments in writing, provides that duly certified copies of such deeds shall be received in evidence, "provided it be shown that the said originals are not under the control of the party offering the said copies, or are lost." (Bancroft's Practice Act, page 441, note 2; *Skinker v. Flohr*, 13 Cal. 638.) The Judge who tried the case was satisfied from the evidence that the original was not under plaintiff's control, and the evidence in the record on this point is such that we cannot say he erred. The deed from Shaddon to Hicks was, therefore, properly admitted in evidence.

The plaintiff relies for recovery upon prior possession, and

claims that he has shown such possession. He claims that Shaddon was in the actual occupancy of the land claimed, by having a portion of it inclosed, and residing thereon, claiming the whole, using it as a range for his cattle from 1848 till 1850, when he conveyed the whole tract to plaintiff by specific boundaries; that plaintiff entered upon a part under said conveyance, and occupied it by residence and exercising other acts of ownership, claiming the whole according to the boundaries described in his deed; and there being no other person in possession adversely at the time of his entry, that these acts, under the well settled rules of law, gave him possession of the entire tract. The appellants do not appear to controvert this proposition, provided the conveyance was such as to constitute color of title. But they insist that plaintiff claims title under the Heleno deed, and that the deed is void upon its face for the several reasons before mentioned; and being void upon its face the plaintiff is bound to know the fact; that knowing the invalidity of the deed his entry is not in good faith, and there is no color of title sufficient to give him the benefit of the rules of law upon which he relies. Unfortunately for the argument, we are not authorized to assume that plaintiff entered, or that he claims under the Heleno deed. He repudiates any such claim himself. He does not profess to trace his title beyond Shaddon, and we do not know that Shaddon claimed under the Heleno deed. He may, for aught the Court can know, have had a perfect title. We do not know that there ever was a deed from Heleno to Shaddon. None was introduced in evidence as a link in plaintiff's chain of title. The instrument called the Heleno deed was not offered as a deed, or as an independent piece of evidence. It was not proved by plaintiff to have been executed by anybody, and was certainly not admitted by defendants to be a genuine instrument. We know that there was a paper with certain words written upon it; that this paper contained a description of the premises suitable for the purposes of Shaddon and Hicks, and was referred to by them for a descrip-

tion instead of copying the description into the deed in evidence, and this is all we know about the document.

The deed in evidence does not pretend to recite that any conveyance was ever made to Shaddon by Heleno. It does not even call this document a deed or conveyance, but simply refers to it as "the foregoing instrument." There is no recital, properly speaking, in Shaddon's deed, unless the statement of the consideration is a recital. There is nothing by deed or recital in evidence that carries us back in the chain of title beyond the deed from Shaddon, and Shaddon's occupancy of a part of the tract conveyed claiming the whole. There is nothing in evidence, then, showing the character of the title under which Shaddon claimed, except his occupancy of the land and his assuming to own it; and occupancy alone is, as was often held by the late Supreme Court, evidence of title in fee as against a trespasser. In these respects, then, there is a material difference between this case and the case of *Sunol v. Hepburn*, 1 Cal. 254, *Livingston v. Peru Iron Co.*, 9 Wend. 511, and other cases cited by appellants.

The deed from Shaddon to Hicks is valid upon its face, and sufficient to transfer any title Shaddon had at the date of its execution. It was sufficient to pass a fee simple title. There was no adverse possession of the land in any other party at the time. The plaintiff entered into actual possession of a part under the deed, claiming title to the whole tract embraced within its calls; and he continued undisturbed in his claim till the entry of the defendants. Under these circumstances does the actual occupancy of a part draw after it the possession of the whole?

The discussions upon this subject generally relate to adverse possession with reference to questions arising under Statutes of Limitations, and under Acts relating to champerty and maintenance. But there must be a possession, or there can be no adverse possession; and such a possession as would be adverse within the champerty Acts, or Statutes of Limitations, and sufficient to serve as the foundation of a title which would ultimately deprive the real owner of the land, and transfer it

to the possessor, ought, certainly, to be sufficient to enable that possessor to maintain an action against a mere intruder on his rights.

In *Ellicott v. Pearl*, 10 Peters, 442, Mr. Justice Story, in declaring what acts are sufficient to constitute adverse possession, says:

“The argument, in support of the instruction as prayed assumes that there can be no possession to defeat an adverse title except in one or the other of these ways, that is, by an actual residence, or by an actual inclosure, a doctrine wholly irreconcilable with principle and authority. Nothing can be more clear than that a fence is not indispensable to constitute possession of a tract of land. The erection of a fence is nothing more than an act presumptive of an intention to assert an ownership and possession over property. But there are many other acts which are equally evincive of such intention of asserting such ownership and possession, such as entering upon land and making improvements thereon, raising a crop of corn, felling and selling the trees thereon, etc., under color of title. An entry into possession of a tract of land under a deed containing specific metes and bounds gives a constructive possession of the whole tract, if not in any adverse possession, although there may be no fence or inclosure around the ambit of the tract, and an actual residence only on a part of it. To constitute actual possession it is not necessary that there should be any fence or inclosure of the land. If authority were necessary for so plain a proposition it will be found in the case of *Moss v. Scott*, 2 Dana, 275, where the Court say: ‘It is well settled that there may be a possession in fact of land not actually inclosed by the possessor.’”

And again, on page 443: “Pearl entered into possession of the seven thousand acre tract under his deed from Edwards, and as that deed described the tract by metes and bounds, Pearl must, upon the principles already stated, be deemed to have been in possession of the whole tract, unless some part of it was, which is not shown, in the adverse possession of some other claimant. In short, his entry being under color of

Hicks v. Coleman et al.

title by deed, his possession is deemed to extend to the bounds of that deed, although his actual settlement and improvements were on a small parcel only of the tract. In such a case, where there is no adverse possession, the law construes the entry to be co-extensive with the grant to the party, upon the ground that it is his clear intention to assert such possession. This doctrine is well settled. It was affirmed in this Court in *Barr v. Grattz*, 4 Wheat. 222, 223," and numerous other authorities are cited by the learned Justice. (See also 5 Pet. 320.) In these and many other cases the questions arose between parties claiming under patents which overlapped each other, and the parties entered under a title apparently good, derived from the Government. But all the cases are not of this class. (1 Conn. 285, 309.) In *Ellicott v. Pearl*, Mr. Justice Story also cites, with approbation, *Thomas v. Harrow*, 4 Bibb, 563.

In that case "it appeared that the defendants, or those under whom they hold, had, more than twenty years before the suit brought, entered upon their respective tracts or parcels of land, and cleared and inclosed parts thereof, claiming title thereto under deeds of conveyance previously made to them according to specified boundaries; but although the person who made the conveyances claimed the land under an entry, it did not appear that the entry covered the land, nor did it appear that there had been any survey made or patent issued in virtue of the entry, until within less than twenty years prior to bringing the action."

In this case the question was, whether there was an adverse possession twenty years before bringing the suit? If there was an adverse possession at that time, it was by virtue of an entry upon a part of the premises under a deed with specific boundaries from a party having no title, or shadow of a title to the particular land conveyed, and claiming the whole under the conveyance.

The Court say: "On this state of the case, the question was made in the Court below, whether the possession of the defendants should be co-extensive with the boundaries of their

Hicks v. Coleman et al.

respective deeds, or be confined to their close or fences? That Court decided that their possession was co-extensive with the boundaries of their deeds, and so instructed the jury; and whether that decision is correct or not, is the only point presented by the record in this case."

"We have no hesitation in saying that the Court below decided correctly. The case of *Fox v. Hinton*, 4 Bibb, 559, we apprehend is a decision on this point. It was held in that case that where there are two patents interfering with each other, while the possession remains vacant, an entry is made on the land within the interference, by one claiming title under the junior patent, his possession shall not be limited to his close, but be co-extensive with the interference; and in principle we can perceive no difference in this respect between the case of a possession acquired under a junior patent, and a possession obtained under a deed with definite boundaries, which was made by one having no title. In either case, the tract or parcel of land, the possession of which is intended to be taken, is equally certain; and the junior patent could not, no more than such a deed, confer a title. If even color of title was necessary, as was supposed in the argument on the part of the appellant, we could not doubt that the deed would be as efficacious as the patent for that purpose. But we cannot admit that the entry, being made under color of title, can have any effect in such a case; for to constitute an ouster, whether it be by abatement, intrusion, disseizin or deforcement, the act must be tortious; and certainly it could not be less so if done without color of title, than if it had been done under color of title."

In *Smith's Heirs v. Frost*, 2 Dana, 149, the Court say: "A person entering on land under a deed specifying the boundaries, is in possession to the extent of those boundaries, although the person making the conveyance to him had no title. The settler on land under a bond describing the metes and bounds acquires an *actual possession* to the extent of those bounds whether the obligor had title or not, and the subsequent entry of an adversary patentee upon another part of the land gives

no seizin to such patentee in the land so held by the settler." (See, also, 2 J. J. Marshall, 257.)

In *The Proprietors of Kennebec Purchase v. Laboree*, 2 Greenleaf's Rep. 286, the Court, after citing *Higbee v. Rice*, 5 Mass. 344, and *Jackson v. Elston*, 12 John. 454, (which see,) say: "From these two cases, then, it appears that if a man enters upon a tract of land under a deed duly registered, though from one having no legal title to the land, and has a visible possession, occupancy and improvement of only a part of it, such *occupancy and improvement*, unless controlled by other facts, being continued thirty years is a disseizin of the true owner of *the whole tract*; and the reason is, the *nature and extent* of his claim are or may be known by *inspection of the public registry*. His deed being registered there gives notoriety to his acts and his motives respecting the land he occupies."

In a note to this case in the last edition of Greenleaf's Reports, the editor says: "The principle here laid down has since continued to be the received and settled law in this State. The authorities seem to establish this rule, that, if the entry and adverse possession is *under a deed* duly registered, and duly defining the boundaries of the tract therein mentioned, then such entry and adverse possession, if in other respects sufficient, *will apply to the whole tract* mentioned in the deed, although the person should be in the actual occupation of *but a part* of the tract, and although the deed *was on its face void*," and cites *Noyes v. Dyer*, 25 Maine, 472; *Robinson v. Swett*, 3 Greenl. 316; *Gookin v. Whittier*, 4 Greenl. 16; *Ross v. Gould*, 5 Greenl. 204; *Prescott v. Nevers*, 4 Mason, 326; *Green v. Litter*, 8 Cranch, 229; *Bailey v. Carlton*, 12 N. H. 9; *Crowell v. Bebee*, 10 Ver. 33; and other cases. The cases already cited seem to us to go to the full extent necessary to decide the question of possession in favor of the plaintiff in the case under consideration, admitting the theory of the appellants to be correct, that color of title is necessary to extend the possession to the boundaries specified in the deed; and it is not necessary, for the purpose of this decision to hold

Hicks v. Coleman et al.

that a deed void upon its face would be sufficient to give color of title. The deed is from a party in open possession of a part at least, claiming the whole, where there is no adverse possession, and is valid on its face. This is sufficient, under those authorities, to constitute color. It is unnecessary to determine whether or not Shaddon would have had such color of title as would have given him possession of the entire tract had he been here as plaintiff claiming possession of the whole by virtue of the Heleno deed. It is sufficient for the plaintiff that he entered under the Shaddon deed, claiming the whole.

The appellants insist that the principles established by the cases cited apply only to adverse possession set up by parties in actual occupancy of lands as a weapon of defense, and not to cases where a party out of possession relies upon a prior possession as evidence of title to recover upon against a party in possession. We have already alluded to this point, but will recur to it again. Under the authorities cited, if Hicks should remain in possession in the manner he appears by the record to have occupied, for the period prescribed by the Statute of Limitations, he could undoubtedly maintain his possession against a party having the title in fee, in an action brought by such party to eject him. According to the authorities upon the subject he would in fact, by such continued possession and claim, become vested with the title in fee. A possession which is sufficient, if continued for the prescribed period, to work such results as to the real owner of the land, ought to be sufficient, in the meantime, to protect the possession against a mere intruder. If there is any difference in the two cases, upon principle, a less rigid rule as to what shall constitute a possession should be adopted as against a trespasser than as against the real owner of the land; and this view seems to be recognized by the authorities. In *Barley v. Carlton*, 12 N. H. 17, the Court refers to this distinction and says: "If the possession was not of a character to indicate ownership and to give notice to the owners of an adverse claim, although the grantee might be held to be in possession according to his title in a controversy with one who should make a subse-

quent entry without right, his possession ought not to be held adverse to the true owner, to the extent of his deed, merely by reason of the deed itself, even if recorded, nor by any entry under it. There are several cases which tend to sustain this view of the principle." (Citing a number of cases.) And again on same page: "If it may be said that color of title gives such constructive seisin and possession that the grantee could maintain trespass against any person who did not show a better right, (that is, a title or prior possession,) there is nothing in the nature of it which can give it a character of disseizin, or possession adverse to the true owner, so as to bind him." But it is enough for the purposes of this decision that possession, as to an intruder, should be put upon the same footing as an adverse possession, which would be sufficient, if continued, to toll the right of entry of the real owner.

The principles of the cases cited by us as to what acts constitute possession was also repeatedly recognized by the late Supreme Court, and in nearly every instance in actions to recover land where the plaintiff relied upon prior possession as evidence of title.

In *Gunn v. Bates*, 6 Cal. 265, the defendant asked the following instruction: "The mere fact that the plaintiff or the decedent was in actual possession, by inclosing a portion of the tract described in the Mexican grant, is no evidence of possession of any land not so inclosed or marked out with clearly defined boundaries."

The Court refused it and gave the following: "If you believe from the evidence that Sheldon entered upon and took possession of the tract of land described in his grant under and by virtue of that grant; that he was put in possession in the manner described by the first witness, (General Sutter,) and that he immediately went on to occupy and improve, and continued to occupy and improve, a part of the land, and asserted his claim and possession to the whole under his grant, and no other person was in adverse possession of any portion of the land, and that Sheldon, or his representatives, never abandoned the land, and that the premises in controversy in

this suit are within the boundaries described in the grant, you will find for the plaintiff." Defendants excepted, and these rulings were reviewed and sustained by the Supreme Court. Mr. Chief Justice Murray cited the rule already quoted from *Ellicott v. Pearl*, 10 Peters, 442, and said: "This doctrine has never within our knowledge been doubted in this Court." (Page 272.) The case turned upon this point, as the other views presented by the Chief Justice were not concurred in by the other members of the Court.

In *Rose v. Davis*, 11 Cal. 141, Mr. Justice Baldwin said: "The Court, at the instance of plaintiff, gave several instructions, numbered from one to five in the record, which *seem to us to be correct*." The first instruction referred to embodied the same principle as that given in *Gunn v. Bates*. But the case is, perhaps, not entitled to much weight, for the reason that a decree of confirmation seems, from another instruction, to have been read in evidence. (See, also, *Baldwin v. Simpson*, 12 Cal. 560; *Keane v. Cannovan*, 21 Cal. 299.) In the last case the deed from Ramirez to Mondolet was held admissible, "as showing the extent and boundaries of the premises of which Mondolet claimed possession."

But admitting the rule to be, that the entry upon, and occupation of, a part of a tract of land, under a deed claiming the whole, gives constructive possession to the entire tract within the calls of the deed, it is still insisted by the appellant that this principle does not apply to large tracts of land like that in controversy, but that it must be limited to tracts of the customary size, such as are usually occupied as farms, partly cultivated; and some New York cases are cited which sustain this view. It would be found very difficult to apply the principle with such a limitation. Who shall say what tract of land is of the customary size, particularly in a new and sparsely settled country, where possessions are measured by leagues rather than acres, or even miles? Prior to 1850 the customary size of tracts of land held and occupied for grazing purposes—the chief occupation of the old inhabitants of California—was much larger than the tract in question. But,

admitting the limitation of the rule contended for, to exist, the tract in dispute would doubtless, at the date of Shaddon's deed, be within the rule thus limited. The tract in *Ellicott v. Pearl*, 10 Peters, was seven thousand acres, much larger than the tract in question. In *Gunn v. Bates*, 6 Cal. 265, already cited, the defendant asked the following instruction: "Possession of a portion of a large tract under a conveyance of such larger tract will not extend to the full extent of such larger tract, when the same amounts to several Mexican square leagues. Such constructive possession is limited to tracts of land usually occupied and used for farming purposes, in the usual course of husbandry in the country. If you believe, from the evidence, that Sheldon never had the boundaries of the tract described in the grant marked out, and that the same exceeds the usual limits of a farm, then his possession is limited to the land he had actually inclosed or clearly marked out; and in such case, if the tract in the possession of the defendants is not included within any such inclosure or marked boundaries, you will find for the defendants."

This instruction was refused and the refusal assigned as error. Mr. Chief Justice Murray's comments upon the instruction refused are equally applicable to the case under consideration. He said: "The Court properly refused the instruction asked by the defendants. The law does not require that the whole tract should be inclosed; it is sufficient if the grant, under which the plaintiff entered, calls for distinct boundaries; neither should the plaintiff's recovery be limited to the size of a usual farm; there is no principle we know of which should alter the rule we have laid down; besides, at the time of the execution of this grant the land was designed for grazing and not for agricultural purposes, and the grant was less than the usual size of concessions for such purposes."

There was no error in refusing to admit in evidence the certified copies of papers from the transcript in the case of the *United States v. J. A. Sutter for the Mokehumne Indians*. The papers could not have aided the defendants had they been admitted.

The defendant Coleman introduced deeds from some twenty-seven Mokelumne Indians, executed in 1856, to one Powers, purporting to convey to said Powers three leagues of land, including the lands in controversy. It is insisted that plaintiff and defendant Coleman derive such title as they have from the same source, and that they are therefore tenants in common.

We have already seen that there is no evidence in the case to show that plaintiff derives, or claims to derive, any title from the so-called Micheltorrena grant to the Mokelumne Indians, and this disposes of the whole basis of the long argument on this point.

It is admitted and insisted by the appellants that the Mokelumne Indians had no title, or if they had, that Indians have no capacity to convey; and for these reasons Heleno not only could not convey the title of his tribe, but that he could not even convey his own interest. In both these positions we think they are right, and the same objections apply with equal force to Coleman's conveyances from the twenty-seven Indians. If the Indians had any interest at all, it was of a public nature, for the benefit of the Indian community at large. It was not subject to sale to individual purchasers by any one or more, or even all of the members of the tribe. Such sales are contrary to the policy and laws both of the Governments of Mexico and the United States. To insist that any right, as tenants in common, or otherwise, could be acquired under a conveyance from any number of a recognized tribe of Indians sustaining the ordinary relation of individual Indians to their tribe, would be very much like claiming that any one or more citizens of California might convey their individual, undivided interest in the swamp and overflowed lands, or any other lands donated by the United States to the State of California for public purposes, and that the grantee would thereby acquire such a right of property therein as would constitute him a tenant in common with all other citizens of California, and enable him to defeat an action for their recovery, with this difference, however, in favor of the latter proposition—that a citizen of California can convey lands in which he has an interest as owner,

Hicks v. Coleman et al.

while an Indian, sustaining the relation to his tribe above referred to, has no capacity recognized by law to convey lands. Such a claim would be preposterous in the extreme.

Yet it is insisted that Coleman, by virtue of his conveyances from the twenty-seven Mokolumne Indians, is in under color of title — that plaintiff at best only entered under color of title, and that a colorable title in Coleman is sufficient to enable him to defeat a merely colorable title in plaintiff. But admitting that plaintiff only entered under color of title, and that defendant also had color, still plaintiff derived his possession and color from an entry under a deed from Shaddon, valid on its face, at a time when he was in possession of a part, claiming the whole, and when there was no adverse possession. His possession under these circumstances, being also prior in point of time, was therefore best, for prior possession is evidence of title in fee. In the apt and accurate language of Mr. Justice Heydenfeldt, in *Norris v. Russell*, 5 Cal. 250, “it is objected that the defendant had color of title, although his possession was subsequent to plaintiff, and therefore it is urged his possession ought to prevail. But it must be held in view that prior possession is evidence of title, and cannot by any system of reasoning be made to yield to mere color of title, or, in other words, to that which is not title.”

Also in *Keane v. Cannovan*, 21 Cal. 305, Mr. Chief Justice Field used language equally applicable. He said: “The possession of Mondolet was evidence of seizin in fee in him, and no further or higher evidence of title was required to enable the plaintiff claiming through him to recover, until the defendant had shown an anterior possession or had traced title to a paramount source. It is immaterial, in this view, whether we consider the tax deed to Dumartheray sufficient to constitute color of title or otherwise.”

So it is immaterial whether we consider the deeds from the Mokolumne Indians, put in evidence by Coleman, sufficient to constitute color of title, or otherwise. We are unable to perceive that these deeds, or the certified copies of papers from the Surveyor-General's office offered in evidence by defendant

Hicks v. Coleman et al.

Coleman and rejected, are entitled to cut any figure in the case.

The next principal error relied on by appellants is that, in admitting in evidence the Cleal survey and rejecting the Brewster survey, the Court adopted an erroneous theory in locating the land described in the Shaddon deed. The construction of the description, in the conveyance from Shaddon to Hicks, was a question to be determined by the Court. Neither theory adopted by the respective surveyors was in all respects correct. But the Cleal survey was based upon the correct theory in every particular except the line opposite the river. The deed calls for *one league*, and the first boundary is to be the Cosumnes River. It is well settled by numerous authorities that where a river is named as a boundary the boundary line follows the meanderings of the stream. It is also established by the authorities, that when a line is to run up or down a stream, not navigable, a given distance, the meanderings of the stream are to be followed until the required distance when reduced to a straight line is attained — and where courses are not specified the other lines are to be run in such a manner that the land shall be in a form as nearly rectangular as possible. Thus in *Craig v. Hawkins' Heirs*, 1 Bibb, 54, a thousand acres of land was to be laid off, commencing at a point on a "branch of the Jessamine, running down the same one mile, extending northwardly for quantity." The Court say: "The beginning being admitted, it will only be necessary to construe the expressions 'running down the stream;'" and it was held that these expressions "clearly import that the branch was intended to be one boundary of the claim, and that it was to form the base of the survey." And the Court say that the land should be surveyed by beginning at the designated point, "and running thence down the branch, with the meanders thereof, one mile, when reduced to a straight line; and from the beginning and the termination of said line of one mile, extending lines off from the branch northwardly, at right angles, to the general course of so much of the branch as will be embraced by the survey,

so far that a line drawn at right angles to those two last mentioned lines, and parallel to the general course of the part of the branch so embraced as aforesaid, will include the quantity of one thousand acres." See, also, *Clalk v. Stribling*, 1 Bibb, 123; and there are many other authorities to the same effect, which, it would seem need not be cited to sustain a construction in itself so reasonable.

The first line, then, is to commence at the point of the river called "Paso Viejo," and is to follow the meanders of the river until a point in the river is reached one league distant, when reduced to a straight line, from the point of beginning, and the straight line between these two points will form the proper basis for laying off the other lines. The second line starts from the point in the river called "Paso Viejo," and runs in a line directly crossing the line of the river. It is plain to us that this line should run at right angles with the line last referred to, being the line of the general course of the river within the survey. The fourth line is to run "one league, or five thousand varas," parallel with the last mentioned line; and the third line is to run one league, or five thousand varas, parallel with the Cosumnes River. We think the plain construction of the call for the third line is, that it is to run parallel with the river in all its meanderings, and not parallel with its general course. This is the obvious import of the terms "parallel with the Cosumnes River." No other line can be said to be parallel with the river.

In the cases where the line opposite the river has been run as a straight line, there is no specific description of that boundary. The description generally gives the starting point and the river as the first boundary, then says running in some designated direction for quantity; and it is held in such cases that a straight line is to be run corresponding with the general course of the river within the survey the designated distance, if given; if not given, far enough to constitute one side of a square containing the given quantity; that the side lines are to be drawn at right angles from the extremities, and then the fourth line to be drawn at a sufficient distance from

the river to include the required quantity between it and the river. But in the case under consideration the direction of the line opposite the river is given in express terms. (See *Keith v. Reynolds*; 3 Greenl. 393; *Williams v. Jackson*, 5 Johns. 506; *Van Gorden v. Jackson*, 5 Johns. 441.)

The construction we have given to the calls of the deed will give the exact quantity called for — one league. While the theory upon which the Brewster survey is made would give less than a league, the construction which makes the third line a straight line, parallel with the general course of the river, would in this instance give more than a league. Had the meanders of the river been different, the quantity might have been much more, or much less than a league, depending upon the extent and direction of its sinuosities. The construction we have put upon the calls of the deed is the only one that harmonizes the quantity called for with the extent and direction of the lines, and in our judgment is the only reasonable construction the language will bear. The distance on the third line is made to harmonize with its meanderings, upon the same principles that the distance is measured on the river boundary, which is parallel with it.

The plat of the Cleal survey in evidence is constructed on the principles we have indicated, with the exception of the third line. The third line is parallel with the general course of the river, instead of its meanderings, as it ought to be. In this respect it is erroneous. The judgment follows the Cleal survey and is also erroneous in the same particular, but correct in all other respects. It therefore becomes necessary to inquire whether this error is fatal to the judgment, or whether it can be so modified as to do justice between the parties.

It is not pretended by appellants that Coleman's land and a portion of Castle's is not within the calls of the Shaddon deed to Hicks, even upon the theory of the Brewster survey, which is by far the most favorable one for the appellants that has been advanced. It is only contended that less of Castle's land would be embraced in the Brewster survey than in any

other, and that Randolph's would be entirely excluded. The testimony shows that some twenty or thirty acres only of Randolph's land lay within the Cleal survey in the southwest corner, and the jury necessarily found that a part at least was within this survey. At that point the line parallel with the meanderings of the river, which we have adopted as the true line, comes down as far as and a little below the straight line of the Cleal survey, and therefore necessarily includes the same land in the possession of Randolph, or at least a part of it, that is included in the Cleal survey. To entitle the plaintiff to a judgment, it is enough that each of the defendants is in possession of any portion of the land belonging to plaintiff; and as no damages were awarded, the extent of the land in the wrongful possession of the defendants, so far as it affects the right of plaintiff to a judgment, is not a matter of any consequence to them, provided they are not ejected from any lands of which they are rightfully possessed.

There is no doubt, then, that the plaintiff is entitled to recover as to all the defendants against whom judgment is entered; but the difficulty is, the record is not in such a condition that we can make the required modification of the judgment. The complaint, instead of following the description contained in Shaddon's deed to Hicks, adopts a description as to the third line corresponding with the theory of the Cleal survey; the verdict is general, giving no specific boundaries of the tracts in possession of the several defendants, and must be held to extend to the boundaries stated in the complaint and of the Cleal survey; the judgment follows the description in the complaint. The complaint, the evidence as admitted, the verdict and the judgment are in entire harmony, and we cannot modify the judgment without setting aside the verdict and finding another upon the evidence in harmony with the construction of the Shaddon deed adopted by us. This we are not authorized to do, and for this reason the judgment must be reversed and a new trial ordered. (*Clark v. Huber*, 20 Cal. 198.) Had the complaint and judgment followed the description of the deed to Hicks, the judg-

ment might have been affirmed. But it does not, and, as more land in the possession of defendants is included in the judgment than plaintiff is entitled to recover, a new trial is rendered necessary.

There is no error in the instructions relating to the declarations of Hicks. Those declarations, under the circumstances shown by the record, were clearly insufficient to constitute an estoppel as to defendants, Castle and Randolph, and the Court, might safely have directed the jury to disregard them altogether.

No exception was taken at the time to a joint verdict, admitting it to be joint, or to the judgment being entered jointly. True, at the commencement of the trial separate verdicts were demanded. But at the close of the case neither the attention of the Court or the jury appears to have been called to the matter. Had the counsel called attention to it at the time the case was submitted, doubtless the Court would have given the proper directions, or have had the verdict corrected in this respect on the coming in of the jury. At least there would have been an opportunity given for such action. It not having been done, the objection cannot be taken for the first time in this Court. Besides, no damages were awarded, and the defendants are in no way injured by the error, if it be such.

There is no error in the charge of the Judge. If there is any error in those parts to which exception has been taken in the arguments, it consists in being more favorable to the defendants than the evidence and the law applicable to it justified. The exceptions to the charge are too general in their terms. We take this occasion to remark that exceptions to a charge ought to point out the specific portions excepted to, and to be made at the time of the trial, in order that the Judge may have an opportunity, before the jury retires, to correct any error he may have inadvertently fallen into, in drawing up the charge, in the hurry and perplexities of the trial.

Lackman et al. v. Wood et al.

The other points not particularly referred to in this opinion do not require comment.

As the same questions will arise upon another trial, we have thought proper to discuss all the important questions in the case.

Judgment reversed and a new trial ordered.

Mr. Justice CURREY, having been of counsel, did not sit upon the hearing of this case.

Mr. Justice RHODES expressed no opinion.

HERMAN LACKMAN AND HENRY BACKEN v. JOSEPH M. WOOD, WILLIAM G. WOOD, AND EMILY WOOD.

EMANCIPATION OF A MINOR.—A father may emancipate his minor child, and when emancipated the child is freed from parental control and is in all respects his own man.

MINOR MAY TAKE AND HOLD VACANT LANDS.—An infant may become a disseisor, and whether emancipated or not, may take possession of vacant lands and hold them in his own right, the same as an adult.

PROOF OF THE EMANCIPATION OF A MINOR.—Evidence that a minor was in the habit of doing business on his own account and in his own name, and of becoming responsible for his own supplies, is admissible for the purpose of proving his emancipation.

ESTOPPEL AS TO INFANTS.—The doctrine of estoppel has no application to infants.

ESTOPPEL MUST BE FOUND OR GIVEN, ETC.—It is erroneous for the Court to assume, in the progress of a trial, for the purpose of deciding on the admissibility of testimony, that an estoppel exists; but the fact of an estoppel must be found or given before any of the consequences of an estoppel can be claimed.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

J. F. Swift, for Appellant.

An actual entry by an infant into another's freehold, gains the possession, and makes him a disseisor. (Bacon's Abridgment, title Infancy and Age, F, G, and particularly H; Co. Litt. 357; Hawk. P. C., Chap. 64, sec. 35.)

Lackman et al. v. Wood et als.

An infant can hold and occupy lands in the United States. (4 Serg. & Rawle, 207; 3 New Hamp. 23.)

He may be, by his father, emancipated, and when he is so emancipated he is entitled to the fruits of his labor. (2 Mass. 415; 4 Mass. 97, 675; 6 Binney, 273; Greenleaf, 33; 4 Binney, 492; 2 Bailey, 497; 3 Pickering, 201; 11 Vt. 258, 477; 2 Blackford, 449; 11 New Hamp. 191; 7 Cow. 92.)

The emancipation may be proved by parol. (5 Vt. 556; 3 Ibid, 290.)

The intention of a father to emancipate his child is a question of fact, and in the absence of direct proof, may be inferred from circumstances, etc. (6 Cushing, 458; 2 Black, 449.)

It was material and proper for Joseph M. Wood to show those facts for the purpose of proving his emancipation, and for the purpose of showing that he was upon the land before his father came there.

Those facts tend to show such emancipation; and if he was emancipated then, he could acquire the possession of lands and hold them in his own right. (4 Serg. & Rawle, 207; 3 New Hamp. 23.)

If he were really emancipated then, he could enter upon the possession of White, the grantor of the plaintiffs, and disseize him and the freehold created in himself, he could not convey, during his minority; or, at all events, if he did convey it, the act would be voidable.

G. F. & W. H. Sharp, for Respondents.

A complete answer to appellants' brief is, that because a father allows his infant son to support himself, and enjoy the fruits of his labor, this does not prevent the father from controlling the personal conduct of the son so as to prevent either his committing or his continuing a trespass upon another's land; and although after a disseizin worked by an infant has, through lapse of time, ripened into a perfect title, such title would be beyond the father's control; yet, until then, the father, by virtue of his having the custody and control of his infant, must be able, against the infant's consent even, to pre-

Lackman et al. v. Wood et al.

vent or terminate the ouster, trespass, nuisance, waste, or any other injury of the infant to another's land.

Again: "If a man carries an infant into the lands of another, and there claims the lands to the use of himself and the infant, yet the infant seems no disseizor, because he made no claim of it himself, and then shall not be charged with the tort of another person." (Bacon's Abridg., title Infancy and Age, H.)

The respondents say that the Court below did not err in excluding the testimony of A. J. Gladding. This testimony was properly rejected, because it ignored the father's consent. Even according to the doctrine contended for by appellants, the acts of the infant, unless approved of by his father, cannot prove or tend to prove emancipation by the father.

By the Court, SHAFER, J.

This is an action of ejectment, brought to recover certain lands in the "Western Addition," so called, situate in the City and County of San Francisco.

The defendants answered severally. William G. and Emily Wood denied all the allegations of the complaint, and the answer of Joseph M. Wood, in addition to a general denial, alleges the title to be in him.

The plaintiffs, at the trial, in proof of their right, relied upon a lease executed by one White to the defendant, William G. Wood, on the 25th day of November, 1851, and upon an assignment to them, by White, of the reversion; and upon the fact that the term created by the lease had expired before the commencement of the action.

For the purpose of bringing the defendant, Joseph M. Wood, within the operation of the facts named, the plaintiff introduced evidence tending to prove that Joseph M. Wood was the son of William G. Wood, and that, at the date of the lease, he was about seventeen years of age, and that Joseph M., so being a minor, went upon the lands as a member of his father's family, and not otherwise.

We consider that the plaintiffs might have safely rested

Lackman et al. v. Wood et al.

their case upon this testimony; but they went further, and introduced evidence, not so much for the purpose of making out a good case *prima facie* in their own favor against J. M. Wood, as for the purpose of showing that he was estopped in *pais* from alleging that the land was his.

The testimony upon the subject of the estoppel was drawn by the plaintiffs from their witness, Williams, who testified that White, the plaintiff's assignor, in company with William G. and Joseph M. Wood, called upon him in June, 1851—five months before the lease was in fact executed—and that in the course of a conversation that ensued between the witness, William G. Wood and White, White exhibited to the witness “a roll of papers as the plan of his land, and introduced the Woods, father and son, to the witness, and said they were to be the neighbors of the witness; that he, White, had leased the premises to Wood and his family, and hoped that he, the witness, would find them agreeable neighbors.” * * * *
“Joseph M. Wood stood by his father, and said nothing.”

The plaintiffs, having closed their case, Joseph M. Wood, as we gather from the record, undertook to sustain his plea of title on the ground—first, that he was emancipated by his father prior to the execution of the lease, November 25th, 1851; second, that prior to the date of the lease, and after his emancipation, he entered upon the premises in his own right, and that he has ever since held and occupied them, adversely to the lessee, to White, and all other parties.

For the purpose of maintaining this defense, A. J. Gladding was called as a witness, and the defendant offered to prove by him “that whilst living on the premises in controversy, both before and after William G. Wood went upon the place, the defendant, Joseph M. Wood, was in the habit of doing business on his own account and in his own name, and that he purchased his own supplies of provisions, and became responsible for them.”

This testimony was objected to as irrelevant and immaterial. The testimony was excluded by the Court, and the defendants excepted.

There was no evidence that the plaintiffs, or those under whom they claimed, had ever been in possession of the premises, and none to show that the premises belonged to them by title derived from the original proprietor.

1. An infant may libel, slander, assault, convert, and dis-seize. He can contract only for necessities, but he can commit torts as efficiently as an adult; and against injuries of that character his nonage will afford him no protection. (2 Hill, Torts, p. 605.) "An actual entry by an infant into another's freehold gains the possession, and makes him a disseizor." (3 Bac. Ab. p. 592.)

From these principles it would seem to follow that if an infant, whether emancipated or not, should enter upon vacant lands and take and hold possession of them in his own right, his occupancy would be followed with all the consequences which would attend a like possession on the part of an adult. But a decision upon that question, in its breadth, is not necessary to a decision of the point now under discussion.

The offer made on behalf of Joseph M. Wood was in effect to prove that he had been emancipated by his father prior to the date of the lease, and that subsequent to the emancipation, and before the execution of the lease, he entered upon and took possession of the premises in his own right, and that this state of things, so inaugurated before the lease, continued to subsist thereafter.

We consider that the facts embodied in the offer would, if proved, have constituted, as to Joseph M. Wood, a good defense to the action.

The power of a father to emancipate his minor child cannot be questioned; nor can there be any doubt as to the effect of such emancipation upon the relations of the persons who are parties to it. The child is freed by emancipation from parental control; he can claim his earnings thereafter as against his father, and is in all respects his own man.

Emancipation is defined as "An act by which a person, who was once in the power of another, is rendered free," and the adjudged cases show that the doctrine of emancipation, as

actually administered, is not less comprehensive than the definition. (*Morse v. Welton*, 6 Conn. 547; *Jenney v. Alden*, 13 Mass. 375; *Chilson v. Phillips*, 1 Vt. 41; *Gale v. Parrott*, 1 N. H. 28; *Keen v. Sprague*, 3 Greenl. 77; *Plummer v. Webb*, 4 Mason, 380; *Burlingame v. Burlingame*, 7 Cow. 92.)

If then the evidence offered was inadmissible, it was not for the reason that the main proposition to be proved was devoid of legal significance and value, and it remains that the ruling of the Court excluding the testimony can be justified only on one of two grounds: first—that the evidence had no tendency to prove the proposition; or, second—that the defendant was effectually estopped from proving it at the time when the evidence was offered and rejected.

The facts embraced in the offer, in so far as they relate to the question of emancipation, were secondary and circumstantial; and in so far as the offer relates to the question of Joseph M. Wood's personal occupation of the premises, the testimony offered must be considered as positive and direct.

On the tendency of the direct evidence to prove the defense in one of its branches, no question can be made, and as to the tendency of the facts enumerated in the offer to prove the emancipation asserted, we entertain no doubt. Every relation among men, whether public or private, may be said to tell its own story—that is to say, it is followed by certain sequences that argue the existence of the relation. If a father in fact emancipates his minor child, all observation and experience would lead us to expect corresponding changes in their intercourse with and in their treatment of each other. The facts named in the offer in question are not only the natural, but the known and established incidents of the emancipation which the defendant, Joseph M. Wood, was interested and offered to prove. (*Canavar v. Cooper*, 3 Barbour S. C. 115; *Stiles v. Granville*, 6 Cush. 458; *Clinton v. York*, 26 Maine, 167; *Chase v. Smith*, 5 Vt. 556.)

Nor do we consider that the defendant Joseph M. Wood was estopped by the testimony of the witness Williams from proving the emancipation and entry asserted at the bar.

The doctrine of estoppel has no application to infants. (*McCoon v. Smith*, 3 Hill, 147; *Brown v. McCune*, 5 Sandford, 224.) In the latter case Mr. Justice Sandford, in delivering the opinion of the Court, says: "In respect to the estoppel we are not aware that any case has gone the length of holding a party estopped by anything he has said or done while he was under age. And we think it would be repugnant to the principle upon which the law protects infants from civil liabilities in general. It is true that Courts of equity have sometimes refused relief on the ground of fraud or suppression of the parties seeking it, while they were minors; and we do not deem it necessary to dissent from those decisions. At the same time we are clear that the doctrine of estoppel is inapplicable to infants. A contrary doctrine would overturn the whole law relative to the contracts of infants."

But even if infants were under the law of estoppel, still neither they nor anybody else is estopped by mere evidence tending to prove an estoppel. The facts of the estoppel must be found or given, before any of the consequences of an estoppel can be claimed. When the defendant's testimony was offered and rejected, the trial was still in progress, and the Court could not properly assume, for the purposes of judgment on the interlocutory question presented, that the facts of the estoppel would be found by the jury.

There is another ground upon which the counsel of respondent seek to vindicate the ruling of the Court now in question. It is stated in the brief as follows: "The offer was too broad as to time. What the father allowed the infant to do after the father lived on the premises, or indeed after the father had taken a lease, was altogether immaterial."

Assuming, for the purposes of argument, that both the emancipation of the son and his entry upon the premises in his own right, must, in order to be available, have antedated the lease to, and entry of the father, (a point by no means free from doubt,) we consider that the question whether the son had been so emancipated or not, rested, in the absence of positive testimony, upon presumptions to be drawn from the mutual conduct of the parties during the whole of the residue

Carpentier v. Williamson et al.

of the nonage of the son. If the son, prior to the lease, was in possession of the premises, and acted independently of his father, in fact, until the lease was given, the circumstance that he continued so to act, and without parental interference, until he attained his majority, would add weight to the presumption that he had been emancipated in the first instance, and was therefore admissible.

Whether the alleged emancipation was simulated merely, or brought forward as an "after thought" upon fabricated testimony, are questions with which the state of the record excuses us from dealing.

Judgment reversed and new trial granted.

HORACE W. CARPENTIER v. HENRY WILLIAMSON, SAMUEL WILSON, JOHN WILLIAMS, GEORGE BLOOM, EVERETT BARTHOLOMEW, GUILLERMO PALLEADEW, AND LEWIS M. BEAUDRY.

MORTGAGE—PARTIES TO FORECLOSURE OF.—If the owner of land executes a mortgage on the same, which is duly recorded, and afterwards makes a conveyance of the mortgaged premises to a third party, and the mortgagee, after the conveyance, without actual notice of the deed, and before it is recorded, forecloses his mortgage and obtains a decree for a sale without making the grantee in the deed a party defendant, and before the sale the deed is recorded, the purchaser of the mortgaged premises at the Sheriff's sale under the decree acquires no title.

EVIDENCE—WHEN SHERIFF'S DEED NOT RELEVANT.—In such case the mortgage, decree of sale, and Sheriff's deed, are not relevant testimony to show title in the purchaser at the Sheriff's sale, or out of the mortgagor's grantee, or his assignee.

ERRORS—WHAT REVIEWED ON APPEAL FROM JUDGMENT.—On an appeal from a judgment, errors in the rulings of the Court below, in the progress of the trial, are subject to review when the exceptions are preserved by bill of exceptions, or brought up in a statement on appeal.

WHEN NEW TRIAL, STATEMENT USED ON APPEAL FROM JUDGMENT.—If a statement is made on a motion for a new trial, and an appeal is taken from the judgment under a stipulation that the statement on motion for new trial may be used as the statement on appeal, the statement may be used so far as it presents any question that can be reviewed on appeal from the judgment, but no further.

SEPARATE APPEALS IN SAME ACTION.—An appeal from a judgment, and from an order denying a new trial, may each be prosecuted separately in the same action, or the two appeals may be prosecuted together.

Carpentier v. Williamson et al.

QUITCLAIM DEED—WHAT IT CONVEYS.—An ordinary quitclaim deed in this State is sufficient to pass any estate the grantor has at the time of its execution, and the grantee can maintain an action to recover the land on it, provided the grantor could have done the same.

REVIEW OF EVIDENCE ON APPEAL FROM JUDGMENT.—On appeal from a judgment, the Supreme Court will look at the evidence so far only as to see the relevancy of the exceptions taken during the trial.

APPEAL from the District Court, Third Judicial District, Alameda County.

The judgment in this case was rendered July 16th, 1863. A statement on motion for new trial was made and filed, and on the 16th day of November, 1863, an order was made denying a new trial. On the 4th day of March, 1864, an appeal was taken from the judgment and from the order denying a new trial. No statement on appeal was made, but the respondents' attorneys stipulated that the statement on motion for a new trial might be also used as the statement on appeal.

The other defendants were in possession as tenants of Williamson.

The Court below found as facts, that on the 31st day of December, 1857, José Domingo Peralta was the owner in fee simple of the land; that on the 14th day of May, 1858, plaintiff became the owner of an undivided one third of the same, and on the 6th of April, 1860, of an additional undivided one sixth; that on the 1st day of January, 1862, defendants entered upon the land and ousted and ejected plaintiff from the possession of the same; that defendant Williamson has not and never had any title to or right of possession to the land, or any portion thereof; and that Edson Adams is the owner of, and from December 31st, 1861, has been the owner of the other undivided one half of the land.

The action was commenced October 29th, 1862. March 18th, 1863, defendants, by leave of the Court, filed an amended answer, setting up title in defendant Williamson to an undivided one half of the land acquired by Peralta's deed, dated January 31st, 1863.

The other facts are stated in the opinion of the Court.

W. W. Crane, Jr., for Appellants.

One tenant in common can only recover the possession of the whole premises as against a trespasser, or, more properly speaking, intruder, who enters without title or color of title; and the defendant Williamson, being neither a trespasser nor an intruder, but deraigning title from Cipriano Thurn, it is immaterial as between himself and plaintiff whether his claim of the title can be successfully assailed by Edson Adams or Jaynes, or not. If this position be incorrect, then the familiar maxim that in ejectment the plaintiff recovers upon the strength of his own title, and not upon the weakness of his adversary's, is reversed, because, while it appears that either Williamson, or Adams, or Jaynes, is entitled to the possession of one half of the demanded premises, and the plaintiff to the other half alone, yet the plaintiff shall have the whole, because Williamson's title is weaker than Adams' or Jaynes'. In short, the rule claimed by plaintiff's counsel permits one tenant in common in an action of ejectment to fish for his co-tenant, and, among several claimants, to ascertain by a judicial determination which is entitled to that position. (*Collier v. Corbett*, 15 Cal. 186; *Stark v. Barrett*, 15 Cal. 361; *Touchard v. Crow*, 20 Cal. 150.)

Fleming's mortgage created merely a lien upon the premises; the fee remained in Thurn. (*Fogarty v. Sawyer*, 17 Cal. 592; *Lord v. Norris*, 18 Cal. 487; *Dutton v. Washauer*, 21 Cal. 609.)

The question then is: What was the effect of Fleming's judgment upon the fee or equity of redemption of Peralta, he never having had his day in Court? It has been three times distinctly adjudicated by the former Supreme Court, that under such circumstances the fee or equity of redemption remains undisturbed. (*Goodenow v. Ewer*, 16 Cal. 467.)

In *Boggs v. Hargrave*, 16 Cal. 580, the mortgagor had parted with the fee, and the grantee was not made a party to the action.

The Court holds that the equity of redemption was not foreclosed; but the purchaser at the Sheriff's sale could not recover the purchase money, as it appeared that the deed from

the mortgagor was executed before the commencement of the suit, and was recorded before the sale. (*Burton v. Lies*, 21 Cal. 87; *Watson v. Spence*, 30 Wend. 260; *Whitney v. Higgins*, 10 Cal. 550.)

The deed from Thurn to Peralta was acknowledged July 11th, 1860, and was delivered on that day. (*Wyckoff v. Remsen*, 11 Paige, 564.)

The foreclosure suit of *Fleming v. Thurn and Adams*, was commenced afterwards, to wit: January 22d, 1861.

The deed from Thurn to Peralta was recorded February 25th, 1861.

From that time it was notice to all subsequent purchasers. Fleming bought at the Sheriff's sale March 11th, 1861, and was a subsequent purchaser with notice; (*Boggs v. Hargrave*, 16 Cal. 560;) and Peralta's deed has priority over such subsequent sale. (*Jackson v. Dubois*, 4 John. 216; *Jackson v. Terry*, 13 John. 471; *Jackson v. Post*, 9 Cow. 120; *Jackson v. Post*, 15 Wend. 588; *Jackson v. Chamberlain*, 8 Wend. 620.)

Patterson, Wallace & Stow, for Respondent.

The Court will not consider the sufficiency of the evidence to sustain the findings. (*Lower v. Knox*, 10 Cal. 481.)

This seems to us to dispose of the question whether defendant Williamson had title to an undivided moiety or not.

On the trial in the Court below, when plaintiff rested, he had shown title to an undivided half, and defendants appeared to be *wrongdoers*, who had entered (according to the averments of the complaint and the admissions made by the amended answer) October 1st, 1859, *without title and as trespassers*.

Upon that state of facts the rule is well settled, that as against defendants, plaintiff is entitled to recover and be restored to the possession of the whole. (*Clark v. Huber*, 20 Cal. 196; *Collier v. Corbett*, 15 Cal. 183.)

When this action was commenced, defendants had no title; *neither were they tenants in common with plaintiff at that time nor when they ousted plaintiff in October, 1859*; and thus they endeavor to escape plaintiff's recovery of damages and possee-

Carpentier v. Williamson et al.

sion, by a pretended acquisition of title *pendente lite*, and by amending their answer by now acknowledging that the plaintiff has title to one half, and setting up title in themselves to the other half; an attitude which, in our judgment, does not particularly commend them to the equitable consideration of this Court.

Again: the learned counsel for appellants mistakes respondent's position in saying that he (respondent) "claims the other half, not because he owns it, but because one Edson Adams does, or in the event Adams fails, then because one Jaynes is the owner." We say respondent owns one half, and it follows that he has a right to the possession of the whole, unless defendants show a right to joint possession with plaintiff. Defendants pleaded such right. Plaintiff (by force of sections forty-six and sixty-five of the Practice Act) takes issue upon the plea, and avers that Adams or Jaynes is *entitled* to such joint possession with plaintiff, because the title is in Adams or Jaynes to the one half not owned by plaintiff; that defendants *do not show any right to the possession under Adams or Jaynes*, since it does not lie in the mouths of defendants to say plaintiff cannot recover the whole, because they are trespassers and wrongdoers as between them and Adams and Jaynes. In other words, plaintiff invokes the familiar rule: *Nullus commodum capere potest de injuria sua propria*.

By the Court, SAWYER, J.

We can only consider the questions arising on the appeal from the judgment, for the reason that the appeal from the order denying a new trial was not taken in time. (*Dooking v. Moore*, 20 Cal. 141.)

There is a stipulation in the record that the statement "on motion for a new trial may be also used as the statement on appeal from the judgment." The statement, therefore, may be used, so far as it presents any question that can be reviewed on appeal from the judgment, but no further.

On such appeal, errors in the rulings of the Court below in

the progress of the trial affecting the judgment are subject to review, when the exceptions are preserved by bill of exceptions, or brought up in a statement on appeal.' (*Brown v. Tolles*, 7 Cal. 399; *Rice v. Gashirie*, 13 Cal. 53.)

Plaintiff sues to recover the possession of certain lands. Defendants, by leave of the Court, filed an amended and supplemental answer, in which they allege that, since the commencement of the action, they have become the owners in fee of an undivided half of the premises in controversy, by a conveyance from one José Domingo Peralta, who, at the time of said conveyance was the owner in fee of said undivided half.

On the trial the plaintiff proved title in fee in himself to an undivided half at the time of the entry of defendants, and that one Cipriano Thurn, on the 10th day of July, 1860, before the commencement of this action, held title in fee simple to the remaining half, and then rested.

The defendants then introduced in evidence a deed from said Cipriano Thurn to José Domingo Peralta, dated the 10th, and acknowledged on the 11th of July, 1860, and recorded February 25th, 1861. Also a deed from said José Domingo Peralta and wife to defendant Williamson, dated January 31st, 1863, and then rested. Said deeds conveying three undivided eighths of the premises in question.

The plaintiff, in rebuttal, then gave in evidence a mortgage from said Cipriano Thurn to Wm. B. Fleming, dated July 6, and recorded July 7, 1860; also a judgment roll in an action (No. 8,356) in the Twelfth Judicial District for the City and County of San Francisco, to foreclose said mortgage, in which action said Wm. B. Fleming was plaintiff and Cipriano Thurn and one Edson Adams were defendants, whereby it appeared that the complaint in said cause was filed January 22, 1861, and a decree for foreclosure and sale entered February 9, 1861. Also, a notice of *lis pendens* in due form in said suit, filed in the Recorder's office of Alameda County, January 23, 1861. Also, an order of sale in said cause, with the Sheriff's return, showing a sale of the premises to plaintiff, Wm. B. Fleming, March 11, 1861. Also, an assignment of certificate of sale in

said case by Fleming to Edson Adams, with admission that Adams paid the consideration of eight hundred dollars. Also, Sheriff's deed of premises to Adams after expiration of time for redemption. To the introduction of each of said instruments of evidence the defendants in proper time and in due form objected. The objections were severally overruled and defendants excepted.

The first ground of objection is, "that neither the defendants in this action, nor José Domingo Peralta, were parties to said action or judgment, to wit: Case No. 8,356, and are not bound by any of the proceedings therein, and said several documents and papers are not relevant to the issue." These rulings are relied on as error.

If this objection is well founded, the judgment cannot be sustained, for it is manifest from the findings that the evidence must have produced an effect unfavorable to the defendants.

The plaintiff had shown title to one undivided half in himself, and to the other in Thurn. The defendants then showed that three eighths of Thurn's half had been conveyed to defendant Williamson. To meet this phase of the case the plaintiff claimed that Williamson's chain of title had been intercepted before it reached him, and that Thurn's title had passed to Edson Adams; but if Edson Adams' title failed, that then it passed through another line to one Anselm Jaynes. The evidence just recited was introduced to maintain the proposition that Thurn's title had vested in Adams. The action was tried by the Court without a jury, and special findings were filed. The Court found that the title to one undivided half was in plaintiff, and the other half in Adams, and not in Williamson. Of course, if in Adams, it could not be either in Jaynes or Williamson. Having found that Adams, and not Williamson, was the co-tenant of plaintiff, judgment was entered in favor of the plaintiff for the whole of the premises, and not one undivided half, as it would have been had the title to a part been found to be in Williamson. Had the Court found against the title of Adams, we are not authorized by the findings to say whether it would have found in favor of Williamson or

Jaynes. As the Court found the title to one half to be in Adams, we must presume that the testimony under consideration contributed to that result. If Adams acquired the title, it was through the proceedings foreclosing Fleming's mortgage, and it will be necessary to consider the effect of the foreclosure on the title of José Domingo Peralta, under which defendants claim. The order in which the several transactions occurred, as we have already seen, is as follows: Thurn's mortgage to Fleming, bearing date July 6th, was recorded on the 7th. He deeded to Peralta on the 10th of the same month. The conveyance to Peralta, therefore, was subject to the mortgage. Fleming commenced his suit to foreclose his mortgage January 22, 1861, without making Peralta a party to the suit. The decree of foreclosure was entered on the 9th of February, 1861; Peralta's deed of July 10th was recorded on the 25th of February, 1861. The sale under the decree of foreclosure was made by the Sheriff on the 11th of March following to Fleming, the plaintiff in the foreclosure suit; and Fleming conveyed his interest so purchased to Adams. At the time of the commencement of the foreclosure suit, then, the title to the land, subject to the mortgage, was in Peralta, although his deed was not on record. His title was good as to all the world except a party deriving title from Thurn for a valuable consideration without actual notice. It has been settled by repeated decisions of the late Supreme Court, that the title of the grantee of mortgaged premises is not affected by a foreclosure of the mortgage in a suit commenced after the conveyance by the mortgagor unless the grantee is made a party to the suit. (*Goodenow v. Ewer*, 16 Cal. 467; *Boggs v. Hargrave*, *Ib.* 560; *Burton v. Lies*, 21 Cal. 88; *Fogarty v. Sawyer*, 17 Cal. 592; *Lord v. Morris*, 18 Cal. 482; *Dutton v. Warschauer*, 21 Cal. 610.)

Peralta, not having been made a party to the foreclosure suit, his title was not affected by the foreclosure and sale, unless Fleming and his grantee, Adams, can be regarded as purchasers for a valuable consideration, without notice, under the Act relating to the record of conveyances; and we do not

see how they can be so regarded. At the time of the entry of the decree, it is true, Peralta's deed was not on record; but he had acquired his title long before the suit was commenced. He got nothing after the commencement of the suit that he did not have before. He merely put his deed on record; and this was done before any sale under the decree had taken place. Fleming parted with nothing on the faith of the record. He was not a purchaser till the sale. At the moment of the sale he was no worse and no better off than when he took his first mortgage. No consideration had as yet moved from him, and when the sale took place Peralta's deed was on record and all the world had notice. Fleming purchased with his eyes open, and he got nothing. When Peralta's deed was put upon record, Fleming, if he had no knowledge of it before, should then have opened his decree and taken the proper proceedings to make Peralta a party, or should have proceeded in some other appropriate manner to foreclose the mortgage upon Peralta's interest before proceeding to a sale. Adams of course purchased from Fleming with notice, and is in no better position than he.

Under this view of the case the defendants were not barred, or in any way affected by the said several documents and proceedings introduced in evidence under objection and exception, and they were irrelevant to the issues for that reason. Their admission in evidence was therefore error, and as the finding of title in Adams must necessarily have been affected by this testimony, it follows that the judgment must be modified as hereinafter indicated, or reversed and a new trial had. We have not overlooked the fact, that, in deciding the motion for a new trial at a subsequent term, the learned Judge who tried the cause came to the conclusion that he had committed an error in finding that the title had passed to Adams by virtue of the foreclosure proceedings, but still denied a new trial on the ground that the testimony would have justified him in finding the title in Jaynes. The judgment is based on the finding as it was made at the time of the trial, and the title is affirmatively found to be in Adams and not in Jaynes. We

Carpentier v. Williamson et al.

cannot substitute for it a different state of facts appearing in the opinion of the Court, rendered at a subsequent term, in deciding the motion for a new trial.

The Court find title to an undivided half of the premises in controversy in plaintiff, and he was entitled to recover to that extent. The record furnishes the data necessary to enable the Court to modify the judgment.

It is therefore ordered that the plaintiff have fifteen days in which to file his written consent that the judgment be modified in accordance with the views expressed in this opinion, and upon filing such written consent, that an order be entered directing the Court below to so modify its judgment that the plaintiff recover an undivided half of the premises in controversy, together with the entire amount of damages found by the Court and the costs of the Court below. In default of filing such written consent, it is ordered that judgment be entered reversing the judgment and ordering a new trial. It is further ordered that the appellant recover his costs of appeal.

Mr. Justice SHAFER, having been of counsel, did not sit on the hearing of this case.

Upon petition for rehearing the Court delivered the following opinion.

By the Court, SAWYER, J.

Counsel for respondent acquiesce in "the law as declared in the opinion of the Court," but think the opinion based on a misapprehension of the facts, and ask a rehearing.

Plaintiff proved title to an undivided half in himself, and to the other half in Thurn. Thurn mortgaged his half to Fleming, and then quitclaimed three undivided eighths only to Peralta, leaving one eighth in himself. The first misapprehension is supposed to consist in overlooking the fact that one eighth remained in Thurn, and that the foreclosure as to that eighth was valid without making Peralta a party. And it is

said that the record in the foreclosure suit was relevant for the purpose of showing that the title to one eighth passed to Adams under the decree and sale in that suit, and that it was offered for the purpose of deraigning title to that eighth to Adams. There is, however, no such limitation as to the purpose for which the record was introduced, shown by the record. But the fact that the one eighth remaining in Thurn had passed to Adams was itself irrelevant to any issue in the case, consequently any testimony tending to prove that fact alone was irrelevant.

The material fact to show was, that the title to the three eighths, which had *prima facie* been shown to have passed to Peralta, and through him to Williamson, had been intercepted before it reached Williamson and passed to Adams or somebody else—it matters not to whom—and not to show what became of the one eighth to which Williamson had shown no apparent title. It was not necessary for the plaintiff to prove that Williamson did not own *one half*. That was an issue presented by defendant, and it devolved upon him to make a *prima facie* case, and not to the plaintiff to negative it. He had only given testimony tending to prove that he had acquired three eighths. It could only be relevant to show that these three eighths had passed to some other party. It did not matter whether the other eighth remained in Thurn, or passed to Adams, or to some other person. It was just as available to the plaintiff as a weapon of offense or defense remaining in Thurn, as if it had passed to Adams. It was enough for the plaintiff's purposes that defendant had shown no title to it in himself.

All the other points arising on this appeal argued in the petition, except the eighth and tenth, are but modifications of the same point, or are disposed of upon the same principles, and, so far as they are deemed to require notice, we shall consider them together.

It is supposed that the Court gave too little weight to the eleventh and twelfth findings, to the effect that Williamson and his co-defendants had no right or title whatever, etc.; and

too much prominence to the finding that the title to one half was in Adams, which last finding, it is contended, is mere surplusage, and ought not to be considered at all.

The counsel are, we think, mistaken in this supposition also. We only considered the affirmative finding in favor of Adams in its relation to the finding against defendants, and to the evidence admitted under exception tending to support those findings. And it is difficult to separate them. The Court having found title to one half in plaintiff, and to the other half in Adams, the finding that the defendants had no title necessarily followed, for the title to the same half could not by any possibility be in Adams and in defendant at the same time. But concede, as plaintiff contends, the finding as to Adams to be surplusage—that it is out of the record—that the findings against defendants only remain, and the condition of the plaintiff is no better.

The question then stands thus: The plaintiff proves title to one undivided half in himself, and to the other half in Thurn, and rests. He has made a *prima facie* case. The defendants then, to maintain the affirmative of the issues presented by them, introduce deeds apparently derailing title to them from Thurn to three eighths. This is sufficient to protect their possession to the extent of three undivided eighths. The plaintiff must now rebut the defendants' proofs, and the only evidence that can have any possible relevancy to the issue is testimony to show that defendants never acquired those three undivided eighths, or if they did, that they had subsequently passed from defendants to somebody else. The title to those particular three eighths is now the only issue. On this issue the plaintiff offered the mortgage of Thurn to Fleming, and the proceedings of foreclosure, sale, etc., under it. If these proceedings were binding upon Peralta, they were relevant, because in that event the title was intercepted before it reached Williamson and nothing passed to him, and his evidence of title to the three eighths would be successfully overthrown. But if Peralta was not bound by the foreclosure, then his title was not affected, and the proceedings were irrelevant to the issue, be-

cause they did not prove, or tend in the slightest degree to prove, that the title to the three eights did not pass to Williamson. The Court held them to be relevant, and as there cannot be the slightest pretense that they were relevant for any other purpose whatever, the Court must necessarily have held the proceedings to be valid and to cut off the equity of redemption in Peralta. Having admitted the testimony against the objection and exception of the defendants, we must presume that the Court considered it and gave it weight. And giving it its proper weight as relevant to the issue, the Court necessarily found the eleventh and twelfth issues against the defendants, that they did not have and never did have any title to or right of possession in the land, etc. Any other finding would have been manifestly contrary to this evidence. It is true the Court might have disregarded this evidence entirely, and there might have been other testimony about which we know nothing, amply sufficient to sustain the finding. But here is testimony erroneously admitted, which, if considered at all, was sufficient of itself to sustain the finding on that point, and we are bound to presume that it was considered, for its effect as evidence was necessarily passed upon in the ruling upon its admissibility.

We held that the foreclosure proceedings did not affect the title of Peralta, who was not a party to the suit, and in the law thus laid down the counsel for respondents "cheerfully acquiesce." This point being admitted, it is clear to our minds, from the considerations just presented, that the record of those proceedings was irrelevant and inadmissible. If this judgment can be supported with such an error in the admission of testimony in the record, it would, in our judgment, be difficult to find a case where a judgment should be reversed for error in admitting irrelevant and improper testimony. The adoption of the rule insisted on by respondent in this case would certainly relieve counsel from a great deal of labor in taking objections and exceptions in the trial of cases, and the Court from further labor and perplexity in reviewing

them. There may have been, it is true, sufficient testimony to sustain the finding without the objectional evidence. We do not know what other evidence was introduced. But there was error; "and the rule is that every error is *prima facie* an injury to the party against whom it is made; and it rests with the other party clearly to show, not that probably no hurt was done, but that none could have been, or was done by the error." (*Jackson v. Feather River Water Company*, 14 Cal. 25.) There is nothing before us which shows that no injury was, or that none could have been done.

Counsel are mistaken in supposing that "unless that issue (the issue as to title) was affirmatively found in favor of the appellants the judgment was not erroneous," because a negative finding on that point, or a failure to find affirmatively, may have been based upon testimony erroneously admitted, and in such case the judgment would be erroneous for the reason that the finding which supports it rests upon improper evidence.

The respondents now insist that the Court cannot consider on this appeal the error relied on, for the reason that the appellant assigned the same error in a motion for a new trial which was decided against him, and not having appealed from the order denying a new trial, he is concluded by that ruling. We think there is no force in this objection. An error of law in admitting or rejecting testimony is subject to be reviewed on appeal from the judgment when the ruling is made a part of the record by a bill of exceptions, or by a statement on appeal. It is true the same error may also be reviewed on appeal from an order denying a new trial. But the two modes are independent of each other. The appeal from the judgment does not depend upon the motion for new trial. The latter proceeding is subsequent to the judgment. An appeal from the judgment may be taken without waiting for the determination of a motion for new trial, or the two appeals may be, and usually are, prosecuted together. As to those errors which may be reviewed on either appeal, the remedy is

concurrent, and the party may pursue either appeal and abandon the other. The late Supreme Court recognized this doctrine in several instances. (*Hastings v. Halleck*, 13 Cal. 207; *Towdy v. Ellis*, 22 Cal. 659.) The cases cited go beyond the requirements of the case now under consideration, for in this case the parties stipulated that the statement in the record "may be also used as the statement on appeal from the judgment," and the statement distinctly presents the error and sufficient testimony to give it point.

The counsel are right in assuming that none of the evidence is before this Court, except so far as is necessary to point the exception taken by defendant to the ruling of the Court in admitting testimony. And we did not in the former opinion, nor have we in this, considered the testimony, except so far as the tendency of the evidence to prove the issues served to illustrate the bearing of the supposed erroneous ruling upon the finding and judgment. Nor did we, as seems to be supposed, refer in our opinion to the opinion of the District Judge on the motion for new trial to aid our decision. It was referred to simply to show that conceding it to be before us, we had not overlooked that portion of the record, and that our reasoning was not obviated by anything appearing in that opinion.

The last point made, is, that Peralto took nothing from Thurn because his deed was only a technical quitclaim deed; and as Peralto had no estate before upon which the quitclaim deed could operate, nothing passed by it. An ordinary quitclaim deed, in this State, is sufficient to pass any estate the grantor has at the time of the execution of the deed. An action to recover the land can be maintained upon it, provided the grantor could have maintained the action. (*Sullivan v. Davis*, 4 Cal. 291; *Downer v. Smith*, 24 Cal. 114; see also *Northrop v. Wright*, 7 Hill, 489.)

An elaborate argument and petition for rehearing has also been filed on behalf of Edson Adams. We have searched the record in vain to find any party to the suit by that name. Adams was a witness, but he has no standing in Court which

Willson v. McEvoy et al.

entitles him to be heard. We have, however, examined the argument, to see if it contained any suggestions worthy of consideration. We find no point, which could be considered on appeal from the judgment, not presented in respondent's petition and argument. The other questions discussed in Adams' petition relate to the evidence and facts of the case, which could only be considered on appeal from the order denying a new trial, and the appeal from that order is not before us.

After a careful consideration of the petition for rehearing, we are unable to perceive that any fact was misapprehended by us in our former opinion, or any principle of law misapplied.

The further examination of the case by the light of the argument in the petition for rehearing confirms us in the opinion that our former decision is correct.

Rehearing denied, and ordered that respondent have five days after filing this opinion to file stipulation mentioned in former order.

ALLEN T. WILLSON v. WILLIAM McEVOY AND JOHN F. CONLIN.

POWER OF COURT TO SET ASIDE AN ORDER.—The Court has no power to set aside an order denying a new trial, after the adjournment of the term at which it was made.

LIABILITY ON INJUNCTION BOND.—In an action on an injunction bond, the fees of an attorney employed to resist the injunction cannot be recovered as damages unless they have been paid. The fact that the plaintiff is subject to a liability to his attorney, without showing actual payment to him, is insufficient.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The Court below found as facts that on the 31st day of January, 1857, an order was made in the case of *Knowles et al. v. Inches and Calderwood*, that a preliminary injunction issue upon plaintiffs' filing an undertaking in the sum of one thousand dollars. That the undertaking was filed on the fifth

Willson v. McEvoy et al.

day of February following, and the writ of injunction issued, which was served on defendant Inches on the 11th day of February following. That on the first day of August, 1857, the bill was dismissed and the injunction dissolved. That an answer was put in and the cause tried by an attorney and counsellor at law, acting on behalf of defendant Inches, and that for his services seven hundred dollars would be a fair compensation.

The other facts are stated in the opinion of the Court.

Allen T. Willson, in person, for Appellant.

W. W. Stow, for Respondent McEvoy.

Stanley & Hayes, for Respondent Conlin.

By the Court, RHODES, J.

This suit was brought on an injunction bond, executed by the present defendants, to Inches and Calderwood, the defendants in the case of *Knowles v. Inches and Calderwood*, 12 Cal. 212. It is described in the complaint as a "certain undertaking, whereby they undertook and promised that they would pay all damages, not exceeding the sum of one thousand dollars, that the said Inches and Calderwood should sustain by reason of said injunction, if the Court should finally decide that the said plaintiffs in that suit were not entitled thereto." Inches assigned the bond to the present plaintiff. The Court found for the defendants, and judgment for costs was entered upon the finding on the 27th of March, 1860. The plaintiff moved for a new trial and filed his statement, and on the 18th day of August, 1860, the motion was "regularly called up for argument in its order upon the calendar, on motion of defendant's counsel, no person appearing to object thereto," as appears from the minutes of the Court, and was then denied. The Court then adjourned for the term.

The plaintiff, on the 10th day of September, 1860, served the defendants with notice of a motion to set aside the order

Willson v. McEvoy et al.

denying the motion for a new trial, and on the 22d day of September the Court set aside the order denying the motion and the defendants excepted to the decision of the Court; and thereupon the Court again denied the plaintiff's motion for a new trial. The plaintiff filed and served his notice of appeal from the judgment and from the order of the 22d of September, denying his motion for a new trial.

The defendants now insist, that the order made on the 22d day of September, setting aside the order made at the previous term on the 18th day of August, was void. The point is well taken. We so held in *Castro v. Richardson*, 25 Cal. 49, in affirmance of the repeated decisions of the late Supreme Court, and we are satisfied that our opinion in that case is correct on principle and authority. This disposes of the appeal from the order denying the motion for a new trial, and the statement falls with the motion.

The plaintiff contends that he is entitled to judgment on the findings. The only breach of the bond assigned by the plaintiff is that "the said Inches sustained damages to the amount of one thousand dollars, by reason of said injunction, by being compelled to retain and employ attorneys and counsellors at law, and to pay them large compensation, to wit: to the amount of one thousand dollars to prevent said injunction from being made perpetual and to procure its dissolution."

The Court found for the plaintiff all the facts set forth in his complaint, except that in relation to the payment by Inches of compensation to his attorneys and counsellors. Upon that issue the Court found "that there was no evidence of any money having been paid by said Inches, or his having given any valuable or other consideration to any person for or on account of the services rendered in said action."

The plaintiff contends that the bond is an agreement to indemnify against a liability as well as against an actual loss; and the defendants insist that it is an indemnity against the damages sustained—the actual loss alone; and that, as Inches did not pay attorney's fees, he has not sustained any damage by reason of said injunction.

Willson v. McEvoy et al.

The rule at common law was, that on a bond to indemnify against the damage the obligee might sustain, he could recover only upon evidence that he had sustained actual damage; that compensation would be awarded only for actual loss. Evidence showing that he was subject to a liability, without showing payment, was not enough. (*Churchill v. Hunt*, 3 Denio, 321; *Jackson v. Port*, 17 Johns. 482; Sedgwick on Measure of Damages, 307.) Sedgwick, in the able work last cited, says, on page 307: "Any rule by which actual damages are given, where no actual loss is sustained, is in truth nothing but an effort to engraft on the Courts of common law a species of specific performance, irregular and illegitimate, and which neither their forms of procedure nor the general arrangement of their system, enable them to exercise without great danger of injustice and abuse. The rule should be considered cardinal and absolute, that *actual* compensation should be given for *actual* loss."

The authorities generally, though not uniformly, sustain this rule. In *Wilde v. Joels*, 15 How. Pr. 320, Mr. Justice Hoffman held, in an action upon an injunction bond, similar in its conditions to the one in this case, that "if a client can be made responsible, and a claim is reasonable, a bond of indemnity would appear to cover such a liability as much as an actual advance." This doctrine is deduced by the learned Judge from the presumed analogy between the grounds of recovery in actions on injunction bonds, and actions for injuries to the person. But the supposed analogy does not exist. In an action upon an injunction bond the liability depends upon the express agreement of the parties—they stipulating that the obligors shall be responsible for the damages sustained; but in actions for injuries to the person, in many decisions, it is held that the defendant is answerable, not only for the damage actually sustained by the plaintiff, but also for certain liabilities the plaintiff has incurred by reason of the wrongful acts of the defendant—such as medical attendance and nursing, in a case of assault and battery, or extra costs incurred in procuring a release from an arrest made without reasonable

Wilson v. McEvoy et al.

cause; and the Courts hold that the plaintiff may recover a reasonable compensation for those liabilities, without proof of payment. The law casts the burden of these liabilities upon him as a consequence of his tortious acts; but in an injunction bond the responsibility of the obligor is ascertained and measured by the terms of his agreement, and he will be charged with a liability incurred by the obligee, if it is so stipulated in the bond.

The only authority cited by Mr. Justice Hoffman where the action was on an injunction bond, is the case of *Garret v. Hogan*, 19 Ala. 344. The condition in the bond in that case was to "pay all damages and costs occasioned to said defendants by the *vexatious* suing out of said writ." The plaintiff assigned breaches of the bond, but did not allege that the injunction was vexatiously sued out, and on demurrer the Court held the declaration bad, for that omission.

That virtually disposed of the appeal, but as the defendants made the point, that attorneys' fees could not be recovered by the obligees, unless they had been paid by them, the Court proceeded to consider the question, and regarded the action substantially as for a *tort*, and after speaking of the evidence that might be necessary to show that the injunction suit was instituted for the purpose of oppression and wrong — for a *vexations and malicious purpose* — cites with approbation *Marshall v. Betner*, 17 Ala. 332, in which it is said "in cases where *malice* is the gist of the action, and *vindictive* damages recoverable, fees paid to counsel in defending against the wrongful act of the defendant, if reasonable and necessary, may be proved and considered by the jury in the assessment of damages," and then proceeds to hold, on the authority of that case, that the demand for the attorneys' fees, in the injunction suit can be maintained without proof of payment.

Considering *Garret v. Logan* as an action sounding in tort, as the Court evidently did, the decision may be sustained, but in the case before us, the action is founded simply and only upon contract.

The ruling of the learned Judge who tried this action is fully

Willson v. McEvoy et al.

sustained by the current of the authorities. (Sedgwick on Dam. 307.) In *Aberdeen v. Blackmar*, 6 Hill, 324, which was an action upon an agreement to indemnify and save harmless the plaintiffs from any claim or demand, etc., Mr. Justice Bronson, in delivering the opinion of the Court, held that the declaration, which alleged the recovery of a judgment against the plaintiff on a demand covered by the agreement, was fatally defective, because it did not allege the payment of the judgment.

We think *Gilbert v. Wiman*, 1 N. Y. 550, also a case precisely in point. The suit was brought by the Sheriff on the bond given to him by his deputy, conditioned among other things that "the said Sheriff shall not sustain any damage or molestation whatsoever by reason of any act from this date done, or any liability incurred by and through said deputy." It was alleged in the declaration that judgments had been recovered against him on account of the neglect of the deputy, but it was not alleged that the Sheriff *had paid* any part of the judgments, and it was held that no recovery could be had on the bond in respect to the judgments, unless they had been paid. (See *Edwards v. Bodine*, 11 Paige, 224.) A liability is not a damage, according to the signification of that term, as employed in contracts, and Courts have no authority to insert the term "liability" in a contract, and then proceed to enforce the contract as they — but not the parties — have made it.

The only remaining point necessary to be noticed is, that the Court, upon the findings, should have rendered judgment for him for at least nominal damages.

The only benefit that would have accrued to him by having the judgment entered for him for that sum was, that he would have been relieved of the payment of costs, taxed in the judgment at four dollars and a half. We think we are justified, in this respect, in invoking the maxim *de minimis non curat lex*. (*McConihe v. New York and Erie Railroad*, 20 N. Y. 495; *Jenning v. Loring*, 5 Ind. 250.)

Judgment affirmed.

Muller v. Boggs et al.

HERMAN MULLER v. ANGUS L. BOGGS AND, CHARLES CLARK.

FINDINGS OF FACT BY A REFEREE.—Where a cause is tried by a referee, and the testimony is conflicting, the Supreme Court will not disturb his findings of fact.

CONSTRUCTION OF A DEED.—Where a deed conveys a tract of land by name and description, and then excepts from its operation certain parcels of the tract, and the language of the exception leaves it doubtful whether it was the intention of the grantor to except a particular parcel, the deed must be construed most favorable to the grantees, and the doubt resolved in his favor.

DEPUTY — POWER OF.—Where the statute confers on an officer power to appoint a deputy, but does not prescribe the duties of the deputy, the deputy has full power to do any and all acts which his principal may perform by virtue of his office.

COUNTY RECORDER — DEPUTY OF.—A Deputy County Recorder, appointed under the provisions of the Act concerning County Recorders, of the 26th of March, 1851, had power in the name of his principal to take and certify acknowledgments of deeds.

SAME.—The ninth section of said Act, enabling the deputy to perform the duties of Recorder in case of a vacancy in the office, or the absence or inability of the Recorder to perform his duties, is an enlargement of and not an abridgment of the powers of the deputy.

COUNTY RECORDERS.—The powers conferred upon County Recorders by the Act of March 26th, 1851, to take and certify acknowledgments of deeds, is an incident of the office, and not personal to the incumbent.

DEED.—The words "grant, bargain, sell, and convey," in a deed operate not merely to release but to transfer any interest which the grantor had in the land at the date of the deed.

TENANTS IN COMMON — RENTS AND PROFITS.—Where one tenant in common obtains judgment against a stranger for the possession of the entire premises, he cannot recover all the rents and profits, but only a proportion thereof corresponding to his interest in the land.

SAME.—If, in such case, judgment is rendered for all the rents and profits, the Supreme Court will not reverse the judgment, provided the plaintiff offer to remit the excess: but, thus modified, it will be allowed to stand.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The following is the certificate of acknowledgment of the deed from Vallejo to Wohler, dated December 20th, 1851:

"STATE OF CALIFORNIA, }
County of Napa. }

"On this, the twentieth day of December, A. D. one thousand eight hundred and fifty-one, personally appeared before

Muller v. Boggs et al.

me, the undersigned, Recorder in and for the county aforesaid, Salvador Vallejo, known to me to be the person described in and who executed the foregoing instrument, who acknowledged to me that he executed the same freely and voluntarily, for the uses and purposes therein mentioned.

"In witness whereof, I have herewith set my hand and seal of office, this the day and year in this certificate above written.

[L. s.]

"R. H. LAWRENCE, Recorder.

"By L. N. EDMONSTON, Dep. Rec."

Salvador Vallejo, in January or February, 1850, caused a portion of the Rancho de Napa, containing about one thousand nine hundred acres, to be surveyed into lots and streets, and numbered the lots up to fifty. This plat was called the "Pueblo de Salvador," and was recorded.

This action was brought to recover the possession of lots numbered 25, 26, 31, 32, and fractional lots numbered 27 and 30, situated in said Town or Pueblo de Salvador, in the County of Napa.

The other facts are stated in the opinion of the Court.

Hoge & Wilson, for Appellants.

The deed of the 20th of December, 1851, did not, and was not intended by the parties, to include any of the lots of the Pueblo or Town of Salvador, and particularly any of the lots in controversy in this suit.

The case of *Doe ex dem. Hampton v. Cowles*, reported in 4th Dev. & Batt. N. C. Rep. p. 16, is remarkably similar in its details to the case before the Court. In that case the plaintiffs claimed title to the lots in question under the will of Hampton, devising to them his *home plantation*; previously, the Town of Hamptonville had been laid out, by the consent of Hampton, on a portion of his home plantation, and the lots sold. The heirs claimed two of these lots as part of the home plantation, and as passing under the clause of the will devising to them that plantation. The Court "were very clearly of opinion that the land so laid off for a town was thereby

severed from the whole tract, or 'home plantation,' so as not to pass under that description in the devise."

In the case of *Aldrich et al. v. Gaskill*, 10 Cushing, 155, the devise was of "the farm on which I now live, consisting of about one hundred and fifty acres, and all the buildings thereon," and the question was whether this description included a portion which had been separated from the main portion of the farm by two small lots which had been sold for house lots; it, however, having been used and let with the other portions of the farm. On page 158, Mr. Chief Justice Shaw says: "Having been once a part of the farm, we think that there is no decisive act showing the intention either of the father or son to sever it from the farm. The word 'farm' is of large import," etc., * * * "but, as to the term, it is said to be a collective word, consisting of divers things gathered into one, as a messuage, land, meadow, pasture, wood, common," etc. * * * "In this country it is a parcel of land, used, occupied, managed, and controlled by one proprietor * * *. The letting of small portions of it for the season or for short terms did not sever it, nor did the intention to sell it for house lots, *not executed*."

In our case, unlike the Massachusetts case, the intention was actually executed in the most solemn form, and placed upon the records of the county. It would be easy to imagine what would have been the opinion of the learned Chief Justice, who delivered the judgment of the Court in that case, upon similar facts to those existing in the case at bar.

In further support of our position, we also refer to the following cases, the limits of a brief not permitting us to specially quote from the facts and opinions of each case: *Bell v. Sawyer*, 32 N. H. 72; *Brendlinger v. Brendlinger*, 26 Penn. 132; *Allen v. Allen*, 2 Jones' Equity, N. C. 235; *Venable v. McDonald*, 4 Dana, 337, 338; *Stone v. Clark*, 1 Metcalf, 378; *Gerrish v. Towne*, 3 Gray, 82; *Sargent v. Adams*, Ib. 72.

But the important question is now presented: Was the Wohler deed properly acknowledged, so as to entitle it to go upon record, and thus become legal notice to any one?

We confidently contend that it was not. A Deputy Recorder, under the law, had no power to take an acknowledgment of a deed. The law casts that duty and power upon the Recorder as one *personal* to himself, and having no connection with his official duties as Recorder. There is no analogy between the case of a Deputy Recorder and a Deputy Clerk or Sheriff. The statutes regulating their duties are essentially different. The provisions of the statutes in relation to Clerks, Sheriffs, County Surveyors, and Recorders, will be found in Compiled Laws, page 193, sections 3 and 5; page 713, sections 13, 14, 15, and 16; page 839, sections 8, 9, and 26; pages 367, 368, and 130.

A Deputy Clerk, by express provision of law, has the same power, *in all respects*, as his principal. The Act of 1850, establishing Recorder's offices and defining the duties of the Recorder, gave him no power to take an acknowledgment of a deed. It was not until the Act of 26th March, 1851, that any such power was given to the County Recorder. The twenty-sixth section of that Act first authorized and empowered the *County Recorder* to take an acknowledgment of a deed. In both Acts, the whole official duties of the Recorder as such are prescribed and regulated. The sections in relation to deputies and their duties are the same in both Acts. Section seven of the Act of 1850, and section nine of that of 1851, provide that: "In case of a *vacancy* in the office of Recorder, or his *absence or inability* to perform the *duties of his office*, the deputy shall perform the *duties of Recorder* during the continuance of such vacancy, absence, or inability." It will be perceived that the deputy, under the provisions cited, has no power even to perform the *ordinary duties* of the Recorder as such, except in the contingencies named. (*McRae v. McGuire*, 9 S. & M. 49, 50.)

J. McM. Shafter, for Respondents.

The question as to the acknowledgment of the deed from Vallejo to Wohler must be decided for us.

Muller v. Boggs et al.

We think there can be no doubt but that a County Recorder could take an acknowledgment by deputy.

It cannot be denied that the act of taking an acknowledgment is a mere ministerial one. (*Bours v. Zachariah*, 11 Cal. 281; *Elliott v. Piersoll*, 1 Peters, 339.)

It is equally true that every ministerial officer can make a deputy, and when so made he has all the power of his principal, and must act in his name. (5 Comyn's Digest, Officer, D. 1, 3; Rolles' Abridgment, 591; 1 Salkeld, 96; Allen on Sheriffs, 76, 8; 1 Bouvier's Law Dic. 7, 447; *Lynch v. Livingston*, 8 Bar. S. C. 463; 6 N. Y. 433; *Hope v. Sawyer*, 14 Ill. 254, 7; *Moon v. Farrow*, 3 A. K. Marsh. 41; *Beaumont v. Yeatman*, 8 Humph. 542; 20 Mo. 5 Bennett, 468; 5 Cal. 449; 2 J. 70; *Toucharl v. Crow*, 20 Cal. 150.)

These cases establish: First—That taking an acknowledgment is a ministerial act. Second—That it ought to be certified by a deputy, in the name of his principal. Third—That any act which is to be performed *in the office* or by the *officer* may be done, and thus certified by the deputy. Fourth—That it makes no difference that the statute in part defines the duties of either the principal or the deputy.

By the Court, SANDERSON, C. J.

This is an action for the possession of certain lots in the Pueblo de Salvador, the same being a part of four leagues of land granted by the Mexican nation to Salvador Vallejo in 1838, called the Rancho de Napa. Both parties claim to have derived title from Vallejo.

The plaintiff claims by deed from Vallejo to Wohler, dated on the 20th day of December, 1851; and by deed from Wohler to Frank, dated on the 20th day of March, 1852; and by deed from Frank to himself, dated on the 21st day of July, 1857; and by deed from Wohler to himself, (for further assurance,) dated on the 5th day of January, 1858.

The defendant claims by deed from Vallejo to Woodman, dated February 12, 1852; and by deed from Woodman to

Ritchie, dated August 11, 1854; and by deed from Ritchie's executors to himself, dated on the 15th of March, 1858.

The lots in controversy were conveyed by Vallejo and wife to one Guttery, by deed dated on the 22d day of July, 1851, and reconveyed by Guttery to Vallejo and wife by deed dated on the 20th of August, 1851.

On the 19th day of November, 1858, the plaintiff conveyed an undivided fourth of the land in question to O. L. Shafter and others.

The case was tried by a referee, who found the issues in favor of the plaintiff, and assessed the rents and profits at the sum of two thousand eight hundred dollars, and reported a judgment in favor of the plaintiffs for the possession of the land and the full amount of the rents and profits as assessed by him. The defendant moved for a new trial, which was denied, and he appeals from the judgment and the order refusing a new trial.

The principal questions involved in the case arise upon the deed from Vallejo to Wohler of the 20th of December, 1851.

First—It is claimed by the defendant that the lots in question did not constitute a part of the Rancho de Napa at the date of the deed, and therefore Vallejo's title thereto did not pass under the description contained in the deed.

Second—It is further claimed that if the lots did form a part of the Rancho de Napa at the date of the deed, they belonged to that portion of the rancho which is expressly excepted from the operation of the deed by its own terms.

Third—It is further claimed that the deed was not acknowledged before a person authorized by law to take the acknowledgment of deeds, and that therefore the record of the deed did not impart constructive notice to subsequent purchasers in good faith.

1. The description contained in the deed is in the following words: "All his right, title and interest in and to all the land belonging to the Rancho de Napa, or all the land appertaining to the rancho of that name, granted to the said party of the first part by the Mexican Government, which has not been

before the date of this instrument sold and conveyed by the said party of the first part by deeds which have been heretofore duly recorded in the office of the Recorder of the County of Napa."

It is not controverted but that the land in question is a part of the grant from the Mexican nation to Vallejo, under the name of the Rancho de Napa, but it is claimed that prior to the date of the Wohler deed the land in question, together with other land, had been segregated from the rancho and dedicated to town purposes, under the name of the Pueblo de Salvador, by the act and direction of Vallejo, and that it was subsequently treated by him as something distinct from the Rancho de Napa, and was so regarded in the neighborhood, and that hence it did not in fact constitute a part of the Rancho de Napa at the date of the deed to Wohler.

We are inclined to think that the qualifying words "granted by the Mexican Government," make the description broad enough to cover the entire grant from the Mexican nation to Vallejo; but it is not necessary to decide that question. The question as to whether the land in controversy constituted a part of the rancho or not, at the date of the deed, was fairly submitted to the referee upon the extrinsic testimony offered by the parties respectively. The referee found that it did. The testimony was conflicting, and, under the previous uniform rulings of this Court, we cannot disturb that finding; but, independent of this consideration, we are satisfied that the finding of the referee in this particular was right. Without particularizing the evidence, it is sufficient to say that in our judgment the finding is supported by a preponderance of testimony largely in favor of the plaintiff.

2. A portion of the Rancho de Napa is expressly excepted from the operation of the deed, and it is next contended that by a fair construction of the language in which the exception is expressed, the lots in question are embraced in the excepted portion. The lands excepted from the operation of the deed are such as had been previously sold and conveyed by deeds duly recorded in the Office of the Recorder of Napa County;

and it is argued that the lots in question, having been previously sold and conveyed, by deed duly recorded, to Guttery, notwithstanding they were subsequently, and prior to the execution of the deed to Wohlor, reconveyed by Guttery to Vallejo and wife, come within the letter of the exception. This position cannot be maintained without furnishing an apt illustration of the legal maxim, *Quæ hæret in litera hæret in cortice*. It was manifestly the intention of Vallejo to convey all the land the title to which was still in him. But, admitting that the letter and not the spirit of the language must govern, it may be safely affirmed, from the evidence upon this point, that the lots in question, although conveyed, were never sold by Vallejo to Guttery. What was the object of the conveyance does not appear. It is characterized by one of the witnesses as "a piece of fooling with the title." No consideration was given by Guttery, as appears recited in the deed by which he reconveyed to Vallejo; and the conveyance and reconveyance were both made in less than a month—the former being dated on the 22d of July, and the latter on the 20th day of August following. In order to bring the lots in question within the letter of the exception it must appear that they were *sold*, as well as *conveyed*, and it can hardly be claimed, in view of the foregoing facts, that such was the case. The most that can be said in favor of the defendant's theory is, that the language of the exception leaves it doubtful whether it was the intention of Vallejo to except the lots in question. Where such is the case the deed must be construed most favorable to the grantee. (*Jackson v. Hudson*, 3 John. 375; *Jackson v. Gardner*, 8 John. 394.)

We attach no significance to the fact that the wife of Vallejo was joined with him as grantee in the deed from Guttery to them. They both appear as grantors in the deed to Guttery, which furnishes a probable reason why they both appear as grantees in the deed from him to them. The effect of the latter deed was to restore the land to its former condition in regard to the title, and subjected it once more to the absolute dominion of Vallejo. Admitting that by these steps the wife

of Vallejo became vested with some interest in the land which she did not before possess, the same was a community interest, subject to the *jus disponendi* of the husband.

3. The acknowledgment was taken before the Deputy Recorder of Napa County, and certified in the name and as the act of his principal; and it is next claimed by defendant that the deputy had no authority to take the acknowledgment.

By the twenty-sixth section of the Act concerning County Recorders, of the 26th of March, 1851, (Compiled Laws, page 388,) County Recorders are empowered to take within their respective counties the acknowledgment and proof of all instruments and papers which may be by law recorded. By the eighth section of the same Act the Recorder of each county is authorized and empowered to appoint a deputy, who shall hold his office during the pleasure of the Recorder. Nothing is said in the Act concerning the duties of the deputy, except what is found in the ninth section, which provides that "in case of a vacancy in the office of Recorder, or his absence, or inability to perform the duties of his office, the deputy shall perform the duties of Recorder during the continuance of such vacancy, absence or inability;" and it is argued that the deputy has no power except what is conferred by the foregoing language, and that a vacancy in the office, or the absence or the inability of the Recorder, are conditions precedent to the exercise of any power or the performance of any act on the part of the deputy. We do not so read the statute. In our judgment the Legislature do not intend to define what shall be the duties of the deputy, except in the contingencies named in the ninth section, leaving the measure of his power under other circumstances to the common law. The ninth section should be read as an enlargement of his powers, and not as a restriction upon them. To guard against the inconvenience which might result to the public in case of a vacancy in the office of Recorder, or his absence or inability, was the design of the ninth section, and to that end it makes the deputy, in the contingencies named, Recorder *de facto*. Under the construction contended for, the Recorder would be unable to avail

himself of the services of a deputy, except as provided in the ninth section, which might not unfrequently result in great detriment to the interests of the public, from mere inability on his part to perform the amount of labor necessitated by the business of the office. If a vacancy in the office, or the absence or inability of the Recorder, are conditions precedent to the exercise of power by the deputy, such conditions would have to be recited in every official act of the deputy in order to impart to it any validity. In the absence of language to that effect, so clear and explicit as not to admit of doubt, we cannot intend that the Legislature designed consequences so unusual and absurd.

The power to appoint a deputy is expressly conferred upon the Recorder, and the duties of the deputy not being prescribed, as we hold, except in the contingencies named in the ninth section, it follows that his official power is to be ascertained by a resort to the common law. At common law there can be no question but that the deputy, where the power to appoint one exists, has full power to do any and all acts which his principal may perform by virtue of his office.

In *Parker v. Kett*, 1 Salkeld, 95, this question came before the Court of King's Bench, in England, and Chief Justice Holt, who delivered the opinion of the Court, said: "Clerk, who was Mr. Keck's deputy, (and so it is of any other deputy, where a deputy may be appointed,) had full power to do any act or thing which his principal might have done. That is so essentially incident to a deputy, that a man cannot be a deputy to do any single act or thing, nor can a deputy have less power than his principal; and if his principal makes him covenant that he will not do any particular thing which the principal may do, the covenant is void and repugnant; as if the Under Sheriff covenant that he will not execute any process for more than twenty pounds without special warrant from the High Sheriff; this is void, because the Under Sheriff is his deputy, and the power of the deputy cannot be restrained to be less than that of his principal, save only that he cannot make a deputy, because it implies an assignment of his whole power,

which he cannot assign over." (See also Comyn's Digest, Officer, D; Rolle's Abridgment, 501; Allen on Sheriffs, 76.)

If the taking of acknowledgments be an official act pertaining to the office of Recorder, there can be no doubt but that it may be lawfully performed by a deputy; and this brings us to the principal question involved in the point under consideration. It is claimed by the learned counsel for the appellant that the power in question is personal to the *incumbent* of the office of Recorder, and therefore forms no part of his official duty as Recorder. A short and conclusive answer to this theory is found in the Act of the 26th of March, 1851, before cited. The first section of that Act creates the office of Recorder, and the subsequent sections clearly define and prescribe the duties and powers of the incumbent of that office, and among them we find the power to take the acknowledgment of all instruments and papers which may be by law recorded. Were this power omitted from the Act creating the office and conferred by some other entirely separate and independent Act, there would be more plausibility in the theory advanced by the appellant; but when we find it incorporated in the Act creating the office and prescribing the duties and powers of the officer without any mark showing that it is *sui generis*, and standing upon a foundation distinct from that upon which the other enumerated powers are based, the force of the argument is wholly destroyed, and the conclusion is inevitable that the Legislature intended to make the power an incident of the office and not personal to the incumbent. The power in question comes from the same source at the same time and through the same channel as the other powers, the existence of which constitutes the office. Like the other powers it goes and comes with the office. The officer takes it the same as the other powers are taken, and loses it in like manner upon the expiration of his term of office.

The Act defining the duties of the County Clerk (Compiled Laws, p. 192) provides that he may appoint deputies, who shall have the same power in all respects as their principal:

Under this statute it was held in *Touchard v. Crow*, 20 Cal. 150, that the deputy had the power to take acknowledgments. In that case the power of the deputy was derived from and founded upon the statute; but the statute, as we have shown, is merely declaratory of the common law. The deputy derives no power from the statute which he would not have possessed by virtue of the common law, had the statute remained silent upon the subject (1 Salkeld, 95). Thus the Deputy Recorder is placed upon the same footing as the Deputy Clerk, and if the latter has the power the same is true of the former.

Whether the certificate of acknowledgment states that the grantor appeared before the principal or the deputy, or whether it be signed by the deputy in his own name only, seems to be immaterial. In *Touchard v. Crow*, the certificate was to the effect that the grantor appeared before the principal and was signed by the deputy without the name of his principal, and the acknowledgment was held to have been properly taken and certified. In *Abrams v. Errin*, 9 Iowa, 87, the certificate was the same as in the present case, and was signed in the same manner, and was held to be good. The Court said: "From the certificate in this case it may fairly be presumed that the deed was acknowledged before the Clerk and his name signed by the deputy." Thus it seems that either form is sufficient, and it is immaterial whether the certificate purport to be the act of the principal or the deputy. If it appear that the person taking the acknowledgment had the power to do so, it is sufficient. The law looks to the substance and not the form, and it is the policy of the law to uphold these certificates if possible. (*Touchard v. Crow*.)

We think that the acknowledgment of the deed from Vallejo to Wohler was taken before a person authorized by law to take the same, and that the certificate is in due form.

4. Several points are made by the learned counsel for appellant, founded upon the hypothesis that the several deeds under which the plaintiff claims are mere quitclaim deeds. It is not necessary to notice these points in detail, for the reason that the hypothesis upon which they are founded is erro-

neous. The deeds in question are not mere quitclaims. The granting or operative words in a simple quitclaim deed are "remit, release and quitclaim." The words of grant in the deed from Vallejo to Wohler, and from Wohler to Frank, and from Frank to Muller, the plaintiff, are, "grant, bargain, sell, and convey," and they operate not merely to release but to transfer any interest which the grantor had in the land at the date of the deed. In *Touchard v. Crow* the words of grant were "bargain, sell and quitclaim," and it was held that the deed was something more than a mere quitclaim, and was sufficient to pass and transfer any interest which the grantor had.

5. It is lastly claimed that the plaintiff, being a tenant in common with others, as appears from the testimony, and owning only a three fourths interest in the land, was entitled to recover only three fourths of the rents and profits, and that therefore the judgment, being for the full amount, is erroneous, and must be reversed. In this particular the judgment is erroneous, (*Clark v. Huber*, 20 Cal. 196,) but the respondent offers to remit one fourth of the judgment for rents and profits. This he has a right to do, (*Doll v. Feller*, 16 Cal. 432; *De Costa v. The Massachusetts Flat Water and Mining Company*, 17 Cal. 613,) and the judgment will therefore be modified in accordance with that offer, and thus modified it will be allowed to stand, but the respondent must pay the costs of the appeal.

Ordered accordingly.

Mr. Justice SHAFER, having been of counsel, did not sit on the trial of this case.

Mr. Justice CURREY, having been counsel in another case involving the title to the same land, has taken no part in the decision of this case.

Priest v. Bounds.

D. Q. PRIEST v. T. W. BOUNDS.

EVIDENCE OF INDORSEMENT OF NOTE.—An indorser of a promissory note is a competent witness for either plaintiff or defendant in an action by the indorsee against the maker, and his competency is wholly unaffected by sections four and three hundred and ninety-three of the Practice Act.

PROMISSORY NOTE.—A promissory note is neither an account, an unliquidated demand, nor a thing in action not arising out of contract.

APPEAL from the District Court, Eleventh Judicial District, Placer County.

This action was first brought in Justice's Court, on a promissory note for two hundred dollars, dated September 15th, 1857, due one day from date, and bearing interest at two and a half per cent per month, and executed by defendant Bounds to John Buckhart.

Buckhart, on the 16th of August, 1858, indorsed the note to Priest, who, on the 6th of January, 1859, indorsed it to Stewart, who, on the 19th of September, 1859, indorsed it to McGowan, who, on the 17th of July, 1861, indorsed it to Buckhart, by whom, on the same day, it was indorsed to plaintiff.

Plaintiff recovered judgment in the County Court and defendant appealed.

J. E. Hale, for Appellant.

Jo Hamilton, for Respondent.

By the Court, SANDERSON, C. J.

This is an action against the maker of a promissory note, of which the plaintiff was indorsee. The defense was part payment and tender as to the balance. On the trial the plaintiff offered as witnesses to rebut the case made by defendants, two persons who had been holders and indorsers of the note, having first executed and delivered to each of them a good and sufficient release. The Court, upon the objection of the defendant, excluded these witnesses, to which ruling the plaintiff duly

excepted and now assigns the same as error. The case was tried in 1861.

In support of the ruling of the Court the respondent cites sections four and three hundred and ninety-three of the Practice Act. The fourth section reads as follows: "Sec. 4. Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this Act; but in suits brought by the assignee of an account, unliquidated demand or thing in action not arising out of contract, assigned subsequently to the 1st day of July, 1854, the assignor shall not be a witness on behalf of the plaintiff." This section cannot be extended to nonenumerated causes of action, and has no application whatever to the present case, for the obvious reason that a promissory note is neither an account, nor an unliquidated demand, nor a thing in action not arising out of contract. The competency of an indorser or assignor of a promissory note as a witness on behalf of the plaintiff in an action brought thereon is wholly unaffected by the foregoing section.

The objection to their competency upon the ground of interest is equally untenable. An indorser of a promissory note is a competent witness for either party in an action against the maker. (*Bryant v. Watriss et al.*, 13 Cal. 85; *Smith v. Richmond*, 19 Cal. 476.) Had they been incompetent on the ground of interest, their incompetency was removed by the release executed by the plaintiff; but no release was necessary.

The other errors assigned, if such, may not arise upon another trial, and we deem it unnecessary to pass upon them.

The judgment must be reversed and a new trial ordered.

ORION BROWN v. WILLIAM P. SCOTT.

DENIAL OF ALLEGATIONS OF SWORN COMPLAINT.—If the allegations of a verified complaint are presumptively within the knowledge of the defendant, a denial of the same in the answer, according to his best knowledge, information, and belief, is evasive of the issue tendered.

SAME.—Where a material fact stated in a verified complaint is denied upon

Brown v. Scott.

information and belief, the answer should state how it happened that the defendant is without knowledge as to the fact averred.

ASSIGNMENT OF JUDGMENT.—The assignment of a judgment which is void because the amount for which it was rendered was beyond the jurisdiction of the Court, carries with it the debt on which it was obtained.

PURCHASER OF VOID JUDGMENT.—One who purchases a void judgment, and contracts with the assignor to pay him therefor, and afterwards uses the judgment in payment for property of the defendant, sold under executions issued on this and other judgments, cannot, when sued on his contract for the purchase money, avoid his liability on the ground that the judgment was void and of no value to him.

APPEAL from the District Court, Eleventh Judicial District, El Dorado County.

The three judgments, the assignment of which formed the consideration mentioned in the contract upon which this suit was brought, were rendered on the 30th day of January, 1854.

When this case was called for trial in the Court below, plaintiff moved the Court for judgment in conformity with the prayer of the complaint. The Court sustained the motion and gave judgment accordingly.

Defendant appealed.

The other facts are stated in the opinion of the Court.

Winans & Hyer, for Appellant.

If the answer in this case were what respondent alleges it to be, *irrelevant*, *immaterial*, and a *sham*, the action of the Court below in rendering the judgment was irregular. The proper course in such a case would be to move the Court, on such terms of notice as its rules prescribe, to strike out the answer for these causes and then to ask for judgment for want of an answer.

The Practice Act, section fifty, contemplates this course of action.

Respondent contends that there is a portion of the complaint that is not specifically denied by the answer.

The substance of this portion of the complaint is, that these judgments were used by the defendant in bidding at a sale, and this amount was credited by Sheriff to the defendant.

The answer alleges that the only sale by the Sheriff of which he became a purchaser was made under other and different judgments, and that there were no executions issued to the Sheriff upon the plaintiff's judgments.

This portion of the complaint requires no further denial than such as the defendant has given.

The second point made by respondent is, that the defendant has denied the allegation of the assignment of the judgments by plaintiff to him, "according to information and belief," asserting that the matter must have been within his own knowledge, *or, if not*, he could have found it out from *examining the records*; and if he had examined the records, would not its disclosures have been "*information*" such as that to which the defendant has sworn? Wherever he derived his knowledge, or however, that knowledge is his "*information*;" and if he believes it, it is also his "*belief*;" which is all the statute requires.

Objection is again made by respondent to the sufficiency of denials in the answer, because made upon information and belief.

The remarks heretofore made are as conclusive upon this point as the one which preceded it. But we will dwell a little on the matter. The question is, whether in a verified pleading the Court will hold an answer frivolous, or sham, because the defendant denies certain allegations on information and belief which the Court presumes to be within the personal knowledge of the defendant. In view of the plain provision of the forty-sixth section of the Practice Act, the statement of the question furnishes the answer. The section referred to says, that the special denial of a material allegation, under oath, according to information and belief, is that which "an answer shall contain," and consequently, is a good sufficient pleading.

The respondent proposes, that though the terms of the statute are complied with, there are cases in which such compliance is not sufficient, but that the party answering must assert facts as true within his own knowledge to make his

Brown v. Scott.

answer sufficient. In other words, that pleading is not to be regulated by the statute, but by some one else.

Without this provision of the statute authorizing a party to deny allegations upon information and belief, the insertion of such words would have rendered the pleading redundant, and would have been stricken out upon motion.

Allegations and denials, before the statute, were required to be made positively. But the allegation of a fact positively, in pleading, never of itself indicated that the party was personally cognizant of it.

There was the same reason for informing that he stated it on information, that there was for supposing that it was stated upon personal knowledge. (7 How. P. R. 221.)

The effect of the statute, then, was and is intended to give to denials thus qualified the same degree of positiveness as if the fact was asserted without any limitation or condition.

Before the statute, the fact must have been asserted to exist with absolute certainty; now, its existence or denial may be put in issue where the pleader alleges it upon his information and belief.

S. W. Sanderson, for Respondent.

It is claimed that the Court below erred in giving judgment on the pleadings.

This claim is well founded if the answer contains a fair and direct denial of any of the material allegations of the complaint, and not otherwise, because it is not pretended that the answer contains *new matter* constituting a defense.

The execution and delivery of the contract is expressly admitted in the answer, and the terms of the contract are not disputed.

But the answer proceeds to claim that the contract was without consideration, and null and void, because the judgments assigned by plaintiff to defendant were not legal and valid.

This portion of the answer is sham and frivolous. It only states conclusions of law, whereas it ought to state the fact.

The complaint avers that "said judgments were used by defendant in bidding upon said canals at the Sheriff's sale, and the full amount thereof was credited to him by said Sheriff as so much money, and thereby he received and used the full amount of said judgments to his own benefit in the purchase of said canals, etc."

This allegation is nowhere denied or attempted to be denied in the answer. Whether, therefore, the judgments were void or not, cannot be material, since the defendant received the full amount for which they called; and it does not lay in the mouth of the defendant to say the judgments were void, they having been paid and satisfied by the sale of the property of the persons against whom they stood, and he having received their full value.

The answer next attempts to deny that the judgments were ever assigned to him. This denial is made upon "information and belief." We say first, that the defendant was bound to *know* the fact, and a denial upon information or belief is therefore insufficient.

The denial must be positive, because the fact must have been within his own knowledge, or if it had escaped his memory, the fact could have been readily ascertained by a brief examination of the records, and the answer does not pretend to have any such examination.

The answer next denies, *according to information and belief*, that the canals, etc., were sold under executions issued upon the judgments in question, but that the same were sold under an execution in favor of L. S. Sims. This denial is subject to the same objections as the preceding. It is predicated upon information and belief, whereas it should have been positive, because the records in the clerk's office, if they had been examined, would have shown exactly how the sale was made, and under what process. But the issue attempted to be made is a side issue, and wholly immaterial. The denial is no answer to the main question — "Did you receive the amount of said judgments?"

There were several judgments against Jones, Turman &
VOL. XXV.—12

Brown v. Scott.

Co., and it was wholly immaterial under which the sale was made, because they were all held by the defendant Scott who bid the amount of all and received a full credit for all on his bid.

The answer next denies upon information and belief that there were any executions on the judgments in question in the hands of the officer who made the sale.

This is another side and immaterial issue. It is not responsive to the main question: "Did you bid these judgments, and did you receive the amount of them as a credit upon your bid?"

There was no application to amend the answer in the Court below. Defendants stood upon their answer then, and must do it here.

By the Court, CURREY, J.

This action was brought to recover a sum of money alleged to be due on a contract executed by the defendant, by which he agreed to pay to the plaintiff one thousand four hundred and forty-four dollars and sixty-six cents, with interest thereon from the 1st of January, 1854, until the same should be paid, at the rate of three per cent per month, upon conditions mentioned and referred to in such contract. The complaint counts upon this contract, and avers in positive terms the happening of circumstances by which the debt became due, and that the defendant refused to perform his contract. The consideration for the contract of the defendant, which is alleged in the complaint, was the assignment of three judgments belonging to the plaintiff, which he had obtained in a Justice's Court, amounting in the aggregate to the sum of one thousand four hundred and forty-four dollars and sixty-six cents, and which the defendant used in the purchase of property of the debtors against whom such judgments were obtained at a sale thereof, made under and by virtue of divers judgments and executions. Each of the judgments so assigned by the plaintiff exceeded two hundred dollars.

To the complaint, which was duly verified, the defendant filed an answer, in which he says that after stating to counsel learned in the law all the facts attending the making of the contract, he is informed by counsel, and verily believes, and so charges the truth to be, that the promise in the contract contained to pay the plaintiff the sum of money named therein, or any part of it, was wholly without consideration and null and void, and that therefore he was not liable on his promise; and then in the same connection he alleges that the judgments, the assignment of which to the defendant is mentioned in the contract as the consideration for defendant's promise, were entirely null and void; and further on in the answer the defendant denies, "according to his best knowledge, information and belief," that said judgments, or either of them, were ever transferred or assigned by the plaintiff to the defendant or to any other person for his use.

This mode of denial is argumentative. In the first place the defendant avers, upon information derived from his counsel, and upon his belief founded on that information, that his promise, contained in the contract, was without consideration; and the reason assigned for this is that the three judgments, the transfer of which to the defendant is set forth in the contract as the consideration for the defendant's promise, were null and void; and then it is denied, according to the defendant's best knowledge, information and belief, that said judgments—that is, the judgments which the defendant had been advised were null and void, and which, because they were so, were no judgments—had been assigned to him or to his use. This will not do. A denial of this sort is evasive of the issue tendered, and must be treated as failing to traverse the allegation of the complaint.

The defendant also denies, according to the best of his knowledge, information and belief, that the property of the judgment debtors referred to in the contract and in the complaint was sold at Sheriff's sale on executions issued on said three judgments, but avers that the same was sold under an execution issued on another judgment.

Brown v. Scott.

The plaintiff alleged in his complaint that the Sheriff's sale mentioned was made on executions issued upon these three judgments, as well as on executions issued upon other judgments, and that at such sale the defendant became the purchaser of the property sold, and used the said three judgments so assigned to him in payment of the amount by him bid. The defendant ought to have known, and will be held to have known, whether he purchased under executions issued on these judgments or otherwise, and whether or not he used the same judgments in paying the amount bid by him. The law does not sanction this mode of pleading. The defendant should have admitted or denied the facts alleged by the plaintiff, or should have shown how it happened that he was without knowledge as to such facts. (*Fales v. Hicks*, 12 How. Pr. R. 154; *Richardson v. Wilton*, 4 Sand. 708; *Hance v. Rumming*, 2 E. D. Smith, 48; *Mott v. Burnett*, Id. 50; *Shearman v. New York Central Mills*, 1 Abbott, 187.) To the same effect is the case of *Curtis v. Richards*, 9 Cal. 37, and *San Francisco Gas Co. v. City of San Francisco*, Id. 453. It matters not that the judgments assigned were invalid as judgments, within the authority of *Zander v. Coe*, 5 Cal. 230, because by the assignment thereof the debts for which they were obtained were assigned to the defendant; besides this he used these judgments in paying the amount due on his bid, in which the debtors whose property was sold were concerned; and it does not appear but they were satisfied to receive these judgments or the debts represented by them in payment on the amount due from the defendant on his purchase. It is to be presumed they were satisfied with this mode of payment, for it is alleged in the complaint that the judgments were used by the defendant in paying the sum at which he purchased the property. He certainly is not in a position to object that these judgments were of no value to him, when, as a fact, they were received in payment of a sum due from him on his purchase, equal to the amount they represented.

The answer fails to put in issue or to confess and avoid the material allegations of the complaint; and therefore there was

Cahoon v. Marshall et als.

no issue to be tried by a jury. The complaint in such cases is to be taken as true. (Practice Act, section 65.)

We think the plaintiff was entitled to the judgment which was rendered on the pleadings.

Judgment affirmed.

Mr. Chief Justice SANDERSON, having been of counsel, did not sit on the trial of this case.

BENJAMIN CAHOON v. SYLVESTER MARSHALL, GEO. W. STEWART, AND CHAUNCEY STEWART.

POSSESSION OF PERSONAL PROPERTY.—An actual change of the possession of personal property, as distinguished from that which by mere intendment of law follows the transfer of title, is an open visible change, manifested by such outward signs as render it evident that the possession of the vendor has wholly ceased.

INSTRUCTIONS TO A JURY.—The jury are the exclusive judges of the facts, and it is erroneous for the Court to assume, in its instructions to the jury, that a certain fact exists, and then submit to them the question whether or not it does exist.

POSSESSION OF LAND.—The possession of real property is of two kinds: the one constructive, depending upon the title and the right to the actual possession, and the other subsisting in the actual occupation.

DELIVERY OF PERSONAL PROPERTY.—Where one purchases land and receives a conveyance therefor, and at the same time buys personal property on the land, the question whether the vendee had actual possession of the land is an important one in determining whether there was an actual delivery of possession of the personal property.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

The facts are stated in the opinion of the Court.

Harrison & Estee, for Appellants.

We will call the attention of the Court to the first instruction excepted to: "Being in possession of the real estate, that he was also in possession of the personal property."

"Being in possession of the real estate" was an absolute assertion on the part of the Court that Cahoon had such possession, and left nothing to the jury. For the proposition

Cahoon v. Marshall et al.

that having exclusive possession of the ranch, carried with it possession of the personal property located on it, is purely a question of law, and not of fact, and the jury have nothing to do with it.

Robert Robinson, for Respondent.

Take the charge together, it is entirely proper. The first exception of defendants, commencing "Being in possession," etc., is only part of a proposition, if he was so in possession, then such would be the result; and there is no doubt of the correctness of the proposition. The law is, that possession of the land does carry with it the possession of personal property. (*Montgomery et al. v. Hunt*, 6 Cal. 366.)

By the Court, CURREY, J.

The plaintiff, who was a creditor of the firm of Miller & Miller in the sum of about seven thousand and six hundred dollars, purchased of them on the 7th of August, 1861, two parcels of real property, one of which was in the City of Sacramento, and the other (a farm) was about eight miles therefrom. The price at which he so purchased was six thousand dollars, and the payment was made by a credit of the Millers with that sum on their debt. A deed of conveyance was executed by them to the plaintiff and duly recorded on that day. To satisfy the balance still due, the Millers on the same day sold to plaintiff certain personal property which was upon the farm and delivered the same to him. The plaintiff at the time employed one Minott, who was then in the service of the Millers on the farm, to take the charge and care of this personal property for him. Minott accepted the employment and remained in charge of the property until it was taken from him by the defendants; and one of the Millers also remained upon the farm, though it does not distinctly appear that he was there to the plaintiff's knowledge or by his consent.

Three days after these sales were made, George W. Stewart

and Chauncey Stewart, who were also creditors of the Millers, commenced actions against them in the District Court for the recovery of the sums of money due the Stewarts, and sued out writs of attachment, by virtue of which the defendant Marshall, who was the Sheriff of the County of Sacramento, attached the personal property sold to the plaintiff. The Stewarts afterward obtained judgments, upon which executions were issued and by virtue thereof the same property was sold by the Sheriff. Immediately after the execution of the attachments, the plaintiff gave the defendants notice of his purchase of and claim to the property. For the taking away and disposing of this personal property the plaintiff brought this action.

The defense interposed was that the sale was made to hinder, delay and defraud the creditors of the Millers, and also that such sale was not accompanied by an immediate delivery of the property sold, nor followed by an actual and continued change of the possession thereof from the vendors to the vendee.

At the trial of the issues joined much evidence was introduced and submitted to the jury respecting the *bona fides* of the sale, and also touching the delivery and actual and continued change of possession. The case was submitted, under instructions of the Court, to the jury, who rendered a verdict for fifteen hundred dollars in favor of the plaintiff against the defendants, on which judgment was entered.

The defendants having appealed from the judgment and an order denying their motion for a new trial, have presented a bill of exceptions to portions of the charge of the Court, and now insist that the judgment ought to be reversed for the causes arising upon their bill of exceptions.

At the request of the defendant's counsel the Court instructed the jury that, "To make a sale valid the delivery must be made of the property sold; the vendee must take the actual possession; that possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to

the world of the claim of the new owner; he must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous; not taken to be surrendered back again; not formal, but substantial." In connection with this instruction the Court, in substance, charged the jury that there was no dispute about the validity of the sale and conveyance of the real property, and that thereby the right to its immediate possession passed from the vendors to the purchaser; that the property in dispute was at the time it was seized under the attachments, upon the farm which had been recently sold by the Millers to the plaintiff, and that plaintiff, being the owner of the real estate, and having purchased the personal property described, the question of fact for the jury to determine was, whether the plaintiff was so in possession of the personal property as to give notice to the world that (assuming he was in possession of the real estate) he was also in possession of the personal property. This is the obvious import of the instruction.

The defendants' counsel excepted to so much of the instruction as is in this language: "Being in possession of the real estate, he was also in possession of the personal property." To understand the point it is necessary to look to what preceded the words particularized by the exception; and when the whole instruction is considered, it appears to have been left to the jury to decide, after assuming it as a fact that the plaintiff was the owner and in the possession of the farm, whether or not he was, at the time the property was attached, in its possession.

There are two kinds of possession of real property — the one constructive, the other actual — the one depending upon the title and the present right to the actual possession, and the other subsisting in the actual occupation or the *possessio pedis*. The question as to the plaintiff's actual possession of the farm, was a point involved in the trial before the jury, so far as the possession of the personal property in controversy was made to depend upon the possession of the farm.

The fifteenth section of the Statute of Frauds declares that every sale made by the vendor of goods and chattels in his possession or under his control, unless the same be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things sold, shall be conclusive evidence of fraud as against the creditors of the vendor. (Wood's Dig. 107.) A sale which is not followed by the change of the possession of the property sold which the statute has prescribed is, as to the creditors of the vendor, to be deemed fraudulent and void, and the want of such change of possession when established admits of no excuse nor explanation. The wisdom of this law commends it to the favorable consideration of Courts of justice, and reasons of public policy demand its faithful execution.

What constitutes an actual change of the possession of personal property, as distinguished from that which by mere intendment of law follows the transfer of title, is not of difficult solution. It is an open, visible change, manifested by such outward signs as render it evident that the possession of the vendor has wholly ceased. (*Randall v. Parker*, 3 Sand. 73.) Then if the possession of the property by the vendors, in the case under consideration, had not wholly ceased when it was attached, it was liable to the attachments, notwithstanding, as between the vendors and vendee, the sale was complete and the title to the property had become vested in the plaintiff as the purchaser.

The possession by the plaintiff of the farm upon which the personal property was when it was purchased by him, provided it was an actual and exclusive possession, would be strong evidence of the like possession of such personal property; but so long as the vendors, or either of them, remained upon the farm, if with the plaintiff's knowledge or consent, the Court could not properly exclude from the jury the determination of the question as to whether the vendors or vendee was in the actual possession of the farm, or whether the possession was not jointly held by them. If the actual and exclusive possession of the farm by the plaintiff would be

Lick v. Madden.

strong evidence of his like possession of the personal property, then the possession of the farm by the vendors, or the concurrent possession of it by the vendors and vendee, would at least tend very strongly to show that the plaintiff had not that actual possession of the personal property necessary to place it beyond the reach of the creditors of the vendors. Hence it was erroneous for the Court to assume and thereby decide the fact to be that the plaintiff was in the possession of the farm when the personal property thereon was attached.

The other objections assigned by the appellants we deem untenable when the instructions given to the jury at the request of the plaintiff are considered in connection with the qualifying instructions of the Court.

As the case must be remanded for a new trial, it is proper to express our opinion in reference to proving the declarations of the vendors concerning the transaction after the sale was made and the property delivered so as to pass it to the purchaser. This species of evidence is, as a general rule, inadmissible, and is never to be received unless it appears that the vendors' declarations were made while in possession of the property, with the knowledge or consent, express or implied, of the vendee, in which case their declarations made while in possession of the property attached might be considered as of the *res gestæ*.

The judgment is reversed and the cause remanded for a new trial.

JAMES LICK v. JEROME MADDEN.

WRITS OF ATTACHMENT.—It is the duty of the Clerks of the District Courts to issue and deliver to the parties respectively, or to their attorneys, writs of attachment in the order in which the preliminary papers are presented to them, and the writs demanded.

PREPAYMENT OF CLERK'S FEES.—When the preliminary papers to authorize a writ of attachment have been presented to the Clerk, and the writ has been demanded, it is his duty to make out and deliver to the plaintiff, with reasonable diligence, the writ applied for, without prepayment of his fees, or a tender of the same, provided the Clerk fails to call for prepayment.

Lick v. Madden.

PREPAYMENT OF OFFICER'S FEES.—The statute which declares that "any officer *may refuse* to perform any services in a civil action or proceeding, until the fee for such service is paid," is not to be construed as prohibiting the officer from performing the service without prepayment of fees, but as permissive merely; leaving the alternatives of cash in advance or credit to his own election.

SAME.—If, when services are demanded of an officer in a civil case, he fails to demand his fees in advance, his obligation to perform the duty required is the same as it would be if the fees were prepaid or tendered in advance.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

The Court below sustained the demurrer to the complaint, plaintiff declined to amend, judgment was rendered for defendant, and plaintiff appealed.

The other facts are stated in the opinion of the Court.

William S. Wood, and *Winans & Hyer*, for Appellant.

Under sections one hundred and twenty and one hundred and twenty-one of the Practice Act, the plaintiff is entitled to the immediate issuance of a writ of attachment on complying with the requirements of the law in this particular, and the Clerk is required to issue the writ immediately, and by omitting so to do the law renders him liable for all damage sustained by his omission, whether it was caused by negligence or fraud on his part. The statute is clear, providing that upon the compliance by the plaintiffs with its requirements the writ shall issue. The Act authorizing writs of attachment was passed for the purpose of enabling the vigilant and active creditor to obtain the advantage due to his vigilance and activity.

The second point raised by the demurrer is thus stated: If a Clerk is required to issue attachments in the order in which they are demanded, must his fees be tendered at the time the demand is made?

Is a tender of the fees necessary? We most earnestly contend that it is not. From what source originated the idea that it is, we are wholly unable to determine. It surely is not made so by statute. That of 1857 was in force at the time of

Lick v. Madden.

acts complained of by plaintiff, and it is therein provided that such fees are allowed to the officers therein named, for their services rendered in discharging the duties imposed by law, as therein authorized, and such officers "*may lawfully charge, demand and receive the same.*" (*Parker and Wife v. McGaha*, 13 Ala. 344; *McRae v. Inzan*, 4 Ala. 286; *Rutherford v. Jones*, 12 Geo. 618.)

E. B. Crocker, for Respondent.

The law does not make it obligatory upon the Clerk to issue writs in the order in which the actions are commenced.

The sections of the statute referred to by appellant in his brief, do not touch the point. To be sure, the Clerk is liable for every "wrongful act or omission" on his part, but the very point here is — Was he guilty of any wrongful act?

Suppose A. commences his action against C., and applies for an attachment, with a complaint which takes half a day to copy. The Clerk does his duty by immediately handing his papers to a deputy to prepare the proper copy and writs, with orders to deliver the writs as soon as the proper papers are completed. Suppose, the next minute, B. commences his action against C., with a short complaint which takes only a few minutes to copy, or with the proper copy already made out, and only requiring the signature of the Clerk to be issued, as many accurate lawyers do; the Clerk hands the papers to a deputy without delay, and they are immediately ready to be issued, and that, too, before A.'s papers are ready. Now, is there any law or reason why B. should wait half a day until A.'s papers are prepared? If the Legislature had intended that such should be the rule, they would undoubtedly have provided for it by statute. As they have laid down such a rule for the County Recorder, and have omitted it in the case of the County Clerk, it shows that it was intentionally omitted as to the latter.

Before the Clerk can be put in default, it must be averred that his legal fees were tendered him for his services required,

Lick v. Madden.

and there being no such averment, the complaint is fatally defective.

"Any officer may refuse to perform any services in a civil action or proceeding *until the fee for such service is paid by the party requiring the service.*" (Wood's Dig. 448, sec. 40.)

The Clerk is only bound to furnish copies, or writs, or papers in his office, *upon the tender of his legal fees.* (*Edmondson v. Mason*, 16 Cal. 388; *People v. Harris*, 9 Cal. 571.)

By the Court, SHAFER, J.

This is an appeal from a judgment rendered by the District Court on a demurrer to the complaint.

The complaint shows that the defendant Madden was County Clerk of Sacramento County, and acting as such on the 10th day of January, 1861; that on that day the plaintiff commenced suit in the District Court of the Sixth Judicial District in and for the City and County of Sacramento, of which Madden was Clerk, against C. Ihmels, G. Reinecke and C. Stockfleth, to recover the sum of one thousand six hundred and twenty-eight dollars. The complaint as amended then continues: "And thereupon he duly prepared, executed and filed in the office of the Clerk of this Court, to wit: of the said defendant Madden, County Clerk as aforesaid, the necessary and proper affidavit and undertaking prescribed by the statute in such case made and provided, to authorize the issuance of an attachment, and likewise delivered the same to said Clerk, to wit: the said defendant Madden; and further, duly and fully complied with all the requirements of law and of the statute in such case made and provided, which entitled him to require from the said Clerk the immediate issuance of a writ of attachment by said defendant Madden, as Clerk aforesaid, in said suit, for said amount of one thousand six hundred and twenty-eight dollars, against the property of said Ihmels *et al.*, directed," etc. And that he did then and there demand the immediate issuance of such attachment.

The complaint further avers, "that said defendant, not-

Lick v. Madden.

withstanding the facts aforesaid, did wrongfully and unlawfully issue unto Eggers & Co. a writ of attachment against the property of said Ihmels *et al.*, in a suit began by them subsequently to the beginning of plaintiff's action and the filing of his affidavit and undertaking, and after his demand for an attachment as above stated. That by reason thereof plaintiff was delayed in delivering his writ of attachment to the Sheriff, and said Eggers & Co. obtained priority over him, and that sufficient was realized from the property of Ihmels, at that time already attached, to have satisfied plaintiff's claim, but that he never received anything on account thereof except about two hundred and eighty-seven dollars."

Two questions arise upon this record: First — Is a Clerk required to issue attachments in the order in which the preliminary papers are presented and the writs demanded? Second — If he is, then can the demand be considered as having been made, and can the Clerk be compelled to deliver such writ of attachment, until the fees have been tendered therefor, though the Clerk fails to call for prepayment?

1. Is a Clerk required to issue attachments in the order in which the preliminary papers are presented, and the writs demanded?

Section nine of the statute defining the duties of County Clerks (Wood's Dig. 88) provides "that for any wrongful act, or any omission to perform any duties imposed upon him by law, the Clerk shall be liable on his bond to any person injured."

The one hundred and twenty-first section of the Practice Act provides that "the Clerk shall issue the writ of attachment upon receiving an affidavit by or on behalf of the plaintiff, which shall be filed," showing certain facts thereafter stated in the section.

As we construe this section, it requires the Clerk, after the proper papers have been presented, to proceed with reasonable diligence to make out and deliver to the plaintiff the process applied for. The section does not regulate the time within which the writ must be made out, as between the

Lick v. Madden.

Clerk and the *first* applicant merely, but as between himself and all applicants; and the rule of reasonable time established by the section enures to the benefit of one applicant as much as to the benefit of another.

But the *gravamen* of this action is not that the defendant violated the rule of official duty, established by this section, by nonfeasance—that is, by simple neglect to make out the process applied for in reasonable time. The complaint, on the other hand, makes, or undertakes to make, a case of official malfeasance—the wrongful act consisting in the defendant's issuing an attachment to Eggers & Co., under the circumstances which the complaint details, and in derogation of the plaintiff's better right.

This action was brought upon the theory that the Clerk is bound to issue attachments in a certain order—that is to say, in the order in which they are applied for. Into this theory reasonable diligence does not enter as a condition; and as section one hundred and twenty-one of the Practice Act is confined to reasonable diligence as a topic, then if the order claimed by the plaintiff exists as a rule of law, it must exist independent of that section regarded as an isolated provision.

In determining, however, whether the rule contended for by plaintiff is established in this State by statute regulation, all the legislation bearing upon the question should be considered, and particularly the whole of that portion of the Practice Act which bears upon attachments as a subject matter.

The portion of the Practice Act referred to contains twenty-one sections; they are all in *pari materia*, and are to be construed together in order to ascertain the intention of the Legislature on the point in controversy. It is apparent, in the first place, that the Legislature intended that the creditor upon whose process any property, whether real or personal, was first attached, should thereby acquire the right, as against all subsequent attachments, to insist that the avails of the property should be appropriated to the satisfaction of his judgment in the first instance. This is the result that the Legislature had in mind; and the priority thus conceded and

Lick v. Madden.

secured to the first attachment, proceeds upon the policy that the laws should subserve those who subserve themselves.

Assuming that we have not mistaken the end to which the legislation upon the subject of attachments is directed, the sections referred to are to be so construed, that the legislative purpose may be accomplished.

If Clerks are not subject to the rule insisted upon by the plaintiff, then they are restrained by no rule; and if unrestrained, then they are left free to issue attachments as their caprice, favoritism or interested views may dictate. The purpose of the Legislature was that the first should be first, and that the last should be last; but under the view presented for the respondent, a mere ministerial officer, in a most responsible, but still subordinate position, could at his pleasure defeat the legislative design and still be held to have done no wrong. The cases in which Legislatures have ordained particular ends, and appointed and salaried ministerial agents to secure them, and have at the same time exempted those agents by intention from all liability both criminal and civil on account of studied and successful efforts to defeat those ends, must have been of very rare occurrence. If such an instance should occur in fact, a well understood rule of construction would forbid the Courts from recognizing the *felo de se*, unless, indeed, its existence should be established to the highest degree of moral certainty.

But there is another consideration connected with the question with which we are dealing.

When attachments have been issued they are delivered to the Sheriff. Is he bound to serve the writs in the order in which they come to his hands, or has he the right to shuffle and serve them as he may choose? On the reasoning of the respondent the immunities of the Sheriff in the matter of serving the writs must be co-extensive with those of the Clerk in the matter of issuing them, for no particular order of service is directed by any positive provision.

We close the discussion of the case, in so far as it relates to this question of construction, by remarking, that though the

Lick & Madden.

respondent is right in saying that there is nothing in the statutes which denies to him, in terms, the irresponsible power which he claims, still it is equally true that no statute provision expressly confers the power upon him. The thing, then, stands upon implication, and we must imply that which will uphold, rather than that which must defeat the principal purpose of the Act.

Should it be assumed, however, that the order in which attachments are to issue is not established in this State by statute regulation, the question, before being finally disposed of, should be examined in the light of the common law.

It may be admitted that the office of County Clerk as it exists in California is a statute creation, but it would not follow that any incumbent of that office held it free of the maxims and pervasive analogies of the common law. The incumbent of the office stands in a public relation, and that relation, how new soever in the circumstance, is not new to the common law in its principle. The defendant as a public officer was bound, amongst other things, to respect the preemptive right which the plaintiff had acquired to the people's process as against Eggers & Co. and all others, under the common law maxim, "*qui prior est in tempore potior est in jure.*" All the facts of the plaintiff's prior right were fully known to the Clerk, and he could have had no right to do a wrong by defeating it. It was on these common law views that the cases reported in 1 Bibb, 311, 6 B. Mon. 415, 7 B. Mon. 544, and 2 J. J. Mar. 422, were decided. Under this aspect of the matter, the duty of County Clerks to attend to attaching creditors in the order in which their applications for process are presented, is in no sense a mere regulation of office, but a legal obligation, binding alike upon all men, whether in public or private stations, to refrain from violating the rights of others, and when specifically charged with the duty, then to aid actively in promoting and fulfilling them. And that duty they may very well be called upon to perform without legislative suggestion, when, as here, it lies embedded in the ethics of the common law.

Lick v. Madden.

It is suggested, on behalf of the respondent, that if applicants for attachments are to be served in the order of their applications, then, if the complaint of the first applicants should happen to be of great length, subsequent applicants would be delayed, and perhaps to their serious detriment.

The answers to this objection are multiplied and apparent.

First — The objection is, that the rule is not absolutely faultless; but there is no rule of man's making that is.

Second — A long complaint in an attachment suit must be of very rare occurrence, and under the Practice Act, as it now stands, it is not altogether certain that a copy of the complaint should go with the summons, in order that the attachment may be valid.

Third — The objection is founded upon considerations of convenience, and they are of but little argumentative weight, except in the last resort. However, were long complaints in attachment suits of much more frequent occurrence than they are, or are likely to be, the mind can readily reconcile itself to all the inconveniences resulting therefrom, in view of the general unsteadiness of movement in the workings of the rule for which the respondent contends — steady, as it would be, in nothing, except in its tendency to corruption.

2. Assuming, then, the rule claimed by the appellant, is the Clerk under obligation to make out and deliver the writ to the first of two successive appellants, in a case where the Clerk is silent upon the subject of the prepayment of fees, and no tender of fees is made?

The only statute provision to which we have been referred having any bearing upon the question is as follows: "Any officer *may refuse* to perform any services in a civil action or proceeding until the fee for such service is paid by the party requiring the service." (Wood's Digest, 446, sec. 40.)

In the understanding of the respondent the filing of the preliminary papers, coupled with a request that a writ of attachment may issue, imposes no obligation upon the Clerk, unless the request is accompanied with a present tender of fees — while in the understanding of the appellant, the obligation of

the Clerk is perfect without a tender, if prepayment is not demanded.

The controlling words are "*may refuse*." The intention was not to *prohibit* the Clerk, in a matter of mere personal concern, from rendering official aid on credit. The word "*may*," in the connection in which it stands, is not to be construed as mandatory to the Clerk, but permissive, leaving the alternatives of cash or credit to his own election. Again, the word "*refuse*" is used in contradistinction to silence, or mere omission, or neglect. The distinction is one lying between action on the one hand and non-action on the other. If the Clerk, in view of the alternatives presented to him, makes up his mind to stand upon prepayment, the mental state is not in itself a *refusal* of credit. The conclusion of the mind antecedates the refusal, and leads to it; but it is neither identical with it nor is it any part of it. It is only in the event of an announced refusal of credit that the applicant, under the adjustments of the section, is required to tender. To hold that the silence of the Clerk is an equivalent antecedent to the duty to tender, would be to interpolate into the section a new and substantive provision. The section, in short, confers upon the Clerk a personal privilege, which he may claim or waive, as he chooses. If he claims it he should announce it; and if he does not so announce he must be understood to have waived it. The statute nowhere provides that the Clerk shall not be obliged to move until his fees, whether asked for or not, have been tendered. Doubtless, under a provision like that, the *role* of the Clerk would be a passive one altogether. But under the law as it stands, after application for process has been made in due form, something is to be done before any exhibition of money is contemplated. The character of the initial act is clearly defined, and the function of performing it is as clearly devolved upon the Clerk.

The case of *People v. Harris*, 9 Cal. 571, turned upon the six hundred and twenty-seventh section of the Practice Act. By the very terms of that section, the duty of the Justice to transmit a certified copy of his docket, etc., to the County

Aitken et al. v. Mendenhall.

Court, in cases of appeal, does not attach, except upon payment of his fees. This section is expressed in language differing widely from that used in the section we have been considering.

The case of *Edmondson v. Mason*, 16 Cal. 386, cited by the respondent, has no appreciable bearing upon the point in controversy.

The judgment is reversed and the cause remanded, with leave to the defendant to answer in ten days after notice of filing remittitur.

B. AITKEN AND J. PRESCOTT v. E. T. MENDENHALL

CROSS-EXAMINATION OF WITNESS.—A witness on cross-examination can only be interrogated in regard to such matters as he testified about on his examination in chief, if objection is made on that ground.

DAMAGES.—If plaintiff in his complaint claims more damages than he is entitled to, this will form no ground for reversing the judgment. If, on the trial, plaintiff offers testimony to prove damages he is not entitled to, and defendant objects to its introduction, and there is a ruling against him, the question can be reviewed on appeal.

APPEAL from the District Court, Eleventh Judicial District, Placer County.

The facts are stated in the opinion of the Court.

Chas. A. Tuttle, for Appellant.

Jo Hamilton, for Respondents.

By the Court, SHAFER, J.

The complaint alleges that the defendant was the owner of a sawmill, and that on the 16th of January, 1861, he leased it to the plaintiffs for one year, on terms, that he, the defendant, would keep the mill constantly supplied with logs, to be sawed by the plaintiffs for the defendant at the rate of four dollars and fifty cents per thousand feet. It is further alleged that the plaintiffs "were to run the mill one year, with the

refusal on their part of running it two years on the same terms; that is to say until the 16th of January, 1863." There are other provisions in the contract, as set forth, but it is unnecessary to notice them for the purposes of this appeal. The breach assigned is, "that since the month of November, 1861, the defendant has wholly failed to furnish any logs at all to said mill, so that plaintiffs were compelled to be idle and dismiss the hands in their employ."

Trial by jury — verdict and judgment for plaintiffs.

The appeal is from the judgment and from the order denying defendant's motion for a new trial.

It appears from the statement, that the plaintiffs in the course of the trial called on one Hawkins as a witness, and from the record of his testimony, given in chief, it appears to have been confined to points in the plaintiff's case, distinct from the breach complained of.

The counsel of the defendant, in the course of his cross-examination, proposed to prove by the witness that during the summer and fall of 1861, "plaintiffs went away and left the mill idle, when there was a plenty of logs." The plaintiffs objected to the introduction of this testimony; the objection was sustained, and the defendant excepted.

The ruling of the Court was correct. The witness not having testified in chief upon the subject of the alleged breach, the defendant had, in strictness, no right to interrogate the witness upon that subject at that time. (*Thornburg v. Hand*, 7 Cal. 561; *Jackson v. F. R. and G. Water Co.*, 14 Cal. 23.)

Objection is taken to the judgment for the reason "that the complaint claims damages for more than six months after the contract expired."

If the counsel of the appellant are right in their construction of the complaint, still the fact that the plaintiffs have claimed damages beyond the just measure of their right, would not in itself be a ground for reversing the judgment. If the plaintiffs at the trial offered testimony to prove damages which they had no right to claim, the defendant should have

Irwin v. Backus et al.

objected to its introduction, and in the event of an adverse ruling they could have brought the question here for review.

Judgment affirmed.

**JARED IRWIN, ADMINISTRATOR, ETC. v. G. BACKUS,
D. O. MILLS, L. B. HARRIS, J. H. GASS, AND R. C.
CLARK.**

SURETIES ON AN ADMINISTRATOR'S BOND.—In an action against the sureties on an administrator's bond for a breach of the bond by the principal, the proceedings taken in the Probate Court in passing on an account rendered by the administrator, and a decree rendered therein directing the administrator to pay over a sum found remaining in his hands, are admissible in evidence against the sureties, although the sureties were not parties to the same.

SAME.—Such decree is equally conclusive upon the administrator and his sureties; and upon the refusal of the administrator to obey the same, the liability of the sureties attaches, and they cannot go behind the decree to inquire into the merits of the matter therein passed on.

WHAT SURETIES MAY SHOW IN DEFENSE.—The sureties may show in defense either that the bond was not made, or that the decree was not made, or that the same has been obeyed, or that the same was obtained by fraud or collusion.

SURETIES ON OFFICIAL BONDS.—As a general rule, sureties upon official bonds are not concluded by a decree or judgment against their principal, unless they have had their day in Court, or an opportunity to be heard in their defense; but administration bonds form an exception to this general rule.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

Backus, the principal in the bond, was not served with process.

The sureties appealed from the judgment.

The other facts are stated in the opinion of the Court.

J. W. Winans, for Appellants.

Administrators are not liable on their official bonds for an established debt of their intestate until they are fined with a *devastavit*. (*Commonwealth v. Molty*, 10 Penn. St. 527.)

In an action on an administering bond, the breach assigned being the failure of the administrator to account for assets of the estate and the conversion of them to his own use, where

Irwin v. Backus et al.

the plea was the statutory plea of the general issue; held, that "proof that the assets have come into the administrator's hands, does not make a *prima facie* case for the plaintiff." (*The State v. Price*, 17 Miss. 431; *Commonwealth v. Evans*, 1 Watts, 37; *Myers v. Fritz*, 4 Penn. St. 347; *Williams v. Hinkle*, 15 Ala. 713.)

The order of the Probate Court is not admissible in evidence against the defendants and appellants in this case, who are the sureties of Backus.

It is not denied that, as against Backus, the principal, any order of the Probate Court, to the proceedings resulting, in which he was a party, would be admissible. But as this is a proceeding against the sureties, it comes directly within the rule of *Pico v. Webster*, 14 Cal. 202, that "In the case of official bonds the sureties undertake, in general terms, that the principal will perform his official duties, and a judgment against the officer in a suit to which they were not parties, is not evidence against them."

It is true, this Court alludes to the fact that a distinction has been taken as to administration bonds founded on the terms of the obligation, but it overrules that distinction by making its decision in *Pico v. Webster* general and unexceptional. Besides, that distinction in the leading case where it is taken, (*Simkins v. Cobb*, 2 Bailey, 60,) is founded on the principle that the letter of the surety bond made the administrator's accounting, or being required to account, *an essential prerequisite to a suit on the bond*, which is not the case in the bond here sued on.

So again it is held, in *Williams v. Hinkle*, 15 Ala. 713, that "in an action on the administration bond against the administrator and his sureties, suggesting a *devastavit*, a judgment against the administrator *de bonis intestatoris*, is not conclusive against the sureties, but it devolves on the plaintiff to show an *actual devastavit* in order to fix their liability."

Harrison & Estes, for Respondent.

A *devastavit* is defined to be "a mismanagement of the

estate and effects of the deceased, in squandering, wasting, and misapplying the assets, contrary to the duty imposed on him, for which the executor or administrator shall answer out of his own pocket." (See 2 Williams on Executors, 1529; Bac. Ab. Executors, L. 1.)

By the Act of March 27, 1858, (Statutes 1858, p. 95,) it is provided that "the proceedings of the Courts of Probate within the jurisdiction conferred on them by the laws, shall be construed in the same manner and with like intendment as proceedings of Courts of general jurisdiction, and that the records, orders, judgments, and decrees of the said Probate Courts shall have accorded to them like force and effect and legal presumptions as the records, orders, judgments, and decrees of the District Courts." (See, also, *Irwin v. Schriber*, 18 Cal. 504.)

It is also provided in section two hundred and forty-five, (Estates of Deceased Persons, Wood's Digest,) "that decree shall be made for payment of creditors, and that the executor or administrator shall be personally liable to each creditor for his claim. That execution may issue and same proceedings be had under such execution as if it had been issued from the District Court; *that the executor or administrator shall be liable on his bond to each creditor.*"

Sections two hundred and thirty-seven and two hundred and thirty-eight of the same Act provide further, "That settlement of accounts and allowances by the Courts shall be conclusive against all persons in any way interested in the estate, except those laboring under a legal disability. Their rights to proceed, either individually or upon his bond, after two years, shall cease, and in any action brought by any such person the allowance and settlement of the account shall be deemed presumptive evidence of its correctness, and that after proof of proper notice the decree shall be conclusive evidence of the fact."

And section two hundred and forty-nine of the Act referred to provides still further, "That if the administrator neglects to render his account, the same proceedings may be had as pre-

scribed in this chapter in regard to the first account to be rendered by him, and all the provisions relative to the last mentioned account, and the notice and settlement thereof, shall apply to his account presented for final settlement."

Our proposition, then, is:

First—*That the order and findings introduced in evidence in this cause is not only presumptive, but conclusive proof of the facts therein contained.*

And this decree is as conclusive against the sureties on the administrator's official bond as against creditors, heirs, or any other parties in interest.

This proposition, however much it may "surprise" the attorneys of appellants, is sustained not only by the statutes of this State and decisions of this Court, but by nearly every reliable authority in the land.

In the case of *Pico v. Webster*, 14 Cal. 202, it is held: "A distinction is taken as to administrators' bonds founded upon the terms of the obligation, as used in South Carolina and other States; those being that the administrators should account—meaning account before the Probate Court—which was held equivalent to an obligation by the surety to pay such decree as that Court might render."

But the attorneys for appellants say "that such distinction" is overruled by making it general, "which certainly cannot be the case," for why refer to the "distinction" unless to create an exception to the rule the Court was then establishing.

There is a wide difference between the two classes of cases, where sureties bind themselves to the effect that their principal shall faithfully perform the duties of an office in general terms, and that class of cases where sureties bind themselves to the effect that their principal shall not only perform all the duties enjoined by law, as such Public Administrator, and particularly that he will account for and *pay over all* moneys that may come to his hands as such administrator. As authority on this proposition we refer to appellants' brief, page 18; *Simkins v. Cobb*, 2 Bailey, 60.

Now, the question arises, did the administrator "account for

and pay over the money that came into his hands?" The Probate Court, the only tribunal which can try that question, decided that he had not accounted; "that money was in his hands," and that he had not administered according to law, and had not accounted for money in his hands, etc. An issue had *been previously joined*, due notice had been given, not to the heirs and creditors only, but to *all parties interested in the estate*. The sureties *then*, on *that* hearing, and under *that* notice, had their "day in Court," and could have then, in common with all the world, shown that the administrator *had* accounted and *had* paid over the amounts which came into his hands as such officer. And it was those acts, "more particularly," that they bound themselves that he should perform. When they signed his bond they said to the world: first—this officer shall faithfully perform all the duties enjoined on him by law; and second, and *particularly*, he shall account for and pay over all money and property that shall come into his hands—both of which Backus has failed to do. And what evidence have we of that fact? The highest evidence attainable; namely, the solemn judgment of a Court of record having jurisdiction of the subject matter. (See Part II, Cowen & Hill's Notes, p. 57; *Bogardus v. Clark*, 4 Paige, 623.) It was there held: "The decision of the Surrogate is conclusive against all the world, as being in the nature of a proceeding *in rem.*, to which *any one can make himself a party*." (Part II, Cowen & Hill's Notes, p. 58; *Loughton v. Atkins*, 1 Pick. 535, 541, 547.)

A decree settling an account is conclusive. (Part II, Cowen & Hill's Notes, p. 58; *Sexton v. Shombleson*, 6 Pick. 422; *Jenison v. Hopewood*, 7 Pick. 1; *Field v. Hitchcock*, 14 Pick. 405; *Downing Estate*, 5 Watt, 90.)

"It cannot therefore be impeached in an action on the probate bond." (*Goodrich v. Thompson*, 4 Day, 215; 14 *Sergeant & Rawle*, 184, note; *Barton v. Morris*, 1 Green. 18.)

"In a suit against sureties the decree against the administrator made by the Ordinary cannot be impeached for error and irregularity." (*Lylor v. Brown*, 1 Harp. 31; *Tyler v.*

Irwia v. Backus et al.

Caldwell, 3 McCord, 225; see Cowen & Hill's Notes, Part II, p. 68.)

By the Court, SANDERSON, C. J.

This is an action upon the official bond of the defendant Backus as Public Administrator of the City and County of Sacramento, against him as principal and his co-defendants as sureties. The suit is brought by his successor in office to recover the amount of a certain estate which came into the hands of Backus in the course of official business, and which he refused to pay over to his successor, the plaintiff, pursuant to the order and decree of the Probate Court. The plaintiff had judgment in the Court below, and the defendant, having moved for a new trial, which was denied, appeals. The facts, as disclosed by the record, are substantially as follows:

In 1857, Backus obtained letters of administration upon the estate of one J. T. M. Cooper and took charge of the same through one J. C. Barr, who for a long time previous and subsequent thereto acted as the clerk or agent, or attorney in fact of Backus, in connection with the business of his office of Public Administrator. The business in the Probate Court seems to have been transacted by Backus, and the collection of the assets belonging to the estate seems to have been made by Barr. After keeping the estate in his hands without rendering an account until May, 1859, Backus, upon petition of the heirs, was cited by the Probate Court to render his account pursuant to law. In reply to the citation, Backus alleged that the deceased was not a resident or inhabitant of the county at the time of his death, but that he was a resident of — County, (name not stated,) and denied the jurisdiction of the Court, charging that the letters of administration which had been issued to him were therefore null and void. At the same time he filed his final account, and a day was appointed for the hearing, of which due notice was given according to law. Upon the issues thus formed a trial was had in the Probate Court, resulting in the following find-

Irwin v. Backus et al.

ing of facts and decree: "Sometime in the spring of 1857, J. T. M. Cooper departed this life in the City and County of Sacramento, where he resided prior to and at the time of his death. It does not appear that he ever had any residence in the State of California elsewhere than in Sacramento County. After the death of said Cooper, to wit: on the 21st day of April, 1857, Gordon Backus, then Public Administrator of Sacramento County, petitioned to be appointed administrator of said estate, and on the said 21st day of April, 1857, the Probate Court of said County of Sacramento made an order appointing said Gordon Backus administrator of said estate as aforesaid of said J. T. M. Cooper, and that he take charge of and administer upon the same according to law. That said Probate Court also appointed John C. Barr, L. Farmer and M. McIntyre appraisers of said estate, who went on and appraised the same, and found the said estate to consist of the following items, to wit: Cash, one hundred and fifty-two dollars and thirty-eight cents; W. H. Bullard's certificate of deposit, five hundred and fifty dollars; W. L. Pritchard's note, six hundred and fifty dollars; T. A. Goodell's note, two hundred dollars; A. P. Carter's note, two hundred and eighty dollars; making a total sum of one thousand eight hundred and thirty-two dollars and thirty-eight cents. The whole of which estate, according to the items aforesaid, was paid over by Morrison McIntyre to John C. Barr, who received the same as the agent or clerk of the said Gordon Backus, and who was authorized by the said Backus to receive the same by his authority. Afterwards said Barr collected all the notes outstanding, save the note on A. P. Carter. That said Barr, acting as the agent or clerk of Backus, collected in cash the sum of one thousand five hundred and sixty dollars; that out of this some small bills were paid, such as funeral expenses, affidavits of appraisers, etc. That said Barr paid over to said Backus, in cash, the sum of one thousand three hundred and thirty-eight dollars, in addition to the sum of two hundred and two dollars and thirty-eight cents, which Barr collected, which he informed the said Backus was subject to his

Irwin v. Backus, et al.

order. But the said Barr asked the said Backus to use the said amount of two hundred and two dollars and thirty-eight cents on account of what Backus was owing him, which Backus allowed him to do. That Backus never filed any appraisal of said estate, never gave any notice to creditors as required by law, or rendered any exhibit whatsoever of the condition of said estate."

Upon the foregoing facts the Court decreed that Backus should be removed from the office of administrator of the estate in question, and that he should pay over to his successor the sum of one thousand five hundred and forty dollars and thirty-eight cents, and deliver to him the Carter note for two hundred and eighty dollars. The plaintiff was appointed such successor and Backus was ordered to pay over to him as aforesaid. The plaintiff demanded the estate from Backus, who refused to pay over the same.

On the trial, in connection with other evidence of like tendency, the foregoing proceedings in the Probate Court were offered in evidence by the plaintiff for the purpose of proving a *devastavit* against Backus and fixing the amount of their liability against his sureties. The evidence was objected to upon the ground that the sureties were not parties to the proceedings and therefore unaffected thereby, and that as against them the *devastavit*, and the amount thereof, must be established by other evidence. The Court admitted the evidence, but before the case was finally submitted to the jury the opinion of the Court seems to have changed, for the jury were instructed in effect to disregard the evidence and base their verdict entirely upon the other evidence in the case. With the proceedings of the Probate Court discarded, appellant claims that the other evidence in the case fails to sustain the verdict, and that some portion of it was improperly admitted. All the points made by appellant are founded upon the theory that the proceedings in the Probate Court were inadmissible for any purpose as against the sureties, and hence become immaterial if that theory proves fallacious. As we are of the opinion that the proceedings were admissible, we shall there-

Irwin v. Backus et al.

fore confine ourselves to the consideration of that question. If the proceedings were admissible, there being no pretense of fraud or collusion, another trial would result in a like verdict, and hence if error was committed in admitting other evidence bearing upon the same point such error (in the absence of any conflict of testimony, which is the case here) becomes inconsequential.

There is some conflict of authority as to the admissibility of this kind of evidence in an action upon an administrator's bond against his sureties for a breach of the bond by the principal, and as to its effect when admitted. The Supreme Court of North Carolina decided that a recovery against a guardian was no evidence against his sureties in an action upon his bond for non-payment of the judgment. (*McKellar v. Howell et al.*, 4 Hawks, 37.) The same Court held that a judgment obtained by a creditor of an intestate against his administrator could not be used as evidence by the creditor in an action against the sureties upon the administrator's bond. (*McBride v. Choate*, 2 Ired. Eq. 610.) In several of the other States a contrary doctrine has prevailed. The Supreme Court of Massachusetts has decided that in an action upon an administrator's bond against the administrator and his sureties, for a refusal on his part to pay a judgment recovered against him, such judgment, if not obtained by fraud and collusion, is conclusive upon the sureties in regard to all matters of defense affecting the merits of the claim as between the parties to such judgment. (*Heard v. Lodge et al.*, 20 Pick. 53.) In New York it has been held that whatever binds and concludes the administrator equally binds and concludes his sureties. (*Baggott v. Boulger*, 2 Duer, 160; *The People on the relation of Demarest v. Laws*, 3 Abbott's Practice Reports, 450.) So in Pennsylvania it has been held that a decree of the Orphans' Court against an administrator is conclusive upon his sureties. (*Garber v. The Commonwealth*, 7 Penn. St. 265.) In Indiana an administrator was convicted by the finding and decree of the Probate Court of having committed waste. His settlement was opened up and the Court found that he had in his hands, unaccounted for, the sum of

Irwin v. Backus et al.

one thousand seven hundred and thirty-two dollars belonging to the decedent's estate. This finding was held to be conclusive upon his sureties both as to the waste and the amount thereof. (*Salzer v. The State*, 5 Porter, Ind. 202.) The same doctrine prevails in Kentucky, Missouri, and South Carolina. (*Hobbs et al. v. Middleton*, 1 J. J. Marsh, 177; *State v. Holt*, 27 Missouri, 340; *Lyles v. Caldwell et al.*, 8 McCord, 225.) In South Carolina it seems to be doubted whether the decree of the Ordinary is conclusive of anything more than the fact that the administrator has been legally cited to account, and of the different items composing his account, so as to relieve a Court of law from an investigation into their merits. (*Simkins v. Cobb*, 2 Bailey, 60.)

As a general rule, sureties upon official bonds are not concluded by a decree or judgment against their principal, unless they have had their day in Court or an opportunity to be heard in their defense; but administration bonds seem to form an exception to this general rule, and the sureties thereon, in respect to their liability for the default of the principal, seem to be classed with such sureties as covenant that their principal shall do a particular act. To this class belong sureties upon bail and appeal bonds whose liability is fixed by the judgment against their principal. This distinction seems to be founded upon the terms of the obligation into which the sureties upon an administration bond enter, which are that their principal shall faithfully perform all the duties imposed upon him by the nature of his trust, and will account for and pay over all money which may come into his hands pursuant to the orders and decrees of the Probate Court. The account must be rendered to and settled by the Court, and the money must be paid out and distributed by and pursuant to the orders and decrees of the Court, and the undertaking of the sureties is that their principal will do all this. "The Ordinary agrees to place in the hands of the administrator the goods, chattels, etc., of the deceased person, to be by him well and faithfully administered, and the administrator and his sureties undertake that the administrator shall make a just and true account, etc.,

Irwin v. Backus et als.

whenever required by the Ordinary, and pay over, etc. Now the administrator is the person who is cognizant of all the affairs of the estate. The surety is not supposed to know anything about the accounts. The surety is not required to go before the Ordinary. He knows that he cannot be made liable until his principal has been called to account, to pay over, and a decree to that effect has been made by the Ordinary. His contract, then, is made with reference to all this." (*Lyles v. Caldwell et al.*, *supra*.)

The condition of the bond in the present case is to the effect "that the said Backus shall faithfully perform all the duties enjoined upon him by law as such Public Administrator, and particularly that he will account for and pay over all moneys and property that may come to his hands as such administrator." This means that he will account to the Probate Court and will pay over, to such persons as such Court may direct, all moneys and property of which he may become possessed in his official capacity; or, in other words, he will obey the orders and decrees of such Court. Such are the terms of the contract, and, upon the refusal of the administrator to obey such order or decree, the liability of the sureties attaches, and they are bound to make good the default of their principal, and cannot go behind the decree to inquire into the merits. They may show in defense either that the bond was not made, or that the decree was not made; or, if made, that the same has been obeyed; or that the same was obtained by fraud or collusion; but they cannot show that the Court has erred in making the decree, or that no assets ever came into the possession of the administrator, although the Court has so found and adjudged. If any error has been committed a remedy is afforded by appeal. Until the order or decree is reversed it is equally conclusive upon the administrator and his sureties. (*The People on the relation of Demarest v. Laws*, *supra*.) We think the proceedings of the Probate Court were admissible, and, in the absence of any fraud or collusion, were conclusive upon the sureties both as to the *devastavit* and the amount thereof.

Hurlburt v. Jones.

It follows from what has been said that the verdict of the jury was right, although errors may have been committed by the Court; and there being no pretense that the decree was the result of fraud or collusion, a new trial would not result in any advantage to the appellants.

Judgment affirmed.

FOSTINA E. HURLBURT v. GEORGE F. JONES.

EVIDENCE.—It is not error for the Court to reject testimony offered by the plaintiff to prove allegations of the complaint which are admitted by the answer.

SOLE TRADER.—If a husband arranges with his wife that she engage in business as a sole trader for the more purpose of shielding their joint earnings against the existing and subsequent creditors of the husband, and with the understanding between them that the property used in or acquired by the business shall belong to both, and the husband have power to dispose of it, this is a fraud upon the creditors, and the property is liable for the husband's debts.

SAME.—If a husband embarrassed with debt makes a settlement upon or conveys to his wife, as sole trader, property, for the purpose of delaying or defrauding his creditors, the conveyance is void.

FINDINGS OF FACT.—If the findings of fact of the Court below are defective, and no objection is taken to them on that ground in the Court below, the objection cannot be raised in the Supreme Court.

APPEAL from the District Court, Fifteenth Judicial District, Colusa County.

On the trial in the Court below, when plaintiff offered the lease from Ord to her in evidence, defendant objected to the same because there was a subscribing witness.

The Court sustained the objection.

The other facts are stated in the opinion of the Court.

George Cadavalader, for Appellant.

The lease should have been admitted in evidence.

The rule in regard to error is correctly stated in the case of *Jackson v. Feather River Co.*, 14 Cal. 25, viz:

"Every error in the Court below in the rejection of evidence is *prima facie* an injury, and it rests with the other party

Hurlburt & Jones.

clearly to show that no hurt would have been done, or was done by the error."

The Court will see that it is not possible that the Court below should have considered the execution of the lease proved when it expressly held that our evidence was insufficient. (See *Verzan v. McGregor*, 23 Cal. 339.)

It is urged by respondent's counsel in substance, that the finding of the Court below to the effect that we had shown no item of property used in our business but what came from the husband, must be considered as conclusive, because we failed to except thereto in the manner pointed out by the statute of 1861.

The Act of May 20th, 1861, has no application to this case, as it has special reference to cases in which appeals have been or are taken directly from the judgment, and where parties rely for a reversal upon the fact that the Court below had failed to file any finding, or that the finding filed was defective. In such cases the object of the statute was to oblige parties to first challenge the correctness of the findings in the Court below, or to demand of the Court that it file a finding.

This statute was passed to meet the views of this Court in *Duff v. Fisher*, 15 Cal. 375, and since then the rule has been held that on an appeal from the judgment (without the intervention of an application for a new trial) this Court would not reverse because there was no finding, or a defective finding, without the attention of the Court below was specially directed to the defect, and it refused after such request to make the necessary correction. This is the statute of 1861, and as will be seen, it refers alone to the correction of judgments on appeal in cases where there has been no finding, or a defective finding.

It has nothing to do with the practice of challenging the correctness of findings of fact upon motions for a new trial, which is this case.

Robinson & McConnell, for Respondent.

Hurlburt v. Jones.

By the Court, SHAFER, J.

This is an action brought by a married woman, to recover the possession of a certain quantity of wheat levied on by the defendant, as Sheriff of Colusa County, as the property of her husband. The plaintiff claims to own the wheat as sole trader, under the Act of 1852.

The answer first denies the principal allegations of the complaint. Second, justifies the seizure complained of, on the ground that the plaintiff became a sole trader, or operator, in "a general ranching business" in 1857, for the purpose of hindering, delaying and defrauding the creditors of her husband, and it is further alleged that the seizure in question was made by virtue of a writ of attachment, issued in an action brought against the husband by one of his creditors, in 1862; and that the wheat was in fact the property of the husband.

The trial was by the Court, and the judgment rendered was in favor of the defendant. The appeal is taken from the judgment, and from the order overruling plaintiff's motion for a new trial.

1. On the trial the plaintiff offered in evidence a lease to the plaintiff from one Robert Ord, executed October 20, 1858, and offered to prove by Ord the execution of the lease. On objection taken by the defendant, the lease was excluded, and the plaintiff excepted.

The execution of the lease was charged in the complaint, and it was further averred that the lease was of the land upon which the wheat in question was raised; and neither of the allegations was denied in the answer.

The execution of the lease was not in issue, and we do not consider that the Court erred in excluding evidence that had no bearing upon any of the points in controversy. Had the answer not admitted that the wheat was raised upon the land included in the lease, it might have been proper for the plaintiff to give her lease in evidence for the purpose of applying the lease by proper proof to that land. But in view of the fact that the authenticity of the lease and its application to

the land on which the crop was raised were both admitted, the ruling of the Court cannot be considered as erroneous.

But it is insisted for the appellant, that it is apparent from the findings that the Court, in deciding the case, failed to notice the state of the pleadings in relation to the execution of the lease.

To this objection it is sufficient to say, that if the ruling of the Court excluding proof of the lease was not erroneous at the time it was made, it could not have become so thereafter by the inattention alleged.

2. It is further insisted by the appellant that the findings of the Court are not supported by the evidence, and that the decision is against law.

The findings, the correctness of which is questioned by the plaintiff, are those relating to the special defense set up in the answer.

If a husband, embarrassed with debt, should make a voluntary settlement upon his wife; or should he in like manner convey to her, as sole trader, any considerable portion of his estate, the conveyance would, or at least might be, void as to the existing and subsequent creditors of the husband. But that case is not this. Here the wife was not endowed by the husband at the time when her declaration was filed, nor was there any evidence introduced at the trial tending to prove that he ever transferred to her any property of his thereafter.

If, however, the husband of the plaintiff, being embarrassed with debts, arranged with his wife in 1857 that she should engage nominally in the business of ranching, as a sole trader under the Act of 1852, for the mere purpose of shielding their several and joint earnings against existing and subsequent creditors of the husband, it being further understood between them that all crops, as well as all issues and profits, should belong to him as between the two, and that the absolute power of disposing of them should remain with him, we consider that such agreement would be not only foreign to the object contemplated by the Act of 1852, but a manifest fraud upon it.

Assuming that the arrangement between the plaintiff and her husband was of the character suggested, then when the wife took her lease from Ord, in 1858, she held it in trust for her husband or as common property; and when the wheat was harvested thereafter, in 1862, she held that in like manner. The Act of 1852 is not fulfilled by a married woman making, recording and advertising a declaration of intention to carry on business in her own name, nor by her so carrying it on in fact. These formal requirements can be very easily complied with. The substantive provision of the Act is, that, these forms having been duly observed, the woman shall, in good faith, actually carry on the business thereafter "on her own account." But if she prosecutes the business on her husband's account in fact, and with a view to shield his or the joint earnings, against the rights of existing or subsequent creditors as a principal purpose, she is entitled to no protection.

From an examination of the testimony and findings we are satisfied that the case was tried and determined upon the theory last suggested. There was evidence in the case tending to prove all the facts upon which that theory proceeds, and though opposed, to some extent, by other facts proved by the plaintiff, still we cannot grant a new trial where the evidence is in conflict.

The findings are objected to as defective. They are so, and perhaps to a greater extent than the appellant claims. The facts as found are, with some exceptions, secondary and not final—mere matters of circumstantial evidence rather than facts entering as terms into propositions of law. But no exception was taken to the findings as defective, as required by the Act of 1861. Strictly, the case should, perhaps, be treated as a case without a finding, and without exception taken for the want of it, and under that aspect we must presume that the Court found from the testimony all the facts essential to the defense.

Judgment affirmed.

Wiseman v. McNulty et al.

JAMES WISEMAN v. THOMAS McNULTY, JAMES BRADY, JOHN FURLONG, MOSES FURLONG, JOHN DOOLY, PATRICK CODY, MICHAEL CODY, H. F. NICHOLS, LAWRENCE NOLAN, JOHN SHARP, JOHN KIRK, MAT SAFFIN, AND MARTIN SAFFIN.

CONSTABLE'S SALE OF PROPERTY OF TENANTS IN COMMON.—If several persons are the owners of a tract of mining claims as tenants in common, and are known by a company name, and an action is commenced against all of them as individuals composing the company on a money demand, and a judgment is rendered against all as the persons composing the company, and the claims are sold by virtue of an execution issued on the judgment, and a deed executed to the purchaser, and if one or more of the defendants were not served with process and did not appear in the action, the purchaser does not acquire any title as against the persons not served with process and who did not appear.

CONSTABLE'S DEED.—A Sheriff or constable's deed, executed under an execution sale which does not recite the judgment on which the execution was issued, is void.

VERDICT WHERE SEVERAL DEFENSES ARE PLEADED.—Where several defenses are pleaded, either of which is good in law, and the verdict is for the defendants, and the Court errs in its instructions to the jury as to one of the defenses, the judgment will be reversed, unless it is made to appear that the verdict was rendered on one of the defenses in relation to which no error was committed.

FORFEITURE OF A MINING CLAIM.—Where a forfeiture of an interest in a mining claim for non-payment of assessments is claimed under an agreement entered into by all the tenants in common owning the same, the parties claiming the benefit of the forfeiture must show an exact compliance on their part with all the conditions in the agreement, or they will not be entitled to the forfeiture.

FORFEITURE.—In order to have a forfeiture take place, there must be some person, natural or artificial, who is entitled to receive the benefit of the forfeiture when it accrues.

FORFEITURE—TENANTS IN COMMON.—Several persons owning a tract of mining claims as tenants in common, and acting under a company name, have not the capacity to take or hold, in the name of the company, the interest of any one or more of the tenants in common, by forfeiture.

REAL ESTATE—TENANTS IN COMMON.—Tenants in common of a tract of mining claims, acting under a company name, are incapable, in the company name, of taking and holding mining claims by grant, or by any other means by which title to real estate would pass.

FORFEITURE OF REAL ESTATE.—No forfeiture of real estate can take for non-performance of conditions precedent or subsequent, unless there are two contracting parties who have, at the same time or successively, an interest in the estate upon which the condition is reserved, for the non-performance of which the forfeiture is claimed.

SAME.—One owning land, and who continues to hold all the interest he ever had in it, cannot annex a condition to his estate of such a character that, upon its breach, the estate shall vest by forfeiture in a person who never held any interest in the land.

Waring v. Crow, 11 Cal. 366, commented on.

Wiseman v. McNulty et als.

APPEAL from the District Court, Seventeenth Judicial District, Sierra County.

The following is the contract entered into between the members of the Richardson Company and those composing the Buffalo Company:

“GOODYEAR’S BAR, Nov. 16, 1856.

“Know all men by these presents, that we the undersigned, do bargain with each other as follows, viz: We of the first part, known as the Richardson Company, do agree with those of the second part, known as the Buffalo Company, to run a bed rock tunnel on the ground of the first mentioned company, on Fir Cap Hill, until they reach the channel; then the Buffalo are to strike off a tunnel through the grounds of the first mentioned company until they reach their own ground; said tunnel to be no wider than six feet, and the Buffalo Company to keep all the gold taken out of the side tunnel, and the main tunnel to be forever undivided property of both companies, unless said Buffalo Company wish to run a new tunnel for their own use; in that case the Richardson Company are to pay back their portion of what the first tunnel cost.”

Signed by the members of the two companies, respectively.

The following is the judgment upon which the execution issued, by virtue of which the mining claims were sold:

“*E. Gifford v. J. Donahue et als.* Action for the recovery of the sum of one hundred and eighty-three dollars and thirty-seven cents, alleged to be due the plaintiff on book account. Copy of account filed October 14th, 1861, and summons issued returnable on the 16th inst., at 1 o’clock P. M.; summons returned served personally upon M. Donahue, Larry Nolan, P. Cody, and H. F. Nichols, in Township No. 6. On the 16th day of October, 1861, at the hour of two o’clock of that day, the plaintiff appeared by his attorney, A. A. Cooper. The defendants came not, but made default.

"Whereupon, on motion of plaintiff's attorney, it is ordered and adjudged by the Court, that E. Gifford, the plaintiff, do have and recover judgment of, from, and against John Donahue, M. Donahue, Larry Nolan, B. Kenneif, D. O. Keefe, P. Cody, H. F. Nichols, Pat. Haley, James Wiseman, R. Anderson, John Doe, R. Roe, and H. Hoe, composing the Richardson and Buffalo Company, on the verified complaint of the plaintiff setting forth a copy of the book of original entries, for the sum of one hundred and eighty-three dollars and thirty-seven cents, together with costs, taxed at fourteen dollars and fifty cents, and accruing costs. On motion of plaintiff's attorney, execution issued.

'T. B. PARKS, J. P.'

The following is the agreement entered into by the members of the Hibernia Company after the Constable's sale, and the formation of that company:

"At a meeting of the Hibernia Mining Company, held at Goodyear's Bar, the following resolution and agreement was adopted:

"*Resolved*, That for the purpose of running a tunnel upon the mining claims of said company, in the Fir Cap District, an assessment shall be levied on the members thereof once in four weeks, until the said tunnel is completed; and if any member of said company shall neglect or refuse to pay any assessment, until after three of the same shall be levied, he shall forfeit his claim or share to said company; and the company is authorized in the event aforesaid, to enter upon and take full, complete, and absolute possession of said claims so forfeited, without suit or other proceeding. Dated May 26th, 1862.

"John Kirk, James Wiseman, John Furlong, three claims; Dennis O'Keefe, Lawrence Nolan, two claims; Moses Furlong, three claims; Patrick Cody, Matthew Saffin, two claims; Martin Saffin, two claims; John Dooly, half claim; H. F. Nichols, Joseph Killbride, Jas. E. Nolan, Patrick Daley."

It was under the foregoing agreement that the defendants claimed a forfeiture.

Wiseman v. McNulty et als.

Defendants recovered judgment, and plaintiff appealed.
The other facts are stated in the opinion of the Court.

Creed Haymond, and *Williams & Johnson*, for Appellant.

In Bingham & Colvin's Treatise on Rents, Covenants, and Conditions, page 146, it is said that:

"While a party lives there are only three ways whereby the absolute property of real estate, *once vested*, can pass out of him: by his own deed, by sale under the judgment of some competent judicial tribunal, and by the exercise of the right of eminent domain. There is no such thing known as a forfeiture that can deprive a party of the absolute ownership of property. The commission of crime was formerly made to work such a result, but it is now provided that no conviction of any person, etc." And again, page 147: "There is an obvious difference in depriving a party of the use of another's property for the violation of certain conditions which have been affixed by contract or the laws of the State, and depriving him of his own property for default or dereliction." Again, same page: "Will any one contend, that if the owner should covenant to pay a certain sum at a certain time, and in case of default, forfeit his land to the covenantee, *with provision of entry*, that it would be operative to vest title in the covenantee, so that he could maintain an action of ejectment to get possession, *or if he were in possession that he could not be removed?*" There can be no dispute among lawyers as to such a question. No such mode of passing title to property is known. And again, pages 147 and 148: "But conditions cannot be imposed upon one's own property by covenant or agreement to be complied with by the owner, the non-compliance with which shall pass his title to another."

"It is a general principle of the common law, that whoever seeks redress for the violation of a contract resting upon mutual and dependent covenants, to obtain success, must himself have performed the obligations on his part." (*Conant v. Conant*, 10 Cal. 254.)

And that "The condition of an obligation is considered as

Wiseman v. McNulty et al.

the language of the obligee, and is so construed in favor of the obligor." (Note B, page 22, 2 Parsons on Contracts.)

Contracts by reason of which a forfeiture is claimed, must be strictly construed. (*Von Schmidt v. Huntington*, 1 Cal. 71; *Ruiz v. Norton*, 4 Cal. 357; Sec. 60, Cal. Pr. Act; *Askew v. Ebbertz et al.*, 23 Cal. 263; *Colman v. Clements et al.*, 23 Cal. 245.)

Vanclief & Bowers, for Respondent.

Of course, the mere failure to pay assessments could not work a forfeiture without the assistance of a contract or law.

The passages cited from the Treatise of Bingham & Colvin, goes the length of saying, that an absolute title to property cannot be forfeited. This, we think, is not law. But the estate of miners, in their claims on the public land, is certainly not greater than an estate for life or years.

In construing contracts, Courts are not to depart from what appears to be the intention of the party to prevent a forfeiture.

In *Woodson v. Skinner*, Missouri R. vol. 22, p. 23, the Court say: "Whilst Courts will not incline to forfeitures, yet where a right to exact forfeiture is given, they should not withhold a reasonable construction from the written instrument by which they are designed to be enforced."

To the same effect is *Jackson v. Topping*, 1 Wend. 394, where the literal and grammatical meaning of the language was departed from to support a forfeiture.

By the Court, RHODES, J.

The plaintiff sues in ejectment, to recover the possession of three undivided seventeenths of a tract of mining ground, known as the mining claims of the Buffalo Mining Company, in Fir Cap Mining District, in Sierra County. It appears that the plaintiff, Dennis O'Keefe, Patrick Daley and twenty others took up and worked these claims in 1856; that subsequently the number of claimants was reduced to seventeen, the said plaintiff, O'Keefe and Daley each owning the one

undivided seventeenth of the Buffalo Company's mining claims; that in 1858 the members of that company united with the members of the Richardson Company, whose claims adjoined those of the Buffalo Company, in running a tunnel in the Richardson Company's claims for the benefit of both companies; that the plaintiff, O'Keefe and Daley worked upon the tunnel and paid assessments to some time in 1861. In October, 1861, three judgments were rendered by a Justice of the Peace against certain persons mentioned as "composing the Richardson and Buffalo Company," and in November following a constable sold and conveyed to L. Nolan, the mining grounds "known as the Richardson and Buffalo Company claims," under an execution against the same persons named as defendants in each of the three judgments.

The purchase was made by Nolan, for the benefit of himself, the plaintiff, O'Keefe and Daley, and a number of others, who were members of those two companies and who contributed their proportion of the purchase money; but it does not appear that Nolan conveyed to them any interest in the claims purchased by him at the constable's sale. Shortly after the execution of the constable's deed to Nolan, he and those for whom he made the purchase formed a company, known as the Hibernia Company, to prosecute the working of the claims of the two former companies. At a meeting of the Hibernia Company in May, 1862, a resolution was adopted by those representing a certain number of claims, among others the plaintiff and his grantors, to levy an assessment once in four weeks, for the purpose of running the tunnel; and the company took possession of the claims and continued to work them until the commencement of this suit. An assessment was levied on the 20th or 24th of July, 1862, which was paid by the plaintiff, O'Keefe and Daley; and subsequently six other assessments were levied, but neither the plaintiff, O'Keefe nor Daley paid either of them. The plaintiff said in October, 1862, that he would not pay any more assessments, and he did not work upon, and was not on, the claim after some time in 1861.

In May, 1863, "a rich prospect was struck" by the Hibernia Company for the first time, and on the 27th of June, 1863, O'Keefe and Daley conveyed to the plaintiff, their right, title and interest in the Buffalo Company's claims. Neither of the three companies seems to have been incorporated, but the persons composing them appear to have formed a voluntary association without any agreement in writing. Such are some of the facts that we have gleaned from a record almost devoid of an alphabetical index, and without the assistance of a statement of facts, which should have formed a portion of the briefs in the case.

The defendants rely upon three defenses:

First—The sale by the constable to Nolan.

Second—Abandonment by the plaintiff and his grantors; and,

Third—A forfeiture of the claims of the plaintiff and his grantors for the non-payment of assessments.

The sale under either of the three judgments rendered by Park, J. P., and the constable's deed, were void, so far as the plaintiff, O'Keefe and Daley were concerned, because it does not appear that the summons in either action was served upon either of them, and no appearance in the actions was made by them or in their behalf, the defendants not being joint owners, but being tenants in common of the mining claims.

The constable's deed, as to them, was void for that reason, and for the further reason that it does not recite any judgment upon which the execution issued. (*Donahue v. McNulty et als.*, 24 Cal. 411.)

Second—If the jury had found for the defendants on the ground of *abandonment*, we would not be inclined to disturb the verdict, for we could not say that there was not sufficient evidence from which the jury would be authorized in finding that the plaintiff had abandoned his claim, and that O'Keefe and Daley had also abandoned their claims, but we cannot undertake to say that the jury rendered their verdict for the defendants on that ground, for the question of forfeiture seemed to be pressed more than any other point, and the

plaintiff complains of instructions given by the Court on that point, and of the refusal of the Court to give other instructions asked for by him, and the jury may have found for the defendants upon that question alone.

Third—As to the forfeiture of the claims of the plaintiff and his grantors to the Hibernia Company. The agreement, in the form of a resolution, signed by the plaintiff and his grantors, and a part of the defendants, provides that the assessment shall be levied upon the members of the company “once in four weeks until the tunnel is completed.” No provision is made for levying assessments at any other time or for any other purpose. In order that a forfeiture might be produced it would be necessary to prove that the assessments had been levied once in four weeks, and not at other times, for by stipulating for a levy at those intervals of time they have excluded the right of levying assessments at other times. The assessments must have been made for the purpose of running the tunnel, and not to meet other expenses incurred in respect to the enterprise. The evidence shows that the assessments were not levied every four weeks, and it is not proven that the assessments were made solely for the running of the tunnel. Such strict proof is required, because the law does not favor forfeitures. When, by the contract, any covenant or agreement is to be kept or performed, as a condition precedent, by the party claiming the benefit of a forfeiture, he must show an exact compliance, or he will not be entitled to the forfeiture. (*Von Schmidt v. Huntington*, 1 Cal. 71.)

It is unnecessary to determine the question that the counsel have very earnestly pressed, whether the party claiming a forfeiture should have the same declared by a judgment of a competent Court, for it will be doubtless found that each class of cases would, in that respect, depend upon its own peculiar circumstances.

But there are questions which we think lie back of the question just mentioned, and which should be first disposed of. (2 Black. Com. 267,) defines forfeiture as follows: “Forfeiture is a punishment annexed by law to some illegal act or

negligence in the owner of lands, tenements, or hereditaments, whereby he loses all his interest therein, and they become vested in the party injured, as a recompense which he alone or the public together with himself hath sustained." This definition, which we consider quite accurate, necessarily implies that there must be some person, natural or artificial, who is entitled to receive the benefit of the forfeiture when it accrues. The resolution adopted by the Hibernia Company provides that, in case of non-payment of assessments, etc., "he shall forfeit his claim to the company," and the company is authorized to enter upon and take possession of the forfeited claim. It is not agreed that it shall be forfeited to the persons composing, or those that might thereafter compose, the company, nor to any individual by name. The company does not appear to be a corporation nor even a partnership, holding the claims as partnership property, but simply a voluntary association not formed by articles in writing and without legal existence—a body unknown to the law. As such, the company would be incapable of taking and holding mining claims, by grant, or by any other means, by which title to real estate would pass. As far as appears upon the record, the persons owning claims, who associated together in the formation of the Hibernia Company, were tenants in common of those claims; at least the members of the Buffalo Company, and of the Richardson Company, were tenants in common with each other in their respective companies, and neither party contends that they were partners, or held the claims as partnership property.

The members of the Hibernia Company did not agree, that those who paid the assessments, should receive the forfeiture of the claims of those who failed to pay, and they could not agree with the company that it should enter upon and possess the forfeited claims, because the company was a legal nonentity.

Further: it is, to say the least, very doubtful if the term forfeiture, according to its common law signification, has any application to the rights, interests, or remedies of the several persons composing a mining association, such as we find in this case; and we think it has none.

“Lands, tenements and hereditaments may be forfeited by various means: 1. By the commission of crimes and misdemeanors. 2. By alienation contrary to law. 3. By the non-performance of conditions. 4. By waste. (Bac. Abridg., Forfeitures; Bouv. Law Dict.) Clearly, none of these modes of forfeiture are applicable to estates held as in this case, unless it be the third—the non-performance of conditions.

For the creation of a condition, for the annexing or reserving of a condition, precedent or subsequent, to or upon an estate—whether it is created directly by covenant or agreement, or arises by implication in any manner known to the law, except in the case of a will—two contracting parties are necessary, who have at the same time, or successively, an interest in the estate upon which the condition is reserved.

Bouvier says, in defining a condition: “In its most extended signification, a condition is a clause in a contract or agreement which has for its object to suspend, rescind, or to modify the principal obligation; or in the case of a will, to suspend, revoke, or modify the devise or bequest.” This definition (except when applied to a will) necessarily requires the execution of a contract. It is also said of conditions annexed to an estate in lands: “Conditions can only be reserved to the feoffer, donor or lessor and their heirs; but not to a stranger.” (Bac. Abridg., Forfeitures, O.) It may be asked, then, how can a condition be annexed to an estate in land by a party owning it, and who continues to hold all the interest he ever had in it, which condition is of such a character that upon its breach the estate shall vest by forfeiture in a person who never held any interest in the land, and has not attempted to convey it; and much more, in an association of persons who, in their collective capacity, are incapable of taking an estate in lands? “He who enters for condition broken shall be in of the same estate he was before.” (Bac. Abridg., Forfeiture.)

In *Waring v. Crow*, 11 Cal. 366, Mr. Justice Baldwin, in employing the term *forfeiture*, uses it as synonymous with abandonment, and holds that the mere failure to pay assess-

ments does not produce a forfeiture of the claim of the delinquent owner; and he says that "the mere temporary absence of one partner" would not, under the mining regulations of the vicinity, create "a forfeiture of his interest," so that "a stranger could then come in and appropriate his share." There was no issue of a forfeiture in the case, and the learned Judge employed the term in the sense in which it is used among miners, as expressing a loss of the claim by the former owner by abandonment, or by what they considered as amounting to the same thing, by ceasing to work it or refusing to pay assessments, so that any *other person* might take it up, not the vesting of the title in the grantor for condition broken. And he says that, "in order to the enforcement of the *claim*, (not *forfeiture*, as quoted in the appellant's brief,) some appropriate action by suit must be taken to liquidate the demand and sell the property," etc. A lien upon the property, or a claim against the owner, may be enforced in that manner, but a forfeiture cannot; and the opinion of the Court does not give the most distant intimation that it could be worked out in that mode.

It is easy to understand the rights and remedies of the parties where one has contracted with his associates who are jointly interested with him in a mining enterprise, that his share or claim shall stand as security for the payment of his proportion of the expenses that may be incurred in the prosecution of the enterprise, or that they shall have a lien on his claim in the nature of a mortgage, with the power of sale, to collect his share of such expenses, or that upon his failure to do certain things his claim shall be deemed to be abandoned; but no one of these covenants amount to a *condition* subject to which the claim is taken or held, and the breach of any of all of these covenants will not produce a forfeiture, as recognized at common law.

The authorities cited by the counsel for the defendants upon the point of forfeiture are all clear cases of forfeiture at common law. *Woodson v. Skinner*, 22 Mo. 23, was a case of a lease for years by the City of St. Louis, the lessee covenant-

ing to pay rent, and that if the rent should be in arrear beyond a certain time he should forfeit his term. He made default in the payment of rent, and the Court held that the lease was forfeited to his grantor, the city. In *Jackson v. Topping*, 1 Wend. 394, a father granted his lands to one of his sons upon the condition that he should support his father and pay his father's debts, with a clause of re-entry in case of default. The son failed to pay one of the debts. The Court held that it was a case of an estate upon condition, and that the heirs of the deceased father had a right of entry for the forfeiture, arising upon the breach of the condition.

The cases cited by the defendants from 11 John. 299; 14 Id. 120; 15 Id. 24, were cases where by law the penalty for the violation of the Non-Intercourse Act was a forfeiture of the goods, and the case in 5 T. R. 120, was a forfeiture for a violation of the revenue laws. Forfeitures for crimes and misdemeanors proceed upon different principles from those arising upon contract. Those cases show what are the rights of the parties in certain classes of cases, where a forfeiture has taken place as a penalty for crime, but they do not assist us in solving the question whether the defendants here had the right to claim a forfeiture.

Again, if the result contended for by the defendants can be worked out in the manner they claim, and the title of the delinquent claimholder can be thus transferred to his associates or to the company, we will then find that we have a new mode of transferring titles—a mode in which neither the owner nor any one acting under his authority, or under or in pursuance of a judgment of a Court, conveys the title—a mode in which the new holder of the title comes in, neither by forfeiture for crime or for breach of condition annexed to the grant made by him, his ancestors or grantors, nor by purchase in its most enlarged sense, nor by descent, nor by title accruing to him by operation of law. An intended purchaser would look in vain to the records in the Recorder's office or in the Courts, for the evidences of the transmission of a title in that mode.

People v. Stratton.

The term "forfeiture" is often employed by miners as synonymous with abandonment, but the term we have considered is used in the objectionable instructions, not as denoting abandonment, but as a mode of transferring title.'

What we have already said sufficiently manifests our opinion in relation to the instructions complained of, without noticing them in detail.

Judgment reversed and the cause remanded for a new trial.

THE PEOPLE OF THE STATE OF CALIFORNIA *ex* *rel.* FRANK M. PIXLEY, ATTORNEY-GENERAL, *v.* JAS. T. STRATTON.

ATTORNEY-GENERAL—FILING INFORMATION.—The Attorney-General may file an information in the nature of a bill in chancery, to annul a patent for lands granted by this State to an individual, in a case where the matter involved in the suit immediately concerns the rights and interests of the State.

INFORMATIONS BY ATTORNEY-GENERAL.—An information is, in its substantive characteristics, a bill in equity, and when it concerns only the rights of the Government, or those whose rights are under the particular protection of the Government, is exhibited in the name of the Attorney-General as the informant; and in the former case a relator is sometimes, and in the latter case always, named who in reality sustains and directs the suit.

INFORMATION TO ANNUL PATENT.—If the State has no interest in the subject matter, an information on the relation of the Attorney-General, on behalf of the State, to annul a patent cannot be sustained.

SAME.—If private citizens have an interest in the lands granted by the patent, and are threatened with injury by the patent, the information should be filed in the name of one or more of such persons, provided they are without adequate remedy at law; and in such case the relator's personal complaint should be joined to and incorporated with the information.

SAME.—An information on the relation of the Attorney-General, on behalf of the State, to annul a patent which avers that the State has no interest in the lands patented, does not state facts sufficient to constitute a cause of action.

SWAMP AND OVERFLOWED LANDS.—If a State issues a patent for lands as swamp and overflowed lands, and the same are high lands as contradistinguished from swamp and overflowed, no title passes to the patentee by the patent; and any person having an interest in the lands may show that fact in his defense in an action at law by the patentee to recover possession.

PATENT AS EVIDENCE.—Though a patent be in fact issued without authority of law, because the State had no title to grant, the presumption in an action of ejectment is, in the first instance, that the patent is valid and passes the title, and the burden of proof is cast on the one who undertakes to impeach the patent to establish the facts necessary for its overthrow.

People v. Stratton.

WHO MAY ATTACK PATENT.— If a patent is issued without authority of law, or the State had no title to grant, a person who owns the lands patented may invoke a Court of equity to restrain by perpetual injunction its use as evidence, or may maintain an action in his own name to annul it.

APPEAL from the District Court, Third Judicial District, Alameda County.

The facts are stated in the opinion of the Court.

W. W. Crane, Jr., for Appellant.

All prosecutions on behalf of the State must be in the name of The People of the State. (Constitution, Art. VI, sec. 18.)

The Attorney-General is the Attorney of the State, and in an action on behalf of the people, his authority to prosecute the suit must be presumed until the contrary be shown. He is not called upon to plead or show his authority. (*State of Louisiana v. Smith*, 13 Louisiana Annual Rep. 424; *Commonwealth v. Fowler*, 10 Mass. 290; *Commonwealth v. Union Fire and Marine Ins. Co.*, 5 Mass. 230.)

A patent can only be set aside by *scire facias*, information, or bill in chancery. (*Jackson v. Lawton*, 10 John. 23; *Bagswell v. Broderick*, 13 Peters, 436; 8 Bacon's Abridg. 608.)

An information and bill are substantially the same, and when the people of the State are interested, the complaint is either by information or bill. (Mitford's Equity Pleadings, 22, 23; Story's Equity Pleadings, secs. 7-9.)

Patterson, Wallace & Stow, for Respondent.

If the land was (is) swamp and overflowed, the State has no interest to set aside the patent, because the sale was authorized by the statutes.

If not swamp and overflowed land, the State has no interest, but has received respondent's money without any consideration, and the patent was void for want of power to issue it. (*Summers v. Dickinson*, 9 Cal. 555; *Den v. Hill*, McAllister's R. 480; *People v. State*, 3 Barb. 556; *Burleson v. McGee*, 15 Texas, 375.)

If third persons have any title to, and they can show in an action of ejectment, or by filing a bill *quia timet* (Practice Act, sec. 8) that the patent is void for want of power to issue it. (9 Cal. 555.)

By the Court, CURREY, J.

The Attorney-General filed his Information on the 6th of July, 1863, in the District Court of the Third Judicial District, in and for the County of Alameda, against the defendant, for the purpose of having the Court declare void and annul a patent for lands granted by the Governor of the State of California to the defendant, in April, 1862. The defendant was brought into Court by proper process and filed his answer to the information.

From the information it appears that in November, 1861, the defendant commenced proceedings, under the Acts of the Legislature providing for the sale and reclamation of the swamp and overflowed lands of this State, with a view of obtaining a title from the State to certain lands described in the information; and it is charged that he falsely represented the lands as of the character and quality mentioned in those Acts, and also that he so represented that he did not know of any legal or equitable claim, other than his own, to such lands; and it is alleged that by means of such false representations he obtained a patent for the lands described therein, when, in fact, they were not swamp or overflowed, salt marsh or tide lands, but were high lands, and that he well knew they were in the possession of divers persons, named in the information, who had a legal and equitable claim thereto; and the information further sets forth, that immediately after defendant obtained his patent he commenced an action against the persons named as having a legal and equitable claim to the lands, for the recovery of the possession thereof.

The answer of the defendant meets the several allegations and charges contained in the information; some by denials,

and others by confession and avoidance, by which an issue on every material matter of the information was joined.

At a term of the Court held in November, 1863, the defendant made a motion to dismiss the information and all the proceedings in the action on the grounds:

First—That the Attorney-General had no authority or power to institute or prosecute the proceedings in this action in the name or on behalf of the people of the State of California.

Second—That the proceeding by information is unknown to the laws of the State of California, and is not the proper proceeding to obtain the relief prayed for in the information filed.

After having heard counsel for the respective parties, the Court granted the motion upon the ground first set forth, and ordered and adjudged that all the proceedings in the action be dismissed and held for naught, and that the defendant go thereof without day. From this judgment the appellant has taken this appeal.

As the case stands upon the respondent's motion to dismiss the information, it must be considered that the allegations contained in it were true; and then the points to be determined are, in the first place, whether the action could be instituted and maintained in the name of the people of the State upon the information of the Attorney-General; and if it could, then, in the second place, whether the facts alleged constitute a case upon which the plaintiff is entitled to the decree thereby sought. We shall consider these propositions in their order as propounded.

1. The Third Article of the Constitution of this State is in the following language: "The powers of the Government of the State of California shall be divided into three separate departments—the Legislative, the Executive and Judicial—and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases hereinafter expressly directed or permitted." The Fifth Article

of the Constitution relates to the Executive Department of the State, and enumerates the officers who belong to it, and defines in general terms the powers and duties of some of such officers, while in respect to the powers and duties of others it is silent. The Attorney-General is of the number whose powers and duties are not in any manner specified in this Article or elsewhere in the Constitution.

In 1850 an Act was passed by the Legislature entitled "An Act concerning the office of Attorney-General," prescribing the duties of that officer. Among the duties which by that Act he was required to perform was to attend each of the terms of the Supreme Court, and there prosecute or defend all causes to which the State might be a party. Nowhere in the Act is it made the duty of the Attorney-General to institute any action in a Court of original jurisdiction on behalf of the State or otherwise; but it is declared that it shall be his duty to assist in all impeachments which may be tried before the Senate, and also whenever in his opinion required by the public service, or when directed by the Governor to repair to any district in the State and assist the District Attorney in the discharge of his duties. It is also made his duty, when required, to give his opinion in writing to the Legislature, or either House thereof, upon questions of law, and to the Governor and other officers mentioned upon any questions of law relating to their respective offices. (Laws 1850, p. 55.)

The Act, as already observed, does not make it the duty of the Attorney-General to institute any action on behalf of the State in any Court of original jurisdiction, and from this silence, it is argued on behalf of the respondent, he can have no such power without the aid of legislative enactment. But can this be so, when the nature and objects of the office are considered?

The Attorney-General is the law officer of the State, and he is classed as belonging to the Executive Department of the Government. The Governor is the chief executive of that department, and by the Constitution it is made his duty to see that the laws are faithfully executed, and to this end

he must have the authority, in order to execute the powers belonging to his high office, to call to his aid, when necessary, the services of this law officer. In England the Attorney-General was from an early period denominated an officer of State. He was elevated to this high position by letters patent granted by the King, and he was the legal representative of the Crown in the Courts of law and equity; he exhibited informations and prosecuted for the Crown in criminal causes; he filed bills in the exchequer in revenue cases, and informations in chancery respecting matters in which the Crown was interested. (Fortesque, Ch. 50.)

In *Commonwealth v. Fowler*, 10 Mass. 293, it was held that the Solicitor-General had the right *ex officio* to file an information against a person for usurping a public office; and in that case Mr. Chief Justice Parsons said: "An information for the purpose of dissolving a corporation, whether created by charter, under the seal of the Commonwealth, or by statute of the Legislature, may be prosecuted, either under the authority of the Legislature, to be exercised in each particular case, or by the Attorney or Solicitor-General acting *ex officio* in behalf of the Commonwealth." (See also *State of Louisiana v. Smith*, 13 Lou. Ann. R. 424.) The question as to the right of the Attorney-General of this State *ex officio* to file an information in the nature of a bill in chancery, to annul a patent for lands granted by the State to an individual, is one perhaps of difficult solution, but by analogy to the powers exercised by officers of like character in England, and in most, if not all of the States of the American Union, we think he may do so in a case where the matter involved in the suit immediately concerns the rights and interests of the State.

2. The disposition made of the first question we have considered does not necessarily determine this case, for whether or not the Court erred in dismissing and holding for naught the action and proceeding instituted, though as the ground for the decision a wrong reason may have been assigned, depends upon the remaining question: Did the facts and circum-

stances set forth in the information constitute a cause authorizing a decree in accordance with the prayer of the appellant?

The information filed must be regarded and treated in its substantive characteristics as a bill in equity. (Mitford's Ch. Pl. 21 and 120; Cooper Eq. Pl. 101 and 107; Story's Eq. Pl. section 8.) Informations in every respect follow the nature of bills except in their style. When they concern only the rights of the Government, or those whose rights are under the particular protection of the Government, they are exhibited in the name of the Attorney-General as the informant, and in the latter case always, and in the former sometimes, a relator is named, who in reality sustains and directs the suit. (*Ibid.*)

When the suit immediately concerns the rights and interests of the State alone, the Attorney-General proceeds by information, as was done in the case of the *Attorney-General v. Vernon and others*, where the defendants had, by surprise and false representation, obtained a grant by letters patent of crown lands. (1 Vern. 277 and 370.) In such case the object of the suit is to annul the patent that the State may re-invest itself with the title to the lands improperly granted. (4 Steph. Com. 48.) So, also, in *Attorney-General v. Richards*, in the Exchequer, (2 Anstruther, 603,) where a nuisance and purpessure, by the erection of a wharf or quay, docks and other buildings, had been committed between high and low water mark in Portsmouth harbor, it was held, upon the authority of many cases, that an information would lie to abate it, as the Crown had the right to all ports and arms of the sea, and to the soil thereof.

It will be observed by these cases that it was a matter of prominent importance that the Government was immediately concerned, as having a proprietary right in the subject matter sought to be affected by the suit.

In England, when the suit does not immediately concern the rights of the Government, as where the rights of those under its particular protection are concerned, as in the case of charities, having no charter to regulate them, or where there has been a trust conferred which has been abused, an informa-

tion may be filed in behalf of the Crown to have the charity properly established, or the grievance redressed. But where informations of this kind were filed, the Attorney-General depended upon the relation of some person, whose name was inserted in the information as the relator, and the suit was carried on under his direction, and he was held responsible to the Court and to the parties for the propriety of the suit and the conduct of it, (Mitford's Ch. Pl. 23,) and also for the costs, in case the information was dismissed. (Newland's Ch. Pr. 55; Cooper's Eq. Pl. 104; 1 Vesey, Sen. 72; 2 Vesey, Sen. 330.) It has been held, however, that a relator in such cases is not indispensable; that the Attorney-General, if he pleases, may proceed without one. (2 Swanst. 520; Story's Eq. Pl. sec. 8.) But the propriety of naming a relator, who should be held responsible for the bringing of the suit, and the oppression arising from a contrary practice, was particularly noticed in the case of *The Attorney-General v. Fox*, (cited in a note to page 24 of Mitford's Equity Pleading.) In that case no relator was named, and though the defendants finally prevailed, they were put to an expense almost equal to the value of the property in dispute, and were entirely without remedy for their costs. (1 Vesey, Sen. 72.)

If the State had no interest in the subject matter of the proceeding commenced to set aside the patent granted to the defendant, it is difficult to understand upon what principle the information, as an information purely on behalf of the State, could be sustained. It is like a complaint that fails to state facts sufficient to constitute a cause of action, for the reason that it does not appear that the plaintiff has any interest in the subject matter of the action.

If the information in this case was filed for the purpose of annulling the patent because of its threatened injury to citizens of the State having interests in the lands described therein, then it should have been filed upon the relation of one or more of such persons, provided such persons were without adequate remedy at law. And in such case the relator's personal complaint would be joined to and incorporated with the

People v. Stratton.

information given to the Court, forming together an information and bill in equity. (Mitford's Pl. 23; Cooper's Pl. 107.)

An information and bill cannot be supported unless the relator has some individual interest in the subject matter of the suit, (11 Sim. 380; 1 Vesey, Jr. 244,) and if the relator dies pending the action, no further proceedings can be had therein until a new relator is made a party to the record; for in a suit instituted by information and bill combined, the relator sustains both the character of plaintiff and relator. (Mitford's Pl. 120; Cooper's Pl. 107.)

The fact that the information in this case represents to the Court that the respondent had commenced an action of ejectment against divers persons in possession, and who had long been in possession of the lands described in the patent, by virtue of a legal and equitable claim, does not aid the appellant's case; for it does not appear that the State had anything to grant by the patent, but the contrary thereof is alleged; hence upon the appellant's own showing the patent could not operate to conclude any third persons as to rights and interests they might have in the lands described; and if the truth as to the character and quality of the lands be as stated by the information, it would be competent for any person having a legal right and interest in the lands to establish the fact in his defense at law to an action on behalf of the patentee to recover the possession. (*Patterson v. Winn*, 11 Wheat. 380; *Pol-lard's Lessee v. Hagan*, 3 How. 212; *Goodtitle v. Kibbe*, 9 How. 471.)

What may have been the origin or what may be the nature of the interests of the persons alleged to have a legal and equitable claim to the lands described in the patent, we are not advised by the information, nor do we deem it a matter of any particular importance to know. If such claim subsisted as a perfect title when California became ceded to the United States, then upon the happening of that event its character did not become changed for the worse by the treaty of cession. If the premises were high lands as contradistinguished from the lands the nature of which is described in the Acts of the

Legislature referred to, and were a part of the public domain at the time of the passage of the Act of the Congress of the United States by which California became one of the States of the Union, then it must follow that no title thereto could pass to the patentee by the patent issued, for by the Act for the admission of the State of California into the Union it was enacted "that the said State of California is admitted into the Union upon the express condition that the people of said State, through their Legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to and right to dispose of the same shall be impaired or questioned."

In *Patterson v. Winn*, 11 Wheat. 380, it is laid down as the settled doctrine of the Supreme Court of the United States, that if a patent granted by a State is absolutely void upon its face, or the issuing thereof was without authority, or was prohibited by statute, or the State had no title, it may be impeached collaterally in a Court of law in an action of ejectment. But notwithstanding the patent may have been issued without authority, or the State may have had no title to grant, the patent would, in the first instance, be presumed, in an action of ejectment, to be valid, and to pass to the patentee a title to the lands described, and the burden of proof would be upon the party who might undertake its impeachment to establish the facts necessary for its overthrow; because it is not to be presumed *in limine* that the State has granted by patent lands which it did not own or have the right to grant. The party who may be permitted thus to impeach a patent issued by the State must himself possess a *status* authorizing him so to do. He must show that he has title to the premises, or such an interest therein in subordination to the title, wherever it may reside, as will authorize him to call the true title to his aid. (*Terry v. Megerle*, 24 Cal. 609; *Doll v. Meador*, 16 Cal. 324, 325.)

If the persons who are represented by the information to have a legal and equitable claim to the lands described in the

Higgins v. Houghton.

patent have rights and interests therein of the character alleged they are not entirely without remedy at law, though it may not be adequate for every purpose. The remedy at law may be sufficient for their present protection, though by reason of the patent the burden of proof may be cast upon them to show that the lands in question were not of the description and quality that could be granted by the State. But as the burden of proof rests upon those who may rightfully claim the lands in hostility to the patent, which, as we hold, is *prima facie* evidence for the uses of the patentee, they may invoke the equitable interposition of the Court to restrain by perpetual injunction its use as evidence of title in the patentee; or perhaps the Court might go further and in the exercise of its plenary power set it aside. (2 Story's Eq. Jur. Ch. 17.)

But the party in interest in such cases may maintain an action in his own name, as thereby he can attain to the same end in effect that could be accomplished by a proceeding in the name of the people of the State upon his relation; and this course better accords with the system of procedure provided by statute in this State. (Practice Act, secs. 4 and 254.)

Judgment affirmed.

F. B. HIGGINS v. J. F. HOUGHTON, SURVEYOR-GENERAL OF THE STATE OF CALIFORNIA.

MINERAL LANDS.—Mineral lands are not excepted from the operation of the grant of the sixteenth and thirty-sixth sections in each township, made to California for school purposes by the Act of Congress of March 3, 1853.

SIXTEENTH AND THIRTY-SIXTH SECTIONS.—By the Act of Congress granting to California the sixteenth and thirty-sixth sections in each township, the State became the owner of said sections, with the right reserved in the General Government of locating the same; and as fast as townships are surveyed and sectionized the State becomes the owner of said sections absolutely, not only as to quantity but as to position also.

SAME.—The title of the State to said sections does not depend in any manner upon the action or non-action of the officers of the General Government, in approving of selections or sales of the same made by the State.

PATENTS FOR SIXTEENTH AND THIRTY-SIXTH SECTIONS.—The fact that sections

Higgins v. Houghton.

sixteen and thirty-six contain mines of the precious metals does not prevent the State from selling the same and issuing patents therefor to the purchaser. The State may, however, by the passage of laws to that effect, prohibit the sale of such lands or the issuance of patents for the same.

CERTIFICATES OF PURCHASE OF SCHOOL LANDS.—Persons who hold certificates of purchase from the State for the sixteenth or thirty-sixth sections, or portions thereof, hold the land as the State held it before the certificate was issued, subject to the right of miners to enter upon and work it for mining purposes.

PATENTS FOR SCHOOL LANDS.—Query: Does the Patentee of the State, for any part of the sixteenth or thirty-sixth sections, hold the same subject to the right of miners to enter upon and work the same for mining purposes?

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

The facts are stated in the opinion of the Court.

J. G. McCullough, Attorney-General, for Appellant.

Upon both these points—that this being mineral land the State cannot sell, and that having no approval of the selection by the Secretary of the Interior the State cannot give any title—the Court is referred to *Lester's Land Laws*, p. 643; *Summers v. Dickinson*, 9 Cal. 554; *Doll v. Meador*, 16 Cal. 296; *Kyle v. Tubbs*, 23 Cal. 431.

A. S. Higgins, for Respondent.

By the Court, SHAFER, J.

The complaint alleges, substantially, that the United States, by virtue of an Act of Congress, approved March 3, 1853, granted to the State of California the sixteenth and thirty-sixth sections in every township for the benefit of public schools therein; and that all and singular the conditions precedent required by the Act of the Legislature of this State, passed April 27, 1863, and entitled "An Act to provide for the sale of certain lands belonging to this State," having been fulfilled by the action of the proper State officer, and by a performance on the part of the plaintiff of all the requirements of said Act to be complied with by him, he, the said plaintiff has become and now is entitled to a patent from the

Higgins & Houghton.

State of California of the north half of Section Sixteen, in Township Number Thirteen north, Range Seven east, Mount Diablo base and meridian, containing three hundred and twenty acres of land; and that it has become and is the duty of the defendant, as Register *ex officio* of the State Land Office, to prepare the patent aforesaid and to certify the same to the Governor for his signature; which duty the defendant neglects and refuses to perform, though specially requested so to do on the 24th of December, 1863. The complaint concludes with a prayer for a mandamus.

The answer of the defendant denies that the lands in question were ever granted to the State by the United States, and the reason assigned is that they are mineral lands; and it is further alleged as a reason why the patent should not issue, that "the plaintiff has not procured the approval of the Secretary of the Interior or the proper officer of the United States Government of his said location and selection."

It is further stated in the answer, that a written protest has been filed in the office of the defendant, signed by many persons, claiming said lands as mineral lands; and the answer further alleges that they are mineral lands in fact.

The Court below found that all the allegations of the complaint were true; that the answer stated no defense as a matter of law, and adjudged that the alternative mandamus first issued be made peremptory.

1. We shall in the first place consider whether the title to the lands in question, assuming them to be mineral lands, passed to the State by virtue of the grant contained in the Act of Congress of March 3, 1853.

The grant occurs in the sixth section of the Act referred to, and is as follows: "That all public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections sixteen and thirty-six, which shall be and hereby are granted to the State for the purposes of schools in each township, and with the exception of lands appropriated under the authority of this Act or reserved by competent authority; and excepting, also, the lands claimed under any foreign grant

Higgins v. Houghton.

or title, and the mineral lands, shall be subject to the pre-emption laws of the 4th of September, 1841."

The language of the grant is too exact and luminous to require or admit of any resort to construction. There is no statement of any condition, exception, reservation or limitation; and in our judgment the grant vested in the State a quantity of land equal to one thousand two hundred and eighty acres, multiplied by the number of townships into which the public lands in California were capable of being divided, the moment the Act received the signature of the President. Mineral lands are excepted from the operation of the pre-emption laws, but they are not withdrawn by the Act from the operation of the grant.

Further, there is no reason to believe that the failure of the Government to reserve the mineral lands was the result of inadvertence, for in the grant of seventy-two sections for the use of a seminary of learning, and in the grant of ten sections for the purpose of erecting public buildings, both of which grants are contained in the Act of March 3, 1853, the mineral lands are exempted from the operation of the grants respectively by express proviso.

But the question now under discussion cannot be regarded as an open one. In the case of *Doll v. Meador*, 16 Cal. 296, it was held that California, upon her admission into the Union, acquired, under the eighth section of the Act of Congress of September 4, 1841, entitled "An Act to appropriate the proceeds of the sales of public lands," a vested and present interest in five hundred thousand acres of land, to be selected out of any public lands of the United States within her limits, except such as were expressly excepted in the grant. This decision was affirmed in *Van Valkenburg v. McCloud*, 21 Cal. 380, and is, furthermore, well sustained by the decision in *Foley v. Harrison*, 15 How. 447.

It appears from the pleadings in the case at bar that Township Number Thirteen was surveyed and sectionized by the Surveyor-General of the United States prior to the 20th

day of March, 1861, and, as we understand, subsequent to the grant.

2. As to the objection that the respondent has not procured the acceptance of his selection by the proper officers of the United States Government.

The appellant, assuming that there has been no such acceptance in fact, draws from it this conclusion: "And therefore the State cannot grant a title until she procures certified lists of the approval of selections (including respondent's) by the Secretary of the Interior."

The reasoning goes altogether upon the hypothesis that the State's title to Sections Sixteen and Thirty-Six in Township Number Thirteen, is inchoate, and that it would therefore be improper to issue a patent.

Whether the title of the State is perfect or imperfect, depends upon the legal effect of the grant contained in the Act of Congress of March 3, 1853, coupled with the subsequent survey and sectionizing of Township Number Thirteen.

Admitting that the title of the State was inchoate, in a certain sense, at the date of the grant; that is to say, that it did not determine, with then present precision, the exact localities upon which it was to attach finally, (*Leisseur v. Price*, 12 How. 77,) still, that is certain which may be rendered certain.

We consider that in the grant to California of March 3d, 1853, the power of locating the quantity granted — one thousand two hundred and eighty acres in effect, in two parcels in every township — was reserved to the Government, and as fast as townships thereafter were surveyed and sectionized, that the State became the owner of the sixteenth and thirty-sixth sections absolutely, not only as to quantity, but as to position also.

Township Number Thirteen was surveyed and properly subdivided subsequent to the grant and prior to May 20th, 1861; and since the date of that occurrence the State, by the effect of the grant and by the law of the event, has been and is now the absolute and several owner of the sixteenth and thirty-sixth sections of that township, as against the Government.

If there is any legislation by Congress, prior to the grant, which would interfere with the conclusion, as the objection in effect supposes, it has not been brought to our notice; and if there has been any legislation since the grant that conflicts with the conclusion, it must be null and void unless, indeed, it has been acceded to by the grantee. But we are not advised by the brief filed for the appellant that any such hostile legislation has been attempted.

3. But it does not follow necessarily that the State, because it is the owner of the sixteenth section in question, is bound to patent the north half of it to the respondent, or to anybody else.

The State, as owner of the sixteenth and thirty-sixth sections of every township within its limits, in the clear exercise of the *jus disponendi*, first entered the market in search of purchasers in 1858; and in a series of Acts found in the session laws of that year, the State dictated or prescribed the terms upon which it would patent those sections, in whole or in part, as well as other public lands, to individuals. In 1859-'60-'61, there was further legislation upon the general subject; and in 1863 the whole of the previous legislation was revised, and to a great extent supplanted by an Act found in the published statutes of that year at page five hundred and ninety-one.

By one of the provisions of this Act any citizen who shall have complied with all the terms and conditions set forth therein in relation to the particular land which he wishes to purchase, shall be entitled to a patent therefor.

As previously stated, it is alleged in the complaint that all the requirements of the Act, as connected with his claim to the north half of Section Sixteen of Township Number Thirteen, have been complied with by the respondent and the concurrent action of the proper public functionaries. The answer denies the averment in one particular only. The denial is as follows: "Defendant avers that plaintiff has not at any time procured the approval of the Secretary of the Interior or of the proper

officer of the United States Government to plaintiff's location or selection."

We have already passed upon the question whether the title of the State to the sixteenth and thirty-sixth sections was by the terms of the grant of March 3, 1853, made to depend in any manner upon the action or non-action of the Secretary of the Interior, and the question now presented is, first, whether by the Act of the Legislature of California passed in 1863 the approval of the Secretary of the Interior of the plaintiff's selection of the north half of Section Sixteen, Township Number Thirteen, is made a condition precedent to the plaintiff's right to a patent therefor from the State.

On this point it is sufficient to say, that in the brief of counsel no reference is made to any such provision in the Act of 1863, or in any of the Acts that preceded it. We have diligently examined the whole series of Acts for ourselves, and can find no traces of any such provision.

But the averment in the answer is in the alternative: "Nor has the plaintiff procured the approval of the proper officer of the Government to said selection or location."

The Act of 1863 (page 594, section 8) is as follows: "Whenever the amount of three hundred and twenty or more acres has been applied for under any one grant, he (the State Locating Agent) shall in behalf of the State make application to the Register of the United States Land Office for the district, for such lands, in part satisfaction of the grant under which they are located, and obtain his acceptance of the selections, which acceptance, together with the corresponding certificates of location according to the form prescribed by the Surveyor-General, he shall forward with the proper affidavits to the office of the Surveyor-General for approval, and when approved and returned to him, he shall record the approval and forward the approved certificate of location to the applicant."

Assuming that the approval of the United States Register, spoken of in this section, is a condition upon which the right to a patent is made to depend, still the issue taken by the

answer upon the question of fact, was determined against the appellant by the Court. There is no statement of the evidence, nor was there any motion made for new trial. The appeal is from the judgment alone.

There is a stipulation in the case that the parties mutually waive "all observance of form and regularity in time, pleadings and orders," still we are limited by the stipulation to "the questions of law presented by the case," and *they* are limited to questions of error arising upon the judgment roll.

4. As to the protest filed in the office of the appellant.

The protest states that the parties to it are citizens "dwelling" on the north half of Section Sixteen, Township Number Thirteen; that a large number of copper and gold and silver ledges were discovered and located in February, 1863, on the same, and a mining district formed embracing said tract of land, and that over fifty thousand dollars worth of work has been done on said ledges; and if said tract of land should be patented to Higgins, property of the value of more than one hundred thousand dollars will be taken from the present owners.

It is not stated that the signers of the protest have any interest in the land, ledges or mining improvements, or that they or any of them will be subjected to any loss should the patent issue. On the face of the protest the parties to it have no relations to the land except as "dwellers" upon it at the point of time when the protest was signed—December 10th, 1863. Nor does it appear from the protest or otherwise, that down to the date of the respondent's certificate of purchase—November 16th, 1863—there were any improvements upon the land not put there by him, nor that any one had, anterior to that date, any valid claim, or even preferred an invalid one, to the land as such. Still, we consider the protesters as competent parties under the Act of 1863, to contest the plaintiff's right to a patent. (*Tyler v. Houghton*, 25 Cal. 26.)

Assuming, then, that all the averments and recitals set forth in the protest are true, the question is presented, whether,

on the ground of any or all of them, or on the ground of any other fact which the case discloses, the plaintiff is barred of a patent.

If barred, it cannot be on the ground that a pre-emption right to the land is or may be outstanding in some one claiming under the laws of the United States; for by the grant of the sixteenth and thirty-sixth sections to the State in full property, they were effectually withdrawn from the operation of the Acts relating to pre-emptions; and further, if they had never been so granted, no one, by virtue of those Acts, could have ever acquired any title to or interest in them if they are mineral lands, as both the protest and answer allege them to be.

Neither can it be said that the plaintiff's right fails on the ground of *any* claim to the land, at such, superior to his own, for the case shows no such claim either real or pretended.

It results, then, that if a patent is not due to the plaintiff it must be on the ground that the mining claims taken up in February, 1863, on the lines of the ledges named in the protest, would pass to the plaintiff by force of the patent, and that, the ledges having been thus reduced to private ownership, mining claims could not thereafter be located upon them under the rules and regulations of miners.

If this were all true, still the State has both the right and the power to do as it chooses, with its own. If the State owns mineral lands, its right to sell and convey them cannot be disputed. By so doing it might prejudice its own interests, and even violate its faith pledged to those who may have taken up and worked mining claims on mineral lands belonging to it, by its implied license; but as a question of power, the matter admits of but one solution.

The apprehension, however, that a patent to the plaintiff of the north half of the section in question would interfere with the mining claims and improvements now upon it, or that it would prevent the taking up and working of like claims hereafter, may be wholly groundless—a point, however, which we do not intend to decide.

The Act of 1863, section seventeen, is as follows: "Where a certificate of purchase has been issued by the Register, the same shall be deemed *prima facie* evidence of legal title to the land for which the certificate of purchase issued; *provided*, such certificates of purchase shall not be so construed as to affect the working of mineral lands for mining purposes."

Three things at least are demonstrated by this provision: First, that the State by the Act of 1863 assumed that it was the owner of mineral lands, and that as such owner it had the right to sell and convey them; Second, that it was the purpose of the Act to put these lands upon the market for sale upon the terms and under the methods prescribed in the Act for the sale of the public lands at large; Third, that it was, however, the intention of the Act that the parties by whom such mineral lands should be purchased, and to whom they should be certified, should hold them under the certificate as the State held them before the certificate was issued—subject to be entered upon and worked for mining purposes.

Should a patent then be issued to the plaintiff of the north half of section sixteen, he might, perhaps, hold the patent, notwithstanding the absoluteness of its terms, subject to the rule of construction provided for in the Act under which he purchased, and under which his title paper issued. True, by the mere words of the statute, the rule of construction referred to is applied to the certificate of purchase alone; but the point may at least be made, that the Legislature intended that the patent, as a title paper, should be affected by the rule of construction to which the document that precedes it in the order of events, is expressly subjected. If it should be held that the main purpose of section seventeen was to conserve the policy of the State in the matter of mines and mining as settled at the beginning of its political history, then section seventeen should undoubtedly be so construed that that result may be secured.

We have, in this opinion, passed upon all the questions raised and discussed by counsel—though to a disposition of the case a decision of one point only was essential—and we

Treble damages were not claimed in the complaint. The rule is, that when treble damages are given by a statute, the plaintiff must expressly claim such damages, and also count upon the statute. (*Chipman v. Emeric*, 5 Cal. 239.) This case has never been reversed. The subsequent cases of *O'Callaghan v. Booth*, 6 Cal. 63, and *Hart v. Moore*, 6 Cal. 161, only hold that in actions of forcible entry, the plaintiff need not in his complaint *refer to the statute*. The amendment to the twelfth section of the Forcible Entry Act requires that the treble damages shall be claimed in the complaint.

M. S. Chase, for Respondent.

The error assigned is, that *trebled* damages were not claimed in the complaint; and

1. Upon this point it may be remarked that the twelfth section, until the amendment thereof, made May 20, 1861, (Laws 1861, p. 582,) and now repealed (Laws 1863, p. 655) by Act of April 27, 1863, never provided for any "claim" (*eo nomine*) for damages, and that this amendment in nowise provides that the claim shall be for *treble* damages, but only that "damages shall be assessed if claimed in the complaint," * * * "and *when so assessed* shall be trebled by the Justice and entered as a judgment," etc. In other words, by the amendment the landlord was held only to claim and prove damages; and then when assessed, it became the magistrate's duty, not by reason of the claim therefor, but in the enjoined exercise of *penal* authority to treble them.

"This section (twelfth) is added, not merely to indemnify the complainant for the injuries suffered from loss of rents and profits, and for waste committed, but to *punish* the offending party." (Mr. Chief Justice Field, in *Hicks v. Herring*, 17 Cal. 568.)

2. As to the rule contended for by appellant, that when treble damages are given by the statute the plaintiff must expressly claim such damages and count upon the statute, it is deemed sufficient to say that both the rule and the sole case

cited in its support, (*Chipman v. Emeric*, 5 Cal. 239,) have no application to the case at bar.

By the Court, CURREY, J.

This is an action arising under the Act concerning forcible entries and unlawful detainers as that Act stood in 1862 and 1863. The Court, before which the cause was tried without a jury, found that the premises were unlawfully held and detained from the plaintiff by the defendant, and that by reason thereof the plaintiff had sustained damage in the sum of one hundred and forty dollars; and in that sum the damages were assessed, and immediately thereupon trebled by the Court. Judgment was then entered for the restitution of the premises and for the damages as trebled.

The only point made by the appellant on the appeal is, that the Court erred in giving judgment for treble the damages assessed, because, he says, the damages were not claimed in the complaint.

The complaint, after setting forth the facts constituting the plaintiff's cause of action, concludes as follows: "Whereby the said plaintiff hath sustained damages by reason of the said unlawful and wrongful detention and holding over to the amount of one hundred dollars. Plaintiff further alleges that the monthly rents and profits of said premises, dwelling house, outhouses and improvements is reasonably worth twelve dollars a month," and then follows the appropriate prayer for judgment.

The twelfth section of the Act referred to provides that "the damages shall be assessed, if claimed in the complaint as well for waste and injury committed upon the premises as for the rents and profits during the detainer, and the verdict shall also find the monthly value of the rents and profits of the premises; and the complainant shall be entitled to recover treble damages against the person against whom the judgment has been rendered; which damages shall be assessed by the Justice or jury, and when assessed shall be trebled by

said Justice, and entered as a judgment in the cause, upon which execution may issue."

It will be observed the statute provides that the damages shall be assessed, if claimed in the complaint, as well for waste and injury committed as for the rents and profits during the detainer. The damages are not necessarily confined to compensation for waste and injury only, as these terms are understood in their proper technical sense, but the value of the rents and profits may enter into the estimate of damages, as the language of the statute clearly imports. If no waste or other injury be committed, the loss of the use and occupation of the premises may be the only damage sustained by the complainant, and that value when ascertained is the proper measure of damages in such case. These damages are to be ascertained, or in other words, assessed, by the jury or by the Court acting without a jury, according to the truth of the case; and when this is done, it is made the duty of the Court to treble them.

The statute does not contemplate by the words, "the damages shall be assessed, if claimed in the complaint," that the complaint shall contain a claim for treble damages, but rather a claim for the damages which a jury is competent to assess. The office of trebling the damages belongs to the Court.

The "Act relating to the rights and duties of landlords and tenants," passed in 1861, (Laws 1861, p. 514,) we are of opinion has no application to this case.

The complaint contained the necessary claim for damages, and the amount thereof having been assessed, the Court was bound to treble the sum so ascertained.

Judgment affirmed.

**MATILDA C. GRAY AND FRANKLINA C. GRAY, BY
PHILIP G. GALPIN, HER GUARDIAN, v. JAMES W.
DOUGHERTY AND SAMUEL B. MARTIN.**

FORMER SUIT AND JUDGMENT IN BAR.—The former judgment of a Court, having jurisdiction over the subject matter and the parties, is a bar to a second suit upon the same cause of action between the same parties or their privies, and is conclusive, not only upon every question involved therein and thereby determined, but also as to every other matter which the parties might have litigated in the cause and which they might have decided.

SAME.—In order to render the former judgment effectual as a bar, it must appear that the matters litigated were submitted on their merits, and annually passed on by the Court; for if the trial went off on a technical defect, or because the cause of action had not yet accrued, or because of the temporary disability of the plaintiff to sue, or the like, the judgment will be no bar to a future action.

PROOF OF WHAT WAS PASSED ON IN A SUIT.—The issues passed on in a former suit may be ascertained by an inspection of the judgment roll; and if that fails to disclose all the facts necessary to a complete determination of the question, a resort may be had to extrinsic evidence.

AN ERRONEOUS JUDGMENT A BAR.—The question whether a former judgment is erroneous is not material; for an erroneous judgment, until reversed, is as binding and conclusive upon parties and privies as one in which no error is found.

PREMATURE SUIT NO BAR.—If a demand by the vendee for a deed from the vendor is necessary before suit can be brought for a specific performance of a contract to convey land, and a suit is brought to enforce such performance before a demand is made, and judgment is rendered in favor of the defendant by reason of a failure to make such demand, the judgment is no bar to a future action by the vendee, or his successor in interest.

JOINDER OF ACTIONS.—Where a party is entitled to both legal and equitable relief, in a matter arising out of the same transaction and founded on the same instrument in writing, the whole matter may be litigated and finally settled in the same action.

DEMAND OF DEED BY VENDEE.—Before the vendee can maintain an action to recover damages for the breach of a covenant to convey land, he must demand his deed from the vendor; otherwise, where he brings an action for specific performance, in which case a demand is important only in respect to costs, and does not affect the merits of the case or the rights of the parties.

SAME.—If, however, the vendor, by any act of his, prevents the vendee from performing his part of the agreement, or makes it known that he does not intend to perform his covenant, except upon compulsion, the vendee is not required to demand a deed from the vendor, or perform his part of the agreement before commencing suit; and in such case a Court of equity will award a decree, compelling specific performance within a certain time, provided the vendee shall have before that time performed on his part.

COSTS IN EQUITY.—Costs in equity are always in the discretion of the Court, and whether granted or withheld are but as incidents to and no part of the relief sought.

APPEAL from the District Court, Third Judicial District, Alameda County.

The facts are stated in the opinion of the Court.

E. W. F. Sloan, for Appellants, on the question of the former judgment in bar, cited: *Gregory v. Burrall*, 3 Edw. Ch. C. 417; *Hughes v. Blake*, 1 Mason, 518; *Penrie v. Dunn*, 4 John. Ch. 142; *Hunt v. Terrill's Heirs*, 7 J. J. Marsh, 68; *Wilcox v. Balger*, 6 Ham. Ohio, 409.

Where the plaintiff discovers, on the trial of his cause, that he cannot safely rest upon the proof introduced, he should take a nonsuit or an order dismissing his bill without prejudice, otherwise the judgment or decree will conclude him in any subsequent suit on the same cause of action. (*Jenkins v. Johnson*, 4 Jones' Eq., N. C. 149; *Hall v. Dodge*, 38 New Hamp. 346; *Colburn v. Woodworth*, 31 Barb. 382.)

If the judgment of the Court did not afford Amador all the relief he thought himself entitled to, he should have moved for a new trial, applied for a rehearing, or taken and prosecuted an appeal. (*Hall v. Dodge*, 38 N. Hamp. 346; *Jenkins v. Johnson*, 4 Jones' Eq. 149; *Wainwright v. Rowland*, 25 Miss. (4 Jones) 53; *Coggins v. Bulwinkle*, 1 E. D. Smith, 484; *Castle v. Noyes*, 4 Kernan, 329; *Doty v. Brown*, 4 Comst. 71.)

Wm. W. Crane, Jr., for Respondents.

It becomes necessary to examine the judgment and proceedings in *Amador v. Norris*, to see if they estop us from obtaining our just rights in the present action.

Clearly they will not, unless we find that in them the matters here presented have once been, not argued nor pleaded, but *determined*. (1 Greenleaf Ev. p. 529; *Swett v. Tuttle*, 4 Kernan, 465.)

Were they so determined?

The rule upon which the defendants rely is, that there must be an end to litigation; and public policy will not admit that the same cause of action be *re-tried* after the solemn *determination* of a Court upon it.

We acknowledge the rule, but we say that the question here presented was not determined in *Amador v. Norris*. To

purpose. (*Burkhead v. Brown*, 5 Sandf. 151; *Wood v. Jackson*, 8 Wendell, 1-49.)

Unless the matter of estoppel appears from the record to have been determined, the defendant must supply defect by parol. (1 Kern. 426.)

But there is no need of parol *proof* where the pleadings demand two species of relief wholly distinct in *kind*, the one thing asked for being a sum of *money*, and the other being the performance of a certain act. Is it not pushing this principle of intendment to an absurdity, to say that the money judgment includes within it that cause of action whose remedy is a conveyance, unless parol proof be introduced to show the contrary?

The judgment can surely determine only such causes of action as are homogeneous with itself.

If I join an action of damages for a broken leg with an action of replevin for a horse, and have a money judgment only, how does that judgment determine the horse is or is not mine, and how could such a judgment be a bar to a second suit in replevin?

But the action of *Amador v. Norris* was not an action at law, but in equity; and the decree should always find the facts which warrant it. (*Abbe v. Goodwin*, 7 Conn. 377.)

There is nothing in the decree which refers in the remotest manner to the question of specific performance.

It is immaterial whether these two causes of action could have been joined or not. It is pretty certain that we could not have a money judgment on one cause of action, and a decree in equity on the other, in the same bill.

Now, *Amador* did have the money judgment. If he could not have had the decree *also*, he must have waived it. If he did, the whole question is still open. (*Larue v. Davis*, 13 Johns. 227.)

The whole argument of the defendant must come down to this: "The Court did not find in favor of *Amador* for the specific performance, therefore, by *implication*, they found against him."

No judgment or decree can be thus extended by or implication.

The point decided is the thing fixed by the judge v. *Table Mt. Water Co.*, 12 Cal. 409; *Heusto* 13 Cal. 27; *Earl v. Bull*, 15 Cal. 421; *Kidd v* 182; *Fulton v. Hanlow*, 20 Cal. 450; *Colton* 496; *Hobbs v. Duff*, 23 Cal. 596.)

Yates v. Fassett, 5 Denio, 21, is a case in replevin failed to ask for a restoration had judgment for costs only. He then took the property, which, pending the litigation, was over to the plaintiff.

Held — that the partial judgment prevented him from maintaining a second action.

By the Court, SANDERSON, C.

On the 25th of October, 1851, the plaintiff seized of certain land in Colorado, and conveyed the same to Leo Noyes, who remained unpaid. On the 1st of November, 1851, the plaintiff brought suit against Noyes for the money and enforce his judgment of February, 1852, the same was between them by an agreement that all existing claims were annulled and rendered void, and his suit, and that Noyes should pay the plaintiff ten thousand dollars, and that Noyes should relinquish by quitclaim deed the land conveyed to him, and the corner of the same, and that he made a formal conveyance of a portion of the same to the plaintiff. On the 1st of May, 1852, McAllister brought suit against the same.

and child are plaintiffs and respondents. On the 15th of December, 1852, Amador sold and conveyed the whole of said tract to the defendant and appellant, Dougherty, at the price of twenty thousand dollars. On the 24th of June, 1854, Leo Norris sold and conveyed to Dougherty the same tract of land, excepting one square league in the northwest corner; since which time Dougherty has sold and conveyed an undivided third thereof to his co-defendant, Martin. Norris never did quitclaim or otherwise convey the legal title to Amador as to any part of the land; so that neither Jones nor Dougherty acquired, by their respective deeds from Amador, a legal estate in any part of the land. By deed from Norris, however, of the 24th of June, 1854, Dougherty obtained the legal title to the land therein described, including so much of the Sycamore Valley as lies in the limits of the Amador Ranch.

The present action is brought for the purpose of procuring a conveyance of the legal title to the Sycamore Valley; or, in other words, for the purpose of enforcing, as against Dougherty and Martin, specific performance of the agreement between Amador and Norris to the extent of that valley.

On the 20th of March, 1852, Amador brought suit upon the same contract against Norris to obtain judgment for the balance of the six thousand dollars due him under the contract, and for the further sum of thirty thousand dollars, as damages for the breach of other covenants contained therein, including the covenant to convey, and also to obtain a decree for the specific performance of the last named covenant by quitclaim deed to the entire ranch, except one league in the northwest corner, including said Sycamore Valley. In said action there was rendered, on the 4th day of November, 1854, a final judgment in favor of Amador for the sum of one thousand six hundred dollars and costs of suit. This one thousand six hundred dollars was the balance of the six thousand dollars which the jury found was due and unpaid. No judgment was rendered or denied, except by implication, for damages on account of the breach of the covenant to convey, nor was a decree for specific performance granted or refused in

mination of the question, a resort may be had to extrinsic evidence. (*Dunckel v. Wiles*, 1 Kernan, 420.) If it appear that the parties are the same, or that those in the second suit respectively claim under those in the first; that the cause of action in question is the same, and that in the former suit it was submitted and tried on its merits, and a judgment thereon rendered by a Court of competent jurisdiction, such judgment is conclusive and a bar to the further prosecution of the second action. Nor is it material whether such judgment is erroneous or not, for, until reversed, an erroneous judgment is as binding and conclusive upon parties and privies as one in which no error is found. (*Reynolds v. Harris*, 14 Cal. 678.)

To support the plea in bar, defendants rely upon the judgment roll in *Amador v. Norris*, unaccompanied by any other evidence. By an inspection of the record in that case it appears that the written contract upon which the plaintiffs in the present case base their right to relief is the same upon which Amador sued, and upon which he relied for a recovery against Norris.

It further appears that the same relief was sought by Amador which is sought by the plaintiffs in the present case, and, so far as the particular cause of action in question is concerned, that the averments and proofs in Amador's case were substantially the same as that in the case at bar, except in the following particulars: In the present case there is an averment of a special demand for a deed, and a refusal, but in Amador's case no such averment was made, there being only the general allegation that Norris had wholly failed, neglected and refused to make the deed in question within one month from the date of the contract as required by its terms. In all other respects the two cases are the same. This difference, in our judgment, is the pivot upon which the question under consideration must turn. If a demand for the deed, before suit, was necessary in order to enable Amador to maintain his action and entitle him to a decree for a deed or a judgment for damages, and no such demand was averred or proved, or, in fact, existed, his cause of action had not accrued at the time the suit was brought,

the Court, neither kind of relief
demand before suit.

on of demand, it is contended by
it appears from the judgment roll
pecially from the verdict of the
action had not accrued, in the
d the case, because of the non-
e contract of the 19th of Feb-
particular: It seems from the
at some time previous to the
y, had sold, and contracted in
l one Lynch, a tract of land,
ne thousand yards wide, the
of land reserved to Norris by
tion was brought. In his
ulment of this contract was
tract of the 19th of Febru-
ained a release of said con-
to do, and had therefore in-
ed to perform the contract
found as a fact that the
been made by Amador as
ador had not obtained a

void all contracts existing
ut any particularization,
cts to which there were
annul such contracts
ower without co-action
the absence of express
t they intended to do
ower to do. Besides,
ture annulment of all
y counsel for plain-
elf performs the act
es no further act of
d. In this particu-

party upon the written consent of the other. Third Court when the plaintiff fails to appear on the trial, the defendant appears and asks for the dismissal. Fourth — By the Court when upon the trial, and before the final judgment of the case, the plaintiff abandons it. Fifth — By the Court upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. The hundred and forty-ninth section provides that in every case other than those mentioned in the one hundred and forty-ninth section the judgments shall be rendered on the merits.

There was no nonsuit taken by the plaintiff before the verdict, nor was the particular cause of action withdrawn in any manner from the consideration of the Court at any stage of the proceedings, nor was there any prejudice. Such being the case, the question is that the Court, pursuant to the provisions of the hundred and forty-ninth section of the Practice Act, rendered a judgment on the merits, having all the facts before it, considered and passed upon them all, and granted to the plaintiff all the relief to which, in the opinion of the Court, he was entitled. Under such circumstances the judgment of the Court must be held to be a denial of further relief.

The fact that both legal and equitable causes of action were joined in the complaint was no impediment in the way of the Court's granting full relief upon both, if warranted by the facts. Both arose out of the same transaction, and were found in the same written instrument, and there seems to be no reason why, in such cases, the whole matter should not be litigated, and finally settled and determined in the same proceeding. Admitting that a ground of demurrer existed, it was waived, and may be waived under the statute by not demurring. If a demurrer was interposed, it does not seem to have been sustained, and to a judgment, and the presumption is that it was waived or abandoned.

Thus, the sufficiency of the plea in bar is made to depend entirely upon the question of demand. If a demand was necessary, the Court was right in not giving

perform his covenant except upon compulsion, thus in effect refusing in advance of a demand, neither law nor equity imposes upon the vendee the observance of a ceremony thus made idle and fruitless. Under such circumstances a Court of equity will go so far as to interpose and compel specific performance before the vendee has complied with the contract on his part, when it would be inequitable and unconscientious to allow the vendor to evade his covenant, and will award a decree compelling specific performance within a certain time, provided the vendee shall have before that time performed on his part. (*Davis et al. v. Hone*, 2 Schoales and Lefroy, 341; *Bourke v. Bocquet*, 1 Desausser, 142; and *Washburn and Wife v. Dewy*, 17 Vermont, 92.)

Thus it appears there are circumstances which excuse the absence of a demand, and it only remains to determine whether the case of *Amador v. Norris* comes within the general rule or forms one of the exceptional cases. It appears that under the contract of the 19th of February, 1852, Amador and Norris agreed, among other things, to annul all existing contracts between them and submit all matters in difference to two arbitrators, one of whom was to be selected by each. These arbitrators were to be chosen and to act within a certain time. Each party selected his arbitrator pursuant to the agreement, but they never met. Amador appeared at the time and place appointed, but, as the jury find, Norris revoked the power of his arbitrator before the time of meeting. Amador, in perfect good faith, had dismissed his action against Norris for the recovery of the purchase money for the land and the enforcement of his vendor's lien. But Norris, when called upon and after due notice, as found by the jury, refused to perform the first act required of him under the agreement, and without any apparent reason retraced the steps which he had taken to that end. This was an act of bad faith on the part of Norris, and was an open violation of the terms of his contract. From his conduct, it was apparent that he did not intend to abide by his covenants, notwithstanding Amador had in good faith performed on his part. By the terms of the contract, Norris was

to perform within one month from its date; yet he not only did not perform, but, when notified, in the manner pointed out by the contract, he refused to take the first step in the path of obedience to his covenant. We think this was such an act of bad faith, and such an open disavowal of his obligation on the part of Norris, as to warrant the conclusion that an express demand for further performance would have been fruitless. This view is fully sustained by the answer filed in the case. It contains no complaint on the ground that no demand had been made, nor does it aver a willingness to perform, but defends upon entirely different grounds.

From all the circumstances, we are of the opinion that no demand was necessary in order to enable Amador to maintain an action for damages for a breach of the covenant to convey. So far as his right to maintain an action for specific performance is concerned, it seems no demand was necessary except so far as the right to recover costs was involved. In *Bruce v. Tilson*, 25 N. Y. 197, the Court of Appeals of New York said: "The distinction between an action for a specific performance in equity and a suit at law for damages for non-performance is this—that in the latter the right of action grows out of a breach of the contract, and a breach must exist before the commencement of the action, while in the former the contract itself, and not a breach of it, gives the action. A demand of performance before suit is brought is only important in reference to the costs of the action, and has no bearing upon the merits or the rights of the parties. But by a demand and refusal the party liable to perform is put in the wrong and in the situation of unreasonably resisting his adversary, and is therefore chargeable with costs. Costs in equity are always in the discretion of the Court, and whether they are granted or withheld, they are but as incidents to and no part of the relief sought. A party getting the relief asked may be compelled to pay costs, but nevertheless his cause of action had accrued upon the filing of the bill or the commencement of the suit."

Thus in every point of view it is apparent that the judg-

ment roll in *Amador v. Norris* shows that Amador had performed the contract in question on his part before he commenced his action; that he sought in that action all the relief both at law and in equity to which under the facts of the case he was entitled; that his whole case, without any part of it being withdrawn, was submitted to the jury and he obtained a verdict upon which he was entitled to a judgment for damages, or a decree for specific performance at the hands of the Court, as he might elect, or as the Court might determine. Hence the whole case was tried and submitted upon its merits and a judgment rendered thereon. That the judgment was erroneous there is no doubt; but, whether so or not, is wholly immaterial so far as the question under consideration is concerned. Until reversed it is conclusive upon parties and privies.

The conclusion to which we have arrived on the plea in bar renders it unnecessary to pass upon the question as to whether the defendants acquired the legal title to the land in question with notice of the plaintiff's equity.

Judgment reversed and the Court below directed to render a judgment in conformity with this opinion.

W. BARTRAM v. THE CENTRAL TURNPIKE COMPANY, AND W. BARTRAM v. R. C. OGILBY, R. A. PEARIS, AND JAMES McDONALD.

ACT AUTHORIZING EL DORADO AND SACRAMENTO COUNTIES TO BUILD A ROAD.

— There is nothing contained in the Act of 1857, submitting to the people of Sacramento and El Dorado Counties a proposition to appropriate money for the construction of a wagon road from Sacramento County, through El Dorado County, to Carson Valley, or in the Acts amendatory thereof, which gives to the two counties, or either of them, the exclusive right to construct or maintain a road along the intended route; nor does the Act of 1862, authorizing the Board of Supervisors of El Dorado County to lease said road, grant to El Dorado County or the lessee such exclusive right.

LEGISLATIVE GRANTS.— Public grants are to be strictly construed, and nothing passes to the grantee by implication.

GRANT OF FRANCHISE.— The grant of a franchise is not exclusive, unless it is expressly made so by the grant itself.

RIGHT TO MAKE ROADS.—The State does not possess the exclusive authority to construct a road over the public domain, or over any land within the State: but any person who can procure from the landholder a right of way, may construct and maintain a road.

COLLECTION OF TOLLS ON ROADS.—The right to collect tolls on a road when constructed is a franchise, and cannot be exercised except it be granted by the Legislature, or some branch of the Government vested by the Legislature with the power to grant the franchise.

SAME.—The grant of a franchise to collect tolls on a particular road does not, by implication, prohibit the construction of roads parallel to the one vested with the franchise.

APPEAL from the District Court, Eleventh Judicial District, El Dorado County.

Defendants recovered judgments in the Court below, and plaintiff appealed.

The other facts are stated in the opinion of the Court.

H. O. Beatty, for Appellant.

George E. Williams, for Respondents.

By the Court, RHODES, J.

The two causes are contained in one record, and have been argued and submitted together. The questions involved in each are in most respects identical, and their separate consideration will not be required.

The plaintiff is the lessee of that portion of the Sacramento and El Dorado Wagon Road, commencing at or near Bartram's Sawmill, about eighteen miles east of Placerville, and running thence eastward to Strawberry Station, a distance of about thirty miles. The County of El Dorado, under the authority of the Act approved April 9, 1862, leased the road to the plaintiff for the term of five years giving the lessee the right to collect certain stipulated tolls, and the lessee covenanting to put and keep the road in repair, and to pay the county fifty dollars per month, after the first three months. The road was constructed by the Counties of Sacramento and El Dorado, under the provisions of the Sacramento and El Do-

radio Wagon Road Act of 1857, and the Acts a thereof, and was intended as a free public road.

At the date of the lease, the Central Turnpike Co corporation organized under the general laws of the the owner and had the control, of a turnpike road from Strawberry Station, westerly to Dick's Station with and near the Sacramento and El Dorado road the same time Ogilby and his co-defendants (who, commencement of the action, have, with others, org incorporation, under the general Incorporation Act, name and style of the Teamsters' Turnpike Compan and had the possession of another road, running from not far distant from Bartram's Sawmill easterly to Webster's Station. Webster's Station and Dick's Station on the Sacramento and El Dorado road and are dis each other about one mile, and the plaintiffs claim Ogilby road terminated about half a mile west of Station, at Carpenter's house. At the commencement of the actions, there was no road parallel to the Sacramento and El Dorado roads between Webster's and Dick's and the plaintiff then had his toll-gate between the actions.

The plaintiff instituted these actions in equity to enjoin the defendants from constructing a road, parallel with the Central Turnpike Company's road with the eastern terminus of the Ogilby road, alleging that the defendants were about to construct the road; that thereby he would be deprived of a large amount of tolls, and that the injury he would thus sustain was irreparable. He alleges also that he has sustained damage by the defendants having constructed their road across the land and by their having taken possession of, and constructed a road, over a short space, where he had surveyed a road, as a portion of his road, and he has not pressed those points, and it is sufficient to show that if he has sustained damage by those acts, or been fully ousted from the possession of any land that he

session of in connection with his road, he has an adequate remedy at law.

The main question in the cases has been argued with great ability and zeal by the counsel of the respective parties, but we do not apprehend that it is difficult of solution. The plaintiff, in order to maintain his position, is bound to show that he has the exclusive right, during his term, to construct a road through what the parties have denominated the Placerville Pass; at least, that he alone has the right to collect tolls from persons travelling that route. We understand the plaintiff to disclaim the right to collect tolls from persons travelling over the roads of defendants, who have not passed over some portion of his road, but he insists that the defendants shall not be allowed to build a road between the termini of their roads; and if they shall be enjoined, the consequence will be that those who intend passing over the two roads of the defendants, must of necessity, pass for a short distance, over the plaintiff's road and pay toll at his gate, the result of which would be to make all who pass over the road pay the plaintiff toll. He complains that the object of the defendants in building the connecting link in their roads is to prevent the plaintiff from collecting tolls, by permitting persons to pass around his toll gate, but this position cannot be maintained, except so far as that result incidentally accrues. The apparent object of the defendants is to induce travellers to take their roads, for if persons who passed over their roads were required to pay tolls to them and also tolls to plaintiff, for passing over a mile and a half of the plaintiff's road, they would travel the plaintiff's road to save a double charge.

It will be observed that there is nothing in the Act authorizing the road to be leased, nor in the lease, which establishes a place for the collection of tolls, or restricts the lessee to any one place for the erection of his toll gate; and such being the case, he may resort to any means in his power, that would be justified by law, to collect toll from those who make use of his road.

As the result that would ensue from the construction of the

proposed road by the defendants, would be that a portion of the travel would be diverted from the plaintiff's road to the defendants' roads, the propositions of the parties is reduced to the simple question whether the lease executed to the plaintiff by the County of El Dorado, in conformity with the Act of 1862, granted to the lessee during his term the exclusive right to maintain a road along that portion of the route where, at the date of the lease, there was no parallel road.

As already observed, the construction of the road was provided for by law, as a public highway, and no tolls were authorized to be collected, and no other or greater power over the road was conferred upon either of the counties than is given by the general road law over county roads.

Subsequently, tolls were required to be collected at Brockliis' Bridge, on the line of the road, the rates to be fixed by the Board of Supervisors of El Dorado County. But there is nothing in any of the Acts relating to the road which expressly gives the two counties, or either of them, the exclusive right to construct or maintain a road along the intended route, or that even confers upon either county the exclusive right to maintain a toll or other bridge on the proposed route at or near the Brockliis Bridge. Nor does the Act authorizing the making of the lease purport to grant to the county, nor to the lessee, such exclusive right, and no clause or covenant in the lease grants to the lessee the right claimed by him.

If the exclusive right set up by the plaintiff exists, it must arise, by implication, from the Acts of the Legislature. It is not derived from the lease alone, for under it the lessee took only such rights as the county was authorized to grant, and did grant, by virtue of the Act conferring the power.

The plaintiff, in support of the proposition, cites as conclusive authority the case of *Charles River Bridge v. Warren Bridge*, 11 Peters, 420, and the defendants rely with equal confidence upon the same case to maintain the negative of the question.

That case, which was so elaborately argued and fully considered, has been for years regarded as the leading authority,

If the doctrine of that case could be considered doubtful, or its authority questioned, the Court, in ascertaining whether in a given case the granting power had intended to confer, or had conferred, by a grant of the franchise, an exclusive right by implication, would be justified in looking at all the surrounding circumstances, and placing itself as near as may be in the position of the granting power at the time of the making of the grant. At the time the two counties were authorized by the Legislature to construct the road, the general law regulating the construction of turnpike roads was in force, and has so remained to the present time; and under its provisions, and subject to the conditions therein expressed, persons were permitted to construct turnpike roads and collect tolls thereon. No reason has been assigned, why the grant to the county, of the right to lease the road, and regulate the tolls to be paid to the lessee, shall be considered as of any other higher order, or as conferring a franchise of a more exclusive nature than the general grant contained in the Turnpike Act. Nor is it pretended and it could not be maintained, that the general law was in any respect repealed by the special Act. The grant of power to the county, to execute the lease, and the lease when made, was subject not only to all rights that had accrued to other persons, but also to such as might be legally acquired under the general law. In fact, the granting power recognized the existence of parallel roads, and by prohibiting the owners of such roads from becoming the lessees of the county road, the Legislature seemed to contemplate, that parallel roads would be constructed and maintained, and manifested a policy well calculated to prevent all the roads over that route from being controlled by the same person or corporation.

Justices Story and McLean, in their dissenting opinions in *Charles River Bridge v. Warren Bridge* seem to put much stress upon the fact that Charles River was a navigable arm of the sea, that the Legislature of Massachusetts had the exclusive control of it, and that no one could of common right erect a bridge over the river, but that authority must first be had for that purpose from the Legislature. In that

respect, that case is much stronger than the one before us, for the exclusive authority cannot be claimed in behalf of the State to authorize the construction of a road over the public domain, or indeed over any land within the State; but, on the contrary, any person who can procure from the landholder the right of way may construct and maintain a road. It is only in respect to the right to collect tolls on his road when constructed, that he must make application to the Legislature or some branch of the Government vested by the Legislature with the power to grant the franchise.

The Legislature had, previous to the Act of 1862, vested this franchise, in respect to the road in question, in the County of El Dorado, in trust that the proceeds should be expended in maintaining the road. Upon the passage of the Act of 1862 no new franchise was granted, nor was the existing franchise granted away from the county, but the county was empowered to lease the existing franchise, that is to say, the right to collect tolls, but not the bed of the road, for neither the county nor the State owned that—and during the term, the lessee was authorized to enjoy the franchise in the same manner and to the same extent, that the county before that time had held it. Before the Act of 1862 neither the county nor private persons were directly nor by implication prohibited from constructing roads, that might take a portion of the travel that had been accustomed to pass over the Sacramento and El Dorado Wagon Road; and we see nothing in the fact that the county was empowered to make a lease, and did execute it, that creates the prohibition by implication against the construction of parallel roads by either the county or private persons.

If this question was involved in great doubt, we would be justified in looking at the consequences of the assertion of the right claimed by the plaintiff to ascertain what was the intention of the granting power. It is the unquestioned policy of the Government to encourage the construction of roads wherever public convenience may require them, and in pursuance of that purpose private rights are made to yield to the wants

of the public. For that purpose, private property may be taken for public use upon just compensation being made therefor. If the doctrine contended for by the plaintiff could be maintained, each road, bridge or ferry franchise would become a monopoly, as odious in many respects as those formerly claimed by royal grant or by prescription in England for the buying, selling, making or using of those things which were considered among the necessities of life, retarding and impeding the progress of business and improvement, and inflicting an unnecessary inconvenience and expense upon the many, with but slight corresponding gain to the few.

We are of the opinion, in any view of the case, that neither the Legislature nor the County of El Dorado, has granted to the plaintiff the exclusive right claimed by him.

The judgments for the defendants in each of the cases must be affirmed.

Mr. Chief Justice SANDERSON, having been of counsel, did not sit on the trial of these cases.

WILLIAM D. PORTER v. ROBERT H. ELAM.

COMPLAINT.—A complaint upon a promissory note, the collection of which is barred by the Statute of Limitations, contains a cause of action if it alleges that the defendant has, some time within four years of the day the suit was commenced, "in writing, acknowledged and promised to pay the note." Such allegation imports that the defendant signed his name to the writing.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

John Reynolds, for Appellant.

N. Bennett, for Respondent.

By the Court, SHAFER, J.

The complaint in this case contains three counts, framed upon three several promissory notes executed by the defendant to one Gray, and by him indorsed to the plaintiff.

The defendant demurred to the first count, on the ground that it appeared that the note described therein was barred by the Statute of Limitations. The demurrer was overruled.

The defendant answered the last two counts, and, on motion, the answer was stricken out by the Court, on the ground that the complaint was sworn to and the answer was not.

Judgment was entered for the plaintiff on all the counts, and the defendant appeals.

1. As to the demurrer. The note described in the first count fell due on the 19th of November, 1858, and the complaint was filed on the 19th of March, 1863. The count contains the following averment: "The said defendant has, since the 4th day of October, 1859, in writing acknowledged and promised to pay the same (the note) but has wholly neglected so to do." It is insisted for the appellant that the averment does not amount to an avoidance of the statute, for the reason that it is not stated in terms that the written promise alleged "was signed by the defendant."

No case is cited in support of the objection, except *Pena v. Vance*, 21 Cal. 142; but that case merely decides that there can be no written promise or acknowledgment without a signature. All that may be admitted, but it would have no effect to determine the question of pleading raised by the demurrer in favor of the appellant. We accept the view of the defendant's counsel as correct, that all the facts essential to the avoidance should be stated; and there can be no doubt, under the decision, that the signature of the party to the written promise or acknowledgment is essential. But we consider the allegation that the "defendant has in writing acknowledged and promised to pay, etc.," involves the very fact which counsel assumes to have been omitted. A man may promise

Seale v. Emerson.

verbally to fulfill certain stipulations previously in written memorandum, but he cannot "promise in without affixing his signature to the written promise case of *Pena v. Vance*, cited for the appellant, favoring rectness of this conclusion.

2. It is further insisted that the Court erred in stating the defendant's answer to the last two counts; and assigned is, that the complaint was not sworn to effect.

We have examined the affidavit and find it to be in conformity to the requirements of the Practice Act.

The judgment is affirmed; and it appearing to us that the appeal must have been taken for delay, on respondent, ten per cent of the judgment below is the costs by way of damages.

Mr. Justice CURREY, having been of counsel, did not take part in the hearing of this case.

HENRY W. SEALE v. SILAS B. EMERSON

THE VERDICT MUST BE ON ISSUES JOINED.—Plaintiff declared a contract to pasture one hundred and forty-seven head of cattle, at the rate of three dollars per head per month, for a given time, amounting to three hundred and thirty-three dollars. Defendant, in his answer, admitted the contract, but alleged that the number of cattle pastured and rate per head per month were as alleged, but that they were to be pastured in a particular field, and did not pasture them in that field, but in another, where the pasture was poor, and that by this breach of the contract he sustained three hundred and thirty-three dollars damage, which he claimed to recoup. The evidence was taken on the breach of the contract as alleged. The jury found for the plaintiff three hundred and thirty-three dollars damages; *Held*, that the verdict was not supported by the evidence, and that if plaintiff obtained a verdict, he was entitled to the amount claimed in his complaint.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

The facts are stated in the opinion of the Court.

S. O. Houghton, for Appellant.

Thomas Bodley, for Respondent.

By the Court, SAWYER, J.

This is an action to recover money alleged to be due for the pasturage of cattle. The complaint alleges the pasturage of one hundred and forty-seven head of cattle for a specified time; that defendant promised to pay for said pasturage at the rate of one dollar per head per month; and that at that rate, for the number of cattle and time alleged, the sum due amounts to three hundred and forty-three dollars, for which sum judgment is claimed. There is no count to recover as much as the pasturage is worth, and no value is alleged. The plaintiff counts only upon a special agreement as to price.

The answer denies the request, or agreement to pasture generally; and alleges an agreement to pasture in a particular field, containing good pasturage, for which defendant was to pay one dollar per month per head, and then alleges that plaintiff did not pasture the cattle in the particular field agreed upon, but in another field where the feed was poor.

After setting up this special agreement and breach as a defense, by way of denial of the contract alleged in the complaint, the defendant alleges affirmatively the same special agreement to pasture in a particular field, and the breach by pasturing in another field in which the feed was poor, and alleges that his cattle, in consequence of the poor feed, did not thrive, but lost flesh, and that by reason thereof he had sustained five hundred dollars damages; which amount he prays to have allowed as a counter claim.

On the trial the jury found a verdict in favor of the plaintiff, and assessed the damages at one dollar. The plaintiff moved for a new trial, on the ground that the verdict is contrary to the evidence, and is contrary to law. The Court denied the motion, and plaintiff appeals from the order denying the motion for a new trial, and from the judgment.

Although the Court appears to have given instructions to

the jury, they are not in the record, and we must presume that the case was fairly submitted as to the law.

There was no issue in the pleadings as to the value of the pasturage, and the testimony upon that point, under a proper charge from the Court, must have been disregarded as irrelevant. The question was whether the agreement was to pasture generally, as alleged by the plaintiff; or to pasture in a particular field, as alleged by defendant. There was no dispute between the parties as to the fact, or place, or time of pasturage, the number of cattle pastured, or the rate per head per month agreed on, and no conflict of testimony on those points. The only evidence as to *where* the cattle were *to be* pastured under the agreement, came from the parties themselves, either given by them respectively in person on the stand, or in the form of declarations of the defendant, testified to by other witnesses. The defendant testified that the agreement was to pasture in the field, called "The Uncle Jim Field," and not in the "Willow Pond Field," or "Mill Pond Field," where they were pastured, and where the feed was not as good as in the "Uncle Jim Field." The plaintiff denies this in his testimony, and says that he refused to pasture the cattle in the "Uncle Jim Field," stating as a reason, that he intended to cut hay on that field in case the grass should prove to be sufficient for that purpose. This was the vital and only real issue in the case. Had this issue been found for defendant, the verdict must necessarily have been for him, because on his theory it was for pasturing in the "Uncle Jim Field," that the defendant agreed to pay the specific price alleged, and plaintiff must recover at this specific rate or not at all, for he did not count on a *quantum valebat*, and he must recover according to his allegations, or fail. The jury, therefore, must have found this issue in favor of the plaintiff, otherwise the verdict would necessarily have been for defendant. Having found this issue in favor of the plaintiff—that is to say, that there was no agreement to pasture the cattle in the "Uncle Jim Field," as claimed by defendant, the only measure of damages was the price agreed upon, about which there is no conflict in either the pleadings or

Bosworth v. Danzien.

evidence, and the price is one dollar per head per month. They did not find in accordance with the price agreed upon, and the verdict as to the amount of damages is not supported by any evidence at all.

Had there been a *quantum valebat* count, this result would not necessarily have followed, for in that case, had the jury been satisfied that the agreement was to pasture in the "Uncle Jim Field," yet if plaintiff pastured the cattle on other grounds, with the knowledge and acquiescence of the defendant, a promise to pay what the pasturage was reasonably worth would be implied, and the plaintiff would have been entitled to recover on that count; and it could not be known but that the issue as to where the cattle were to be pastured had been found in favor of the defendant, and that the small amount of damages resulted from an allowance on the counter claim for breach of the contract to pasture in the "Uncle Jim Field." But the issues in the case do not admit of any such solution.

The judgment must therefore be reversed and a new trial granted, and it is so ordered.

WILLIAM BOSWORTH v. CHARLES DANZIEN.

DESCRIPTION OF PROPERTY IN TAX PROCEEDINGS.—Neither an assessment for taxes nor a tax deed are necessarily void because, in describing the land assessed, a false call has been inserted in the description in the assessment roll or tax deed.

DESCRIPTION OF LAND IN ASSESSMENT ROLL.—An assessment of land is not void by reason of mistake in description, unless it contains such a falsity in the designation or description of the land assessed as might probably mislead the owner and prevent him from ascertaining that his land had been assessed.

NORTHERLY MEANS NORTH.—The term "northerly," when used in a grant or conveyance, unless controlled by monuments mentioned in the description, means due north.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

er
unt
he
nd

in
re
ast
ce
no

ir
t
et
oe
cri
li

th
th
n
uli
ue
on
he
f

e
sed
e t
re

tion with the description given in the complaint of the premises demanded we find them to agree in every particular.

The deed also recites the description of the larger tract as given in the assessment roll and advertisement. The point of beginning and the first course and distance therefrom, are described as follows: "Lot commencing on the northeasterly corner of Center and Guerrero streets, thence easterly on Corbett street, two hundred feet, thence at right angles northerly," etc.

It will be observed that the description in the assessment roll begins at the northeasterly corner of Center and Guerrero streets and runs thence easterly on Corbett street two hundred feet, and that in the description of the land sold and conveyed, the same line is described as beginning at the same point, running easterly therefrom on Center street.

The Court has found in effect that a line drawn easterly, that is, due east, (1 John. 156; 3 Caines, 293,) from the corner named, would run along Center street in fact, and furthermore it is impossible that it should be otherwise — the corner, the direction of the streets toward the cardinal points, and their subsequent intersection at right angles being given.

We here assume the true point of the respondent's objection to the validity of the deed to be, that the description of the south line of the tract assessed is contradictory in fact, and, not being true to the whole extent of the terms used, that the assessment is utterly void as matter of law. The counsel of the appellant, meeting the case in this aspect of it, seeks to defeat this consequence on the ground that the false call in the description of the property as listed, may be rejected as surplusage.

1. Where, in case of a deed voluntarily executed by the owner of land, it appears upon applying the instrument to its subject matter, the description in it is true in part, but not true in every particular, so much of the description as is false will be rejected, and the instrument will take effect if a sufficient description remains to ascertain its application. *Falsa demonstratio non nocet cum de corpore constat.* (*Smith v. Gal-*

loway, 5 B. & Ald. 43, 51.) In such case evidence of *res gestæ* will be received for the purpose of ascertaining the intention of the parties, and giving to it a complete effect and operation.

But tax proceedings are *in invitum*. The land owner intends nothing. The Government, acting after its own methods and through its own agents, seeks to enforce the collection of a tax which it has imposed upon the citizens; and it follows that if a false description in a tax deed or assessment roll can be rejected as surplusage, it cannot be for the reason that it is necessary that it should be so dealt with in order that the intention of parties may be fulfilled. It does not, however, follow that a false call occurring in an assessment roll is to be retained to the entire overthrow of the tax title, because it cannot be rejected for the particular reason above stated.

It not unfrequently happens that a case arises, not in all respects within the beneficial operation of one rule of law, but which may be manifestly within the saving operation of another, going upon broader conditions. The maxim, "*Ut res magis valeat quam pereat*," is a canon, with reference to which, not only contracts and wills are to be construed, but statutes also—passed, as they are, without any direct co-operation or assent on the part of the citizen. The spirit of the maxim is that nothing should be destroyed merely for the sake of destruction. We have not, by our own examination, been able to find any adjudged case in which it has been held that a false call in an assessment roll, advertisement or tax deed, necessarily vitiates a tax title. The rule as given in *Tallman v. White*, 2 Comst. 66, is as follows: "An assessment of land is fatally defective and void, if it contains such a falsity in the designation or description of the parcel assessed, as might probably mislead the owner and prevent him from ascertaining by the notices, that his land was to be sold or redeemed. Such mistake, or falsity, defeats one of the obvious and just purposes of the statute—that of giving to the owner an opportunity of preventing the sale by paying the tax." We accept the above decision, not more on the authority of

People v. Holladay et al.

the Court by which it was pronounced, than on our entire conviction that it is correct in principle.

The test, then, to which every false call occurring in the course of tax proceedings is to be subjected, is this: Has it probably had the effect to mislead the landowner in relation to the land assessed, advertised and sold?

In the case at bar, the description in the assessment roll begins at a point fixed with entire precision, and runs therefrom due east two hundred feet. The superadded description of that line—"along Corbett street"—was not, in our judgment, calculated to mislead the landowner, and for the manifest reason that it was impossible that the call should be true. The call was not only false, but absurd, and that, too, in the light of facts appearing on the face of the general description of the corner and line.

Judgment reversed and new trial ordered.

THE PEOPLE v. BENJAMIN HOLLADAY AND JESSE HOLLADAY.

COMPLAINT IN ACTION TO RECOVER TAXES.—In an action brought by the people to recover judgment for delinquent taxes assessed during the three years preceding March 1st, 1861, the complaint is fatally defective if it does not aver that the Tax Collector has failed to collect the taxes in question by reason of his inability to find, seize, or sell property belonging to the delinquent.

POWER OF LEGISLATURE.—The Legislature possesses full power to legalize defective and invalid assessments of delinquent taxes, and to provide for their collection.

ACT OF MAY 17TH, 1861, TO LEGALIZE ASSESSMENTS.—The first section of the Act of May 17th, 1861, entitled "An Act to legalize and provide for the collection of delinquent taxes in the counties of this State," legalizes every assessment for taxes made during the three years preceding March 1st, 1861, however defectively and imperfectly it may have been made in any respect.

COMPLAINT WHERE DESCRIPTION DEFECTIVE IN ASSESSMENT.—If an assessment of a tax made during the three years preceding March 1st, 1861, is defective in not stating the kind and quantity of property assessed, whether real or personal, or if real, in not giving its description, the pleader, in an action brought to recover judgment for such tax, may, if the same can be ascertained, insert in his complaint the necessary averments as to kind and quantity or description.

ASSESSMENT OF PERSONAL PROPERTY.—A complaint, under the Act of May 17th, 1861, which avers that the tax "was levied upon and assessed against personal property," contains no cause of action. The complaint should not

People v. Holladay et al.

only aver that the tax was levied upon and assessed against personal property, but also the kind or kinds of personal property.

IN WHAT COUNTY ASSESSMENT TO BE MADE.—All personal property within a county on the first Monday of March, is assessable in that county if not removed from that county before the assessment is actually made, and if assessed in that county before it is removed from it, the tax is payable in that county; but if removed from that county to another before actually assessed, the Assessor of that county may make the assessment, and transmit the same to the Assessor of the county to which the property is removed.

WHERE TAX PAYABLE.—Taxes are due and payable in the county where the property is first assessed; and if the property, after it has been assessed, be removed into another county, and there assessed, the first assessment is unaffected thereby, and payment of the latter assessment is not a discharge of the former.

By CURREY, J.—RHODES, J., concurring:

CONSTRUCTION OF ACT OF MAY 17TH, 1861.—The Act of May 17th, 1861, was only designed to legalize assessments in some respects formally defective, though substantially good, and was not intended to make good an assessment which was totally invalid for not stating either the kind or quantity of property assessed, or not describing it, when real estate.

POWER OF LEGISLATURE.—When an assessment is so defective as to be totally void, the Legislature cannot cure it by legislative enactment having a retrospective operation, so as to create an obligation where none existed before.

APPEAL from the Seventh Judicial District, Solano County.

The facts are stated in the opinion of the Court.

Haight & Pierson, for Appellants.

J. G. McCullough, Attorney-General, for Respondent.

By the Court, **SANDERSON, C. J.**

This is an action to recover delinquent taxes on certain personal property, brought under the provisions of the Act of the Legislature of the 17th of May, 1861. (Statutes of 1861, p. 471.) After stating the title of the action the complaint proceeds as follows:

The plaintiff above named comes, by J. C. Hinckley, District Attorney for said county, and in pursuance of an Act of the Legislature of the State of California, entitled "An Act to legalize and provide for the collection of delinquent taxes in the counties of this State," approved May 17, 1861, complains

against the defendants Benjamin Holladay and Jesse Holladay, known by the firm name of "Holladay & Brother," and for cause of action alleges that the said defendants are indebted to plaintiff in the full sum of three hundred and seventy-one dollars and twenty-one cents, which sum is due, owing and payable from defendants to plaintiff for public revenue and taxes levied as follows: Tax for State purposes, one hundred and sixty-five dollars; tax for county purposes, two hundred and six dollars and twenty-one cents. Said taxes were levied upon and assessed against personal property valued at twenty-seven thousand five hundred dollars, belonging to said defendants, in the County of Solano, for the year 1858, etc.

It is claimed by the appellants that the foregoing complaint does not state facts sufficient to constitute a cause of action, and in support of this objection to the complaint they assign the following grounds: First—Because it does not allege that the Tax Collector has failed to collect the taxes in question by reason of his inability to find, seize or sell property belonging to the delinquents, as required by the second section of the Act under which the suit is brought. Second—Because it does not designate the "kind and quantity" of the personal property upon which the taxes were levied and assessed, as required by the second section of said Act.

1. The first point seems to have been determined in favor of the appellants by the case of *The People v. Pico*, 20 Cal. 595. That action, like the present, was brought under the provisions of the Act of the 17th of May, 1861. In that case the taxes sued for had been assessed against real property, which constitutes the only difference between the two cases. The same points were made by the appellant in that case which are made in this, except so far as the second point may be affected by the character of the property against which the taxes were assessed. Both points were there decided in favor of the appellants.

Upon this point the Court held, in effect, that the inability of the Tax Collector to find, seize and sell property belonging to the delinquent, was made by the statute a condition precedent to the right of action therein conferred upon the State;

and that the District Attorney had no authority to commence an action to recover unpaid taxes, except in cases in which the Tax Collector had failed to collect them for the reasons specified in the Act; and that without an averment of such failure on the part of the Tax Collector, the complaint fails to state a cause of action. The same principle was announced by us in the case of *The People ex rel. Hastings v. Jackson*, 24 Cal. 630, where it was held that conditions precedent must be pleaded in all cases, except those arising out of contract, in which latter cases, the pleading of conditions precedent is excused by the sixtieth section of the Practice Act, and a general averment of performance made sufficient.

2. We do not consider the case of *The People v. Pico* as conclusive of the present case upon the second point made by appellants. The taxes sought to be recovered in that case had been assessed against real property, which was described in the complaint as "the unsold portion of eleven square leagues of land known as Los Mokelamos." The second section of the Act of the 17th of May, 1861, provides that the property, if real estate, shall be described in the complaint; and the Court held that the description was insufficient, and thus far the decision in that case is undoubtedly correct; and further than this it was unnecessary for the Court to go for the purpose of deciding that case, and hence so far as that case seems to hold that the assessment must contain a description sufficient for the purposes of the complaint, and that if the assessment is fatally defective in that respect no cause of action can exist under the Act in question, it may be regarded as *obiter dictum*.

The object of the Act, as declared in the title, is to legalize and provide for the collection of delinquent taxes in the counties of this State. The question as to the power of the Legislature to pass such Acts has been decided in favor of the power too often to admit of doubt at the present time. The first section of the Act provides as follows:

"SECTION 1. The assessments of taxes upon all property, real and personal, in the several counties in this State, whether

Thomas Bodley, for Respondent.

By the Court, SAWYER, J.

This is an action to recover money alleged to be due for the pasturage of cattle. The complaint alleges the pasturage of one hundred and forty-seven head of cattle for a specified time; that defendant promised to pay for said pasturage at the rate of one dollar per head per month; and that at that rate, for the number of cattle and time alleged, the sum due amounts to three hundred and forty-three dollars, for which sum judgment is claimed. There is no count to recover as much as the pasturage is worth, and no value is alleged. The plaintiff counts only upon a special agreement as to price.

The answer denies the request, or agreement to pasture generally; and alleges an agreement to pasture in a particular field, containing good pasturage, for which defendant was to pay one dollar per month per head, and then alleges that plaintiff did not pasture the cattle in the particular field agreed upon, but in another field where the feed was poor.

After setting up this special agreement and breach as a defense, by way of denial of the contract alleged in the complaint, the defendant alleges affirmatively the same special agreement to pasture in a particular field, and the breach by pasturing in another field in which the feed was poor, and alleges that his cattle, in consequence of the poor feed, did not thrive, but lost flesh, and that by reason thereof he had sustained five hundred dollars damages; which amount he prays to have allowed as a counter claim.

On the trial the jury found a verdict in favor of the plaintiff, and assessed the damages at one dollar. The plaintiff moved for a new trial, on the ground that the verdict is contrary to the evidence, and is contrary to law. The Court denied the motion, and plaintiff appeals from the order denying the motion for a new trial, and from the judgment.

Although the Court appears to have given instructions to

Seale v. Emerson.

the jury, they are not in the record, and we must presume that the case was fairly submitted as to the law.

There was no issue in the pleadings as to the value of the pasturage, and the testimony upon that point, under a proper charge from the Court, must have been disregarded as irrelevant. The question was whether the agreement was to pasture generally, as alleged by the plaintiff; or to pasture in a particular field, as alleged by defendant. There was no dispute between the parties as to the fact, or place, or time of pasturage, the number of cattle pastured, or the rate per head per month agreed on, and no conflict of testimony on those points. The only evidence as to *where* the cattle were *to be* pastured under the agreement, came from the parties themselves, either given by them respectively in person on the stand, or in the form of declarations of the defendant, testified to by other witnesses. The defendant testified that the agreement was to pasture in the field, called "The Uncle Jim Field," and not in the "Willow Pond Field," or "Mill Pond Field," where they were pastured, and where the feed was not as good as in the "Uncle Jim Field." The plaintiff denies this in his testimony, and says that he refused to pasture the cattle in the "Uncle Jim Field," stating as a reason, that he intended to cut hay on that field in case the grass should prove to be sufficient for that purpose. This was the vital and only real issue in the case. Had this issue been found for defendant, the verdict must necessarily have been for him, because on his theory it was for pasturing in the "Uncle Jim Field," that the defendant agreed to pay the specific price alleged, and plaintiff must recover at this specific rate or not at all, for he did not count on a *quantum valebat*, and he must recover according to his allegations, or fail. The jury, therefore, must have found this issue in favor of the plaintiff, otherwise the verdict would necessarily have been for defendant. Having found this issue in favor of the plaintiff—that is to say, that there was no agreement to pasture the cattle in the "Uncle Jim Field," as claimed by defendant, the only measure of damages was the price agreed upon, about which there is no conflict in either the pleadings or

lars." It is presumed that this description is taken from the assessment, and, if so, the assessment, but for the Act of the 17th of May, 1861, would be fatally defective; but that Act cures the defect, and the assessment, which was previously worthless, has become legal and binding, and may be enforced by suit, provided the complaint supplies a proper description. The statute requires that the kind and quantity of the property, *both* real and personal, shall be designated in the complaint—that is to say, the kind and quantity of real property shall be designated, and the kind and quantity of personal property shall be designated. The use of the word "both" in the connection in which it is used makes this reading imperative. The word "kind" does not distinguish between and refer solely to the terms real and personal, but the latter terms are used generically, and the word "kind" refers to the species of each as defined in the Revenue Act. The statute divides personal property into various classes, and a lumping assessment under the general head of personal property is insufficient. It would be impossible to fix a valuation upon property so assessed, nor could the valuation be corrected by the Board of Equalization. The different classes must be stated—as, for example, goods, solvent debts, horses, cattle, etc. The complaint in this respect is deficient and obnoxious to the objection made by the appellants.

3. Another point is made upon which we deem it proper to express an opinion, for the purpose of furnishing a rule of decision upon a second trial, should one be had. It appears from the evidence that the property against which the taxes in controversy were assessed consists of cattle. On the first Monday in March of the year for which the taxes were assessed, these cattle were in Solano County. Between that time and the month of May following they were removed to the County of Alameda, and it is claimed that they were there assessed and the taxes paid, and that therefore the appellants ought not to be made to pay the taxes which were assessed in Solano County, for if so he will be made to pay taxes upon the same

property twice. Of course the law does not exact double taxes.

It is the duty of the Assessor to assess all taxable property in his county between the first Mondays of March and August in each year. All property which is within his county on the first Monday in March is assessable in his county, provided it is in his county at the time the assessment is made; and the taxes thereon are payable in his county. But, if the property is removed from his county to another before the assessment is actually made, he cannot make an assessment which will be payable in his own county; but he may make the assessment in the manner prescribed in the twenty-sixth section of the Revenue Act (Wood's Digest, p. 622) and transmit the same to the Assessor of the proper county. The taxes are due and payable in the county where the property was first assessed, and if the property, after it has been assessed, be removed into another county and there assessed, the first assessment is unaffected thereby, and a payment of the latter assessment is not a discharge of the former. In other words, the first assessment, if the property was in the county at its date, is the lawful one as between the two, if the taxes be paid upon the latter assessment it is a mere voluntary payment, and is no answer to a demand for payment upon the first. Hence, if the cattle in question were in Solano County at the date of the assessment made by the Assessor of that county, the taxes were legally due in that county, and a payment of taxes subsequently assessed upon them in Alameda County was no discharge of the debt, but a mere voluntary payment. It was the business of the appellants to know whether their cattle had been assessed in Solano County before their removal; and if so, such assessment and payment thereon would have been a complete answer to the claim of Alameda County.

The judgment is reversed and a new trial ordered, with leave to the respondent to amend the complaint.

tion with the description given in the complaint of the premises demanded we find them to agree in every particular.

The deed also recites the description of the larger tract as given in the assessment roll and advertisement. The point of beginning and the first course and distance therefrom, are described as follows: "Lot commencing on the northeasterly corner of Center and Guerrero streets, thence easterly on Corbett street, two hundred feet, thence at right angles northerly," etc.

It will be observed that the description in the assessment roll begins at the northeasterly corner of Center and Guerrero streets and runs thence easterly on Corbett street two hundred feet, and that in the description of the land sold and conveyed, the same line is described as beginning at the same point, running easterly therefrom on Center street.

The Court has found in effect that a line drawn easterly, that is, due east, (1 John. 156; 3 Caines, 293,) from the corner named, would run along Center street in fact, and furthermore it is impossible that it should be otherwise—the corner, the direction of the streets toward the cardinal points, and their subsequent intersection at right angles being given.

We here assume the true point of the respondent's objection to the validity of the deed to be, that the description of the south line of the tract assessed is contradictory in fact, and, not being true to the whole extent of the terms used, that the assessment is utterly void as matter of law. The counsel of the appellant, meeting the case in this aspect of it, seeks to defeat this consequence on the ground that the false call in the description of the property as listed, may be rejected as surplusage.

1. Where, in case of a deed voluntarily executed by the owner of land, it appears upon applying the instrument to its subject matter, the description in it is true in part, but not true in every particular, so much of the description as is false will be rejected, and the instrument will take effect if a sufficient description remains to ascertain its application. *Falsa demonstratio non nocet cum de corpore constat.* (*Smith v. Gal-*

loway, 5 B. & Ald. 43, 51.) In such case evidence of *res gestæ* will be received for the purpose of ascertaining the intention of the parties, and giving to it a complete effect and operation.

But tax proceedings are *in invitum*. The land owner intends nothing. The Government, acting after its own methods and through its own agents, seeks to enforce the collection of a tax which it has imposed upon the citizens; and it follows that if a false description in a tax deed or assessment roll can be rejected as surplusage, it cannot be for the reason that it is necessary that it should be so dealt with in order that the intention of parties may be fulfilled. It does not, however, follow that a false call occurring in an assessment roll is to be retained to the entire overthrow of the tax title, because it cannot be rejected for the particular reason above stated.

It not unfrequently happens that a case arises, not in all respects within the beneficial operation of one rule of law, but which may be manifestly within the saving operation of another, going upon broader conditions. The maxim, "*Ut res magis valeat quam pereat*," is a canon, with reference to which, not only contracts and wills are to be construed, but statutes also—passed, as they are, without any direct co-operation or assent on the part of the citizen. The spirit of the maxim is that nothing should be destroyed merely for the sake of destruction. We have not, by our own examination, been able to find any adjudged case in which it has been held that a false call in an assessment roll, advertisement or tax deed, necessarily vitiates a tax title. The rule as given in *Tallman v. White*, 2 Comst. 66, is as follows: "An assessment of land is fatally defective and void, if it contains such a falsity in the designation or description of the parcel assessed, as might probably mislead the owner and prevent him from ascertaining by the notices, that his land was to be sold or redeemed. Such mistake, or falsity, defeats one of the obvious and just purposes of the statute—that of giving to the owner an opportunity of preventing the sale by paying the tax." We accept the above decision, not more on the authority of

those existing for want of a proper observance of formalities of subordinate importance, but not those vitally affecting the levy and assessment. This conclusion seems to me to be necessary in order to give any effect to this Act, for the reason that the Legislature had not the power to render an assessment valid and binding which was originally invalid in substance, and which was therefore void. It may be asked, what are the informalities which may be cured, and what are the matters of substance to which the healing power of the Legislature cannot extend? The statute requires the Assessor to do certain things to make an assessment, and to accomplish this end the things required must be performed in some manner. The manner or mode of performance may in some particulars be of the essence of the assessment, and in others not so. Where the act to be done is essential to or constitutive of the things to be accomplished, its omission cannot be cured by legislative enactment having a retrospective and retroactive operation, so far as to impair rights already existing, or to create a new obligation or impose a new duty or attach a new disability in respect to transactions or considerations already past. (*The Society, etc. v. Wheeler*, 2 Gallison, 139.)

To hold that the Legislature is competent to render valid and binding from the beginning that which by the law was at the time invalid and void seems to me to be involved in an inextricable absurdity. As well might the Legislature undertake to create rights unknown to the laws of the land and give them a retrospective existence, and therewith furnish to those who, by a fiction, possessed such rights, remedies for injuries affecting them before they had existence. It would, I apprehend, be equally in the power of the Legislature to legalize and render valid and binding in law an abortive proceeding instituted in past years against a citizen to divest him of his property, without affording him an opportunity to be heard in his defense, as to declare a radically and invalid assessment valid and binding *ab initio*.

A statute which in its scope and spirit has for its object to make valid and binding the acts of Courts or officers, which

when performed were null and void, is to my mind in violation of the rights of the citizens affected by it; and measured by a moral standard should be condemned by every Court of justice which may be called on to deal with it.

Statutes which are retrospective in their character and to which is given a retroactive effect, have generally been considered in violation of common right and common reason, and *ipso facto* void, independently of any constitutional restrictions against their passage. (*Bowman v. Middleton*, 1 Bay's R. 252; *Bonaparte v. C. and A. R. R. Co.* 1 Bald. C. C. R. 223.) The law is a rule of civil conduct, and from its very nature must be prospective. In Smith's Commentaries, section one hundred and fifty-three, it is said, "Retrospective laws are not only inconsistent with the idea of a law, as a rule of civil conduct, but they are in many instances only the exercise of powers which are in their nature strictly *judicial*, instead of *legislative*. Such laws, when only such, look not to the future, but upon the past; or, in other words, pronounce judgment upon acts done antecedent to their adoption; and in this respect they assume a *judicial* power, as contradistinguished from what is strictly *legislative* power. They assume to give character to facts which they did not possess at the time they took place, and then to judge of them in the new character thus legislatively created for them; to settle, in some instances, old rights, depending on laws as they existed before the Act was passed, by new principles created and applied by the retrospective Act, having no existence antecedent to the time of its passage, which then, and not till then, sprang into being."

I do not object that the Legislature cannot pass remedial statutes, affording the means to enforce rights on the one hand, and the performance of obligations on the other, which had existence before the remedy was provided; but my objection opposes any construction of the Act of 1861 which has the effect to give to an assessment a character which it did not possess at the time it passed from the officers whose duty it was to see that it was made.

The language of the Act is that certain assessments "are hereby legalized and confirmed and are rendered valid and binding, both at law and equity, against the persons and property assessed." If the Act was designed to do more than to remedy defects of a mere formal character, and which ordinarily would be remedied by the principles which are the basis of the maxim, *De minimis non curat lex*, then it must be held to have assumed to give a character to the assessment which it did not have, and then further to judge of it in the habiliments of its new creation, and that, too, without affording to the party affected by it any chance whatever to obtain a reduction of the amount thus constructively assessed, however excessive and unjust it might be. If the Act goes to this extent it should be restrained. It should be limited to the cure of infirmities of minor importance, which, according to the rules of construction applied in the consideration of the proceedings of Courts and officers of inferior jurisdictions, would render ineffectual the assessment for any efficient purpose.

While I admit that the Legislature has the power to heal infirmities arising from a failure to pursue with exact precision the course prescribed in matters of a formal character, I deny its power to cure evils affecting the substance of the assessment; because in the one case the law is remedial and operates prospectively, and in the other it is curative and retrospective and in its practical working deprives the citizen of his property without due course of law. Give to the Act the effect that is claimed for it on behalf of the State and it furnishes to the public prosecutor a case, in its living essence of legislative creation, falsely antedated, which the citizen who is made the victim is not permitted to gainsay by a statement of the truth, that no valid assessment was made; but he is permitted, after first assuming that a valid and binding assessment was made at the time alleged in the complaint, to answer that he has paid the taxes not necessarily on the property set down and described in the assessment roll, but on the property described in the complaint.

I cannot believe that the legislative omnipotence, with all its creative energies, can perform the miracle of creating a thing whose origin shall be of years that have passed; nor do I believe the Legislature has the power to deny to the citizen the right to be heard in defense of his person or property.

RHODES, J., also concurring in the judgment, but dissenting from the opinion in part.

I concur with the majority of the Court in reversing the judgment of the Court below, but I agree with Mr. Justice CURREY in his dissenting opinion; and I would further add, that if it can be held that all the acts—be they apparently of the most formal character—of the Assessor and the other officers charged by law with the performance of the series of acts that are required to be done before the taxes are payable, are essential and constitute a part of the substance of the assessment, without which the assessment is invalid, then, in my opinion, the Legislature cannot dispense with the performance of any of those acts in past transactions, and thus create a cause of action where none existed at the time of the performance of the last official act.

WILLIAM H. CROWELL v. SONOMA COUNTY.

LIABILITY OF COUNTY FOR DAMAGES.—A county is not liable for damages for injuries sustained by individuals caused by a road overseer placing the abutment of a bridge in the bed of a stream in such manner as to cause the waters of the stream to flow out of their usual channel, and wash away land or the improvements thereon.

ROAD OVERSEER.—The relation between a county and its road overseer bears no resemblance to that of master and servant, nor to that of employer and employé.

LIABILITY FOR ACT OF ROAD OVERSEER.—If an abutment to a bridge is wrongfully built in the channel of a stream, the remedy, if any exists, is against him by whom the injury was committed.

APPEAL from the District Court, Seventh Judicial District, Sonoma County.

Crowell v. Sonoma County.

Plaintiff recovered judgment, and defendant appealed.
The other facts are stated in the opinion of the Court.

J. G. McCullough, Attorney-General, for Appellant, cited *Sherbourne v. Yuba County*, 21 Cal. 113, and *Hoffman v. San Joaquin Co.* 21 Cal. 426.

A. Thomas, for Respondent.

There is no question from authority that cities and counties are municipal corporations, and are equally liable, in an action for any injury which results to an individual from *ministerial* acts which they or their agents perform within their powers. (16 N. Y., 2 Smith, 159, and note; 17 N. Y., 3 Smith, 104; 15 N. Y., 1 Smith, 519.)

A municipal corporation is liable, if by the want of care and skill in its agents a public work is constructed which causes damage to individuals. (3 N. Y., 3 Comst., 463; 5 N. Y., 1 Selden, 369; 2 Denio, 433.)

The cases cited by the appellant are not apposite to the case before the Court. Those cited were actions for injuries sustained in consequence of a failure to do a duty enjoined by law. "This is an action brought for an act done by the county." The building of the bridge was a corporate act performed by its agents and servants; the defendant is responsible upon settled principles illustrated by several adjudged cases. (16 N. Y. 162, 173; 1 Selden, 375; 3 Hill, 612; 3 Comst. 464; 5 Selden, 163.)

By the Court, SHAFER, J.

The complaint states that the plaintiff, before and at the time of the grievances complained of, was lawfully possessed of certain lands in said county, describing them; that "the defendant, contriving to injure the plaintiff, on the 1st of October, 1859, at said county, built a bridge across the Santa Rosa Creek at the southern end of "O" street, in the Town of Santa Rosa, and in building said bridge, wrongfully and unlaw-

Crowell v. Sonoma County.

fully erected an abutment at the north end of said bridge, extending into the channel of said creek, and has kept and continued the abutment in the channel of said creek for a long space of time, to wit: thence, hitherto; and thereby during all the time aforesaid unlawfully and wrongfully diverted and turned the water in said creek out of its regular channel, and prevented and hindered the water in said stream from flowing along its usual course; and that in consequence of said diversion of the water in said creek by the erection of the abutment of said bridge in the channel of said stream by the defendant, the water of said creek flowed with all its force and weight against the said land of which the plaintiff was and is possessed as aforesaid, and said water of said creek washed off large quantities of said land and a large amount of fencing thereon, together with houses and fruit trees, to the damage of plaintiff, one thousand five hundred dollars." The defendant appeals from the judgment.

It was held in *Sherbourne v. Yuba Co.*, 21 Cal. 113, that a county is not liable in damages to one, who, while an inmate of a county hospital, sustains injuries from unskilful treatment by the resident physician, or from the failure on the part of the officers of the hospital to supply sufficient and wholesome food.

In *Hoffman v. San Joaquin County*, 21 Cal. 426, the Court held that a county is not liable for damages at the suit of an individual, sustained by him in consequence of a want of proper repairs to a bridge on a public highway of the county.

The case at bar is clearly within the principle upon which the foregoing judgments proceed.

Counties are mere instruments created by the Government for the purposes of internal administration. They have no rights as against the Government, and owe no duties to the public, nor to individuals, except such as are imposed by law.

By the Act of 1855, (Wood's Dig. p. 650) it is made the duty of the Board of Supervisors of each county "to divide the county into a suitable number of road districts, and to appoint annually, or whenever vacancies may occur, an over-

seer for each district, whom they shall have power to remove at pleasure. The road overseers are required to keep all the public highways in their respective districts clear from obstructions and in good repair—causing banks to be graded, bridges and causeways to be made when the same may be necessary, to keep the same in good repair, and to renew them whenever destroyed.”

From these provisions it is apparent that the relation between a county and its road overseer, bears no available resemblance to that of master and servant, nor to that of employer and employé. The office of road overseer in the defendant county, was not created by that county, but by public law instead, and all the duties connected with the office were created in like manner. The county had no power even to designate the incumbent of the office, for by the Act referred to, the power of appointing road overseers is conferred upon the Board of Supervisors; and in exercising that power the Board acts not under the county, but under the law.

It is also apparent that the Act does not cast the duty of building bridges upon the counties. True, counties are subjected to the pecuniary burdens connected with the building and repair of bridges, but the duty of building them when and where there is a necessity for them, and of keeping them in repair thereafter, is devolved primarily upon the overseer; and to that intent road overseers are the agents and servants of the law rather than of the counties within and for which they are appointed.

In this case, if the abutment “was wrongfully and unlawfully built in the channel of the creek,” as the complaint alleges, then it must have been so placed and built by the overseer or by a volunteer. If by a volunteer, the county confessedly cannot be charged; and if unlawfully placed in the channel by the overseer, if the plaintiff has any remedy, it must be against him by whom the injury was committed.

Judgment reversed, and the Court below directed to dismiss the action.

Robles v. Clarke.

JOSE TEODORO ROBLES v. JEREMIAH CLARKE.

RESULTING TRUST.—R. was the owner of promissory notes overdue, and desired to have the same collected. Having no means to pay attorney's fees and costs, he arranged with C., an attorney, to take the notes for collection. By the arrangement C. was to furnish money to pay costs and disbursements, and have the notes indorsed to him, and bring suit in his own name, and be reimbursed, both for his fees as attorney and for advances by him made, out of the proceeds when collected. R. then indorsed the notes to C., who gave him a receipt as attorney, stating that he received the notes for collection. C. brought suit in his own name, obtained judgment, and had an execution issued, but the same was returned unsatisfied. C. then made an arrangement with a brother of one of the defendants in the judgment, by which the brother conveyed to C. a tract of land, and C. assigned him the judgment, and paid him a sum of money beside. C. was solvent and willing to pay R. whatever was due him on a settlement. *Held*, that there was no resulting trust in favor of R., and that C. did not hold the land conveyed to him in trust for R., and that R. was only entitled to recover the money due him on a fair settlement.

RESULTING TRUST.—It seems that when the portion of the purchase money furnished by the party claiming the benefit of a resulting trust, is not an aliquot portion of the whole, there is no resulting trust corresponding with the portion of the purchase money so furnished.

DECREE COMPELLING CESTUI QUE TO CONVEY TO TRUSTEE.—A decree establishing a trust in favor of the *cestui que*, and making allowances to the trustee for moneys by him advanced in and about the trust estate, and directing the trustee to execute a conveyance of the trust estate to the *cestui que* before payment of the moneys advanced by the trustee, is erroneous. The payment of the money should be made a condition precedent to the conveyance.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

The facts are stated in the opinion of the Court.

J. Clarke, Appellant in *pro. per.*

The defendant having paid the cash consideration of eight hundred dollars of his own money, (as found by the Court) — even conceding that the judgment was held wholly in trust for the plaintiff — the right of the defendant in equity would be to follow the land, not for the purpose of getting a share of it corresponding to the amount of the judgment, relative to the eight hundred dollars; nor, secondly, to get the whole of it by paying defendant the eight hundred dollars (as the Judge below, in effect, decides) — but simply to have the amount of

Robles v. Clarke.

the judgment declared a lien upon the land, and to realize it, if necessary, by a judicial sale of the latter.

This remedy the plaintiff has no occasion to pursue; for it is not pretended that the defendant has not, at all times, been willing to account to plaintiff for the amount of the judgment as so much cash.

Greenleaf's *Cruise on Real Property*, 391: "Lord Hardwick has said that when the whole consideration moved from one, and the conveyance is made to another, there is a resulting trust for the person who paid the consideration; but he never knew it when the consideration moved from several persons."

In *Drop v. Norton*, 2 Atkins, 74, the Court say: "When the purchase money is paid by one, and the legal estate is in another, this, by operation of law, is a resulting trust for the person who paid the money; and the doctrine is very right, when the whole purchase money is paid by one person. But then the whole value of the purchase is not paid by Colonel Norton, for the fifteen hundred pounds is only part of the consideration. I am of opinion that there is no resulting trust."

Hovenden on *Frauds*, Vol. I, p. 471, states that "although personalty misapplied by a trustee may be traced into the purchase of land, it does not follow that in all cases the land purchased must belong to the *cestui que trust* of the money with which it was purchased. The personal estate may be *chargeable upon* and demandable out of the real estate so bought, but it may only constitute a *lien* upon, not give title to the estate itself. *To this limited extent the equity of a case must plainly be confined when an estate shall appear to have been purchased partly with his own and partly with trust moneys,*" and he cites *Lewis v. Maddox*, 17 Ves. 58; *Savage v. Carroll*, 1 Ba. & Beat. 285; see *Myers v. Myers*, 2 McCord's Ch. R. 265.

S. O. Houghton, for Respondent.

From the time Clarke obtained the conveyance from Vallejo, he claimed to be the sole owner of the premises, and denied that Robles had any rights therein. This dispenses with the necessity for a demand. The rule in chancery is, if the

Robles v. Clarke.

defendant denies the right of the plaintiff, he cannot insist in his defense that there was no demand. (*Ayer v. Ayer*, 16 Pick. 335.)

The appellant contends that because only a part of the consideration of the conveyance from Vallejo to Clarke was paid with property of Robles, no trust could result to him, and that the remedy of Robles is limited to having the amount of the judgment declared a lien on the land conveyed by Vallejo to Clarke.

In support of this position he cites the case of *Wallace v. Duffield*, 2 Sergt. & Rawle, 521, and quotes from the opinion of Mr. Justice Gibson. There are three opinions in that case, and the point there decided does not sustain appellant's views, but is an authority against him.

The rule as declared by Mr. Justice Gibson in that case, has never been followed, and the same Judge, then Chief Justice, in delivering the opinion of the Court in *Kissler v. Kissler*, 2 Watts, 324, after discussing the question, and expressing some doubt of the correctness of the rule, declares it settled by our Courts "that a purchase with trust money in whole or in part, gives the owner of the money a correspondent ownership of the land," and cites as authorities *Duffield v. Wallace*, (one of the cases relied upon by appellant as supporting his position,) and *Gregory v. Setter*, 1 Dall, 139, and *German v. Gabbald*, 3 Binn. 302.

The quotation made from Hovenden on Frauds, is not sustained by the cases cited in support of the rule as there stated.

Lewis v. Maddox is a case of a marriage contract, providing that all the personal estate acquired or possessed by the husband, should at his death, in case she survived him, go to his wife. During the marriage he purchased an estate, partly with his own funds and partly with funds borrowed by him, and it was held that the amount of his own money used in that purchase could be followed into the land. It was not sought to take the land instead of the money.

Myers v. Myers, 2 McCord's Ch. R. 265, also cited as sup-

Robles v. Clarke.

porting the same principle, is a case where an executor had mingled trust funds with his own in the purchase of property.

In the opinion of the Court occurs the following language: "And there is no rule of equity better settled than that a trustee shall not be permitted to employ the trust fund for his own benefit; all purchases, therefore, made with the funds of the trust estate, will be considered for the benefit of the *cestui que trust*. That principle is exemplified in numerous cases where it has been held that executors, *attorneys*, and trustees, shall not purchase at their own sales, nor of their *cestui que trusts*, clients, etc. All persons acting in such representative capacities are considered in equity as trustees, and are governed by the same rules; and it is no answer on the part of the defendant that he has so mixed up the two funds together that he cannot distinguish one from the other. A person may, sometimes, by mixing the estate of another with his own, subject himself to the loss of both, for it is his own fault that they have not been kept separate."

It is submitted that the principle contended for by the appellant is not supported by any authority cited by him, or indeed by any other.

The right of Robles is not limited to following his property into the land. He has his election to hold his trustee personally liable, or he may follow the fund belonging to him into the land, and have it raised out of it by a sale thereof, or he may claim the land itself.

This rule is well settled, and is supported by numerous authorities.

"In all cases where trust funds have been misemployed or moneys placed in the hands of others in a fiduciary capacity have been invested in property without the consent of the beneficiary, a trust results, unless the *cestui que trust* elects to take the money instead thereof." (Tiffany & Bullard on Trusts and Trustees, 33, 34, 480; *Seaman v. Cook*, 14 Ill. 505; *Torry v. Bank of Orleans*, 9 Paige, 663; *Van Epps v. Van Epps*, Idem, 237, 241; *Hawley v. Cramer*, 4 Cowen, 736; *Quackenbush v. Seaman*, 9 Paige, 334.)

Robles v. Clarke.

Appellant in reply.

Plaintiff's counsel makes a mistake as to *the nature of the trust* with which defendant was invested. It was not a trust of *land*, to be rented, used, or managed. It was a trust of a *judgment*, (strictly, of part of a judgment, but the principle is the same,) to be *turned into money*, and nothing else, and this whether by acknowledging satisfaction of it if paid by the judgment debtors, or by assigning it if assumed by one liable, or supposing himself liable, as surety. Surely, the judgment was not intended to be *kept*, to be held as an *investment*, as so much desirable *property*, which it would be a fraud, a breach of trust, to part with for money!

By the Court, SAWYER, J.

There is no conflict in the testimony bearing upon most of the controlling issues presented by the pleadings in this case, and the findings must depend mainly upon the construction put upon the evidence. Some of the findings are, in our judgment, clearly not in accordance with the evidence; some embrace only a part of the facts, and require qualification, and some issues presented by the answer, having an important bearing on the rights of the parties, should, under the evidence, have been found for the defendant, but do not appear to have been passed upon by the Court.

The following are the leading facts found by the Court, or when not found by the Court, as herein stated, or not passed upon at all, to our minds clearly established by uncontradicted evidence.

On the second of April, 1858, the plaintiff executed to Antonio Larrain a conveyance, purporting to convey an undivided half of a tract of land called Santa Rita, or Rincon de San Francisquito, excepting a designated tract of fifty acres, reserved to the grantor, for the consideration of two thousand dollars, receiving in payment six hundred dollars in cash and two notes of Larrain, guaranteed by Salvator Vallejo—one

Robles v. Clarke.

for four hundred dollars, payable in thirty days, and one for one thousand dollars, payable in six months. There are covenants of warranty in the deed, and although the granting part purports to convey an undivided half, there is a provision that "the covenants of this deed shall not extend to deeds which from time to time have been made of several and separate parcels of said land to purchasers thereof, but only to said entire interest and the residue or remainder thereof after such sales," etc., thereby showing that lands had been conveyed, and that a full undivided half did not pass, as purported in the granting clause; and other evidence, in regard to which, however, there is some question as to its admissibility, shows that a very considerable portion of said rancho had been thus conveyed. According to the testimony of Mrs. Larrain, widow of Antonio, which is uncontradicted, Robles first made the agreement with Mariano G. Vallejo to sell to him; then Vallejo requested Larrain to buy it and take the deed in his name, but for the benefit of said M. G. Vallejo, the real party in interest. M. G. Vallejo was present at the time and furnished the money to make the cash payment, and the notes were given for the balance. At the time the deed was made, M. G. Vallejo handed the money to the witness, Mrs. Larrain, and she gave it to Robles. On the same day Larrain conveyed it to said M. G. Vallejo. The notes were executed by Antonio Larrain and guaranteed by Salvador Vallejo, a brother of M. G. Vallejo, the real purchaser, whose name does not appear on the notes. The notes were not paid when due, and plaintiff, Robles, being without funds to pay costs of suit, and requiring some small advances for personal expenses, desired defendant, Clarke, to make the advance of cash and the costs, and collect the notes, taking his advances and fees for services in collecting out of the proceeds. Defendant consented to do so, on condition that plaintiff would assign the notes to him, to enable him to control them, and thereby secure his advances and compensation. Thereupon plaintiff indorsed the notes to defendant for this purpose, defendant, giving him an acknowledgment in writing that the notes were received for

Robles v. Clarke.

collection. The defendant at the same time advanced plaintiff thirty-five dollars cash, for his personal use, taking a written acknowledgment for the money so advanced. Suit was immediately brought by defendant in his own name against the maker and guarantor, defendant advancing the necessary costs. The suit was defended by able counsel, on the ground that there was a breach of covenants of warranty in Roble's conveyance; but judgment was finally entered in favor of plaintiff for one thousand three hundred and eighty-two dollars and sixty-nine cents debt, and thirteen dollars and fifty cents costs — a small payment having been made before the notes came into the defendant's possession. For his services in prosecuting this suit under the circumstances, the Court found, and the testimony justified the finding, that defendant was entitled to a fee of five hundred dollars, which, added to his cash advances under the arrangement with plaintiff, entitled him to the sum of five hundred and forty-eight dollars and fifty cents out of the judgment. Execution was taken out upon the judgment and sent to Napa County, where it was supposed that Salvador Vallejo's property, if he had any subject to execution, was situated; but it was returned unsatisfied. Larrain was totally insolvent, and the testimony renders it highly probable, if not entirely certain, that nothing could be made out of Salvador Vallejo. The prospect of making the money out of the judgment debtors appearing desperate, as it manifestly was, and having reason to suppose that the purchase was made for M. G. Vallejo, the defendant obtained an interview with him, and sought to induce him to assume and pay the judgment, at the same time insisting that he (M. G. Vallejo) was personally liable as principal and the land subject to a vendor's lien. Vallejo alleged that he had paid Larrain the full value of the property in cash, and denied that there was any personal liability or any lien on the land. There was a mortgage on the premises originally for five thousand five hundred dollars, drawing interest at four per cent per month, to be compounded monthly if not paid, given to one Goodman, but then held by S. O. Hastings, but what

Robles v. Clarke.

amount was unpaid at this time does not appear. The title was still unconfirmed by the authorities of the United States Government, but a proceeding for confirmation was pending, the claimants being represented by the defendant as attorney. The boundaries were still indefinite and undetermined, and the title and condition of the land in these respects were unsettled and unsatisfactory. After a great deal of negotiation with M. G. Vallejo, the latter, expressing regrets that he had purchased in the present condition of things and a desire to protect his brother Salvador in respect to the judgment, proposed to sell and convey his interest in the premises to defendant for the said judgment and eight hundred dollars cash. The defendant, acting upon his own judgment and responsibility, and without consulting plaintiff, concluded to make the purchase on his own account, and assume himself the liability to pay plaintiff the amount of the judgment coming to him, and to account to him for it as so much cash collected. The proposition was accepted, the defendant paid out of his own funds the eight hundred dollars cash, and assigned to Vallejo the judgment; and Vallejo, in consideration thereof, on the 29th of March, 1859, conveyed the premises to defendant. There is no pretense that the defendant was not at the time, or that he has not been at all times since, a man of ample means and abundantly able to pay in cash, without resorting to the property purchased, any amount that may be due to plaintiff on this judgment, nor is there any evidence tending to show that he has not been at all times ready and willing to account with plaintiff and pay him any sum of money that may have been due him; on the contrary, the defendant testifies that he has at all times been, and that he now is ready and willing to account for and pay any sum that may be due to plaintiff. From the time of this conveyance the defendant has claimed to be the owner of the whole of said premises.

The defendant had before this time acquired large interests in said rancho through mesne conveyances from plaintiff, executed prior to the conveyance to Larrain; and subsequent to said purchase he acquired other interests therein. On the 8th

Robles v. Clarke.

of October, 1859, long subsequent to said conveyance of Vallejo to defendant, S. C. Hastings, then the holder of said mortgage to Goodman, covering said premises and other lands, commenced a suit to foreclose the same, claiming in his complaint some nine thousand dollars to be due thereon. On the 25th of May, 1860, more than a year after said conveyance from Vallejo to defendant, and at a time when said plaintiff had ceased to have any interest in said premises in dispute, unless he had an interest under said conveyance from Vallejo to defendant, said defendant, for the purpose of protecting his interests, procured from said Hastings an assignment to himself of said mortgage, for which he paid, out of his own funds, the sum of five hundred dollars. Said defendant then amended the complaint and brought in other parties defendants, purchasers subsequent to said mortgage, and prosecuted said suit to a decree for his own benefit in the name of the said Hastings. Said plaintiff appeared in said suit by other counsel, and litigated said action, setting up in said suit that defendant Clarke held as trustee for him. Said defendant also filed a petition of intervention in said suit on his own behalf, and his interest in said suit appeared upon the record of said cause. After a long litigation, a decree was finally entered on the 4th of September, 1862, for a large sum of money. An order of sale issued, and the interest of said Robles in said premises was sold to said defendant, and the amount of his bid credited on said judgment.

Since the sale from Vallejo to Clarke, a final confirmation of the said grant has been obtained, and several contests have occurred between the claimants under this grant, and the grantees of adjoining grants, as to the boundaries, in which said defendant intervened, claiming to act for his own interest, and by his efforts sought to enlarge the boundaries of said rancho by moving back the lines, as insisted upon by the adjoining claimants. In resisting the encroachments of neighboring claimants, he incurred considerable expense in costs and disbursements, which were paid out of his own funds, and he performed a large amount of professional labor. After most

Robles v. Clarke.

of these results were accomplished, the plaintiff, for the first time, set up a claim that he was entitled to the sole benefit of the purchase made by defendant from Vallejo, and of all the increased value given to the property by the subsequent labor bestowed, and expenses incurred by the defendant in that behalf; but, so far as anything to the contrary is shown by the record, without ever offering to refund to defendant his advances, or compensate him for his various services. To enforce this claim he brought the present action, wherein he asks a judgment to the effect that said premises are held by said defendant in trust for said plaintiff, and that defendant be adjudged to convey to said plaintiff said undivided half of said rancho conveyed to said defendant by said Vallejo.

The decree was for plaintiff, and defendant appeals.

The foregoing statement of facts is sufficient, and perhaps more than sufficient, to explain the grounds of our decision.

It is claimed by the plaintiff that there is on these facts a resulting trust in his favor. The principle, supported by a number of authorities (2 Paige, 238; 13 Ill. 233; 30 Maine, 127; 14 Gray, 121; 15 Wend. 650; 1 Hov. Frauds, 471; 1 Ball and Beat. 284) that where the portion of the purchase money furnished by the party claiming the benefit of a trust is not an aliquot part of the whole, there is no resulting trust corresponding with the portion of the purchase money so paid, seems to be admitted by respondent; for it is insisted that where the party taking the deed in his own name wrongfully mingles the money of another with his own, in making the purchase, in such manner that it cannot be distinguished, or does not constitute an aliquot part of the whole amount paid, then he must suffer the inconvenience, if any, and a trust results to the other party to the extent of the whole property purchased; and upon this principle the present judgment seems to be founded.

If there is a resulting trust to any extent in favor of the plaintiff in this case, it must depend upon the principle of that class of cases, where a party wrongfully purchases property in his own name, with funds in his hands held in a fiduciary

capacity. The usual cases found in the books under this class are, such as where funds are placed in the hands of an agent for the purchase of property, or the purposes of trade, and he invests them in his own name; or where executors, guardians, and the like, who are charged with the management of funds belonging to others, invest them in their own name, and for objects not contemplated. In all such cases, the funds placed in the hands of the trustee have been misapplied, in violation of the duties of the trustee, and when the party in such cases violates the trust, and wrongfully purchases property for his own benefit, with the funds in his hands in a fiduciary character, he will not be permitted to enjoy the profits of a successful operation, wrongfully made at the risk of his *cestui que trust*. The principle is, that where funds are placed in the hands of a party for safe keeping, or to be employed for the advantage of the owner, it is the duty of the party accepting the confidence to do every reasonable thing in his power to accomplish in the most advantageous manner the object of the trust reposed in him. The general rule upon the subject is founded upon the moral obligation resting upon a party to refrain from placing himself in relations, which ordinarily excite a conflict between self-interest and integrity. In the class of cases referred to, where there is a breach of good faith, and a misapplication of the trust fund, a Court of equity will convert the party violating the confidence reposed in him into a trustee, whenever necessary to protect the interest of the confiding party, and do justice between them.

The question is, does the case under consideration fall within the principle? We think not. We have examined a large number of cases, and we do not find one that goes far enough, when carefully considered, to sustain the judgment in this case. The plaintiff has two notes which the maker and guarantor refuse to pay. Being without means to pay the costs of litigation, and in want of a small sum for his own purposes, he agrees with the defendant, an attorney pecuniarily responsible, to take the notes for collection, advance him

Robles v. Clarke.

a small sum for his immediate wants, also the disbursements in the suit, and take his compensation and advances out of the money when collected; and to give the attorney the control of the notes he indorses them to him, thereby placing the legal title in him. The only object the plaintiff has, and the only purpose of the trust, so far as his own interest is concerned, is to convert the notes into money. The object of the trust was to realize the money, not to invest the proceeds in other property of any description whatever. The attorney, by making the advances and prosecuting the suit, also acquired an equitable interest in the proceeds of the note by the express understanding between them. The attorney prosecutes the suit, advancing the disbursements in addition to the small advances made for the personal convenience of the plaintiff. Judgment is finally obtained, execution issued and returned unsatisfied—the judgment debtors proving to be insolvent. The only hope remaining is that a vendor's lien may be enforced against the land which formed the consideration of the notes, said land being then in the hands of a third party. But the proof shows that the land was purchased not for the party taking the deed and making the notes, but for another party who advanced the cash payment and to whom it was conveyed the same day—that the plaintiff was present at the transaction and must have understood the facts—that he took the note of one party guaranteed by another, neither of whom was in fact interested in the purchase, instead of the notes of the real purchaser—and no fraud was alleged or claimed in the transaction. It is not at all certain that a vendor's lien could be maintained under such circumstances. A security is taken from parties known not to be interested in the purchase, and this is usually deemed to be a waiver of a vendor's lien. (*Baum v. Grigsby*, 21 Cal. 175.) But at best the question was doubtful, and to pursue the land would involve further expense and harassing litigation. At this stage, Vallejo offers to convey the premises to the defendant in consideration of an assignment of the judgment and the further sum of eight hundred dollars in cash, being two hundred dollars more than

Robles v. Clarke.

was originally paid. The object of the trust, so far as the plaintiff was concerned, was to realize his money, and the defendant having ample means of his own aside from the property in question to pay the amount, and having a large equitable interest in the judgment, concludes to take the risk, make the purchase on his own account, and account to plaintiff for his share of the judgment as so much cash collected, and closes the transaction in this way by advancing the eight hundred dollars out of his own funds, assigning the judgment, and taking a conveyance of the property. The Judge finds that the defendant was entitled to have out of the judgment for his services and advances, five hundred and thirty-eight dollars and fifty cents, which, deducted from the amount of the judgment, one thousand three hundred and eighty-two dollars and sixty-four cents, leaves eight hundred and forty-four dollars and thirteen cents to be accounted for to plaintiff. The defendant paid cash, eight hundred dollars, making his amount put in, besides the sum due plaintiff, one thousand three hundred and thirty-eight dollars and fifty cents. And subsequently defendant expended other sums and performed other labors in perfecting and protecting a title both embarrassed and encumbered in various ways.

What is there on the part of the defendant in this transaction that is objectionable on the score of the strictest principles of good morals, or in any respect inconsistent with his duty to his client? Had he immediately tendered plaintiff in cash the balance credited to him, the most rigid causist could find nothing in the transaction of which he could complain. The defendant would have performed to its fullest extent the object of the trust. Had the judgment been a lien on the property, and had he purchased it at a sale on the execution for a sum less than the amount coming to his client on the judgment, and sought to retain the benefit of the purchase for himself, his interest and his duty would have conflicted: for in that case it would have been his interest to obtain the land at as low a rate as possible, while it would have been his duty to get as much as possible out of the land, until sufficient should

be realized to liquidate the amount due to the client. But this was not his position. The chance for making the money on the judgment was desperate. An opportunity occurred wherein, by advancing a considerable sum of money himself and taking upon his own shoulders all the risks of a purchase of the lands, in the condition stated, upon which he had no judgment lien, he could secure his own interest in the judgment, and at the same time fulfil both the letter and spirit of his trust, and he embraced it. In this we can see no breach of duty, or misapplication of trust funds within the principle of any case that has been brought to our notice, unless the fact that the amount due plaintiff was not immediately tendered to him in cash by defendant changes the aspect of the case.

There is not the slightest evidence in the record that the defendant has ever to this day been called upon to account, or that he has not been both able and willing to pay over the entire amount due. On the contrary, the testimony shows that the defendant has been at all times, and that he now is ready and willing and able to account and pay over any sum that may be due.

The defendant claims, in his answer, that at the time this purchase was made, and at all times since, there were other sums of money due from plaintiff to defendant greater than the amount due on said judgment, and that upon a just accounting there would have been at all times a balance due from plaintiff to defendant. And there is enough in the record to render it highly probable, that at the time of the purchase of the land in question, plaintiff was indebted to defendant in other sums sufficient to absorb nearly all, if not all of the said balance: as, for instance, the defendant alleges, among other things, as a counter claim in this action, that he holds a note executed by plaintiff to defendant for the sum of five hundred and seventy-six dollars, borrowed money, dated July 22, 1856, several years before the conveyance of said land, and that the whole of said sum and interest thereon still remains due and unpaid. The plaintiff demurred to this counter claim, on the ground that the cause of action appears to be barred by the Statute of

Robles v. Clarke.

Limitations and had judgment on the demurrer. If such was the condition of account between the parties at the time of the purchase from Vallejo, there can be no equitable ground for the claim set up by plaintiff in this action,

But, however this may be, we do not think the mere fact that no settlement of the matters between the parties, when defendant does not appear to have been called upon to account, is sufficient to show a breach of trust, and convert defendant into a trustee under the state of facts shown in this record.

The Court below found that defendant purchased the land and assigned the judgment referred to in fraud of the rights of plaintiff. There is, to our minds, no testimony showing a fraud in fact, and we must therefore conclude that the learned Judge who tried the case considered the transaction, in view of the existing relations of the parties, as fraudulent in law. The question as to whether a transaction honest in itself, is or not, nevertheless, to be regarded as fraudulent in law, often depends upon nice distinctions; and when we consider the great mass of authorities upon the subject, not always consistent with each other, it is not surprising that errors frequently occur in the rulings of the Courts in the hurry of trials of cases like this at *nisi prius*. We think the facts appearing in the record in this case do not show the transaction under consideration to be fraudulent in law, and that the Court erred in this finding.

In the purchase of the land we think the defendant acted in good faith, and not in violation of a trust.

Upon a careful consideration of all the circumstances under which this purchase was made, we are fully satisfied that it would not only not be equitable, but on the contrary grossly inequitable, to charge the defendant as trustee for the benefit of the plaintiff and compel a conveyance of the land.

The plaintiff, however, if there is anything due him, is entitled to a judgment for such amount, and to have it charged as a lien upon the land in controversy. The state of the accounts between the parties was not ascertained on the for-

Robles v. Clarke.

mer trial. For the purpose of ascertaining what amount, if any, is due from defendant to plaintiff, a new trial must be had. The views we have expressed are sufficient for the purposes of the decision, and to guide the Court below in its further proceedings.

There are several other questions, to some of which we will allude without discussing them.

Admitting that defendant is chargeable as a trustee and liable to be called upon to convey, it is evident that the decree, if its terms are complied with, would compel defendant to convey a much larger interest in the land than he acquired under the purchase from Vallejo.

The questions growing out of the proceedings under the assignment of the mortgage from Hastings to defendant we shall not discuss, for under the view we have taken, it is not necessary to determine whether a party charged as trustee *in invitum* can purchase for his own benefit an interest in the property adverse to that of the *cestui que trust*. The judgment, however, is erroneous in annulling the decree of foreclosure in the suit of *Hastings v. Robles et al.*, and directing that satisfaction of said judgment be entered of record. Such a judgment is entirely without the scope of the facts alleged in the complaint in this action. True, the defendant in his answer set up a title to the land in question, derived under those proceedings; but admitting that the proceedings were proven to be void or voidable on the ground of fraud or otherwise, the Court was not authorized to grant such affirmative relief in favor of the plaintiff. It may be questioned how far those proceedings can be attacked collaterally, even by way of rebutting a title set up under them, without filing a complaint to impeach directly and vacate the judgment on the ground of fraud. But there can be no doubt that the decree is erroneous in granting to the plaintiff affirmative relief in this action by annulling the judgment and ordering satisfaction to be entered. Such relief is entirely foreign to any case made by the allegations of the complaint.

Admitting the judgment to be right in other respects, it is

Robles v. Clarke.

erroneous in giving the plaintiff sixty days after defendant Clarke should make the conveyance under the judgment to pay the several sums found due to Clarke from plaintiff for the advances made by him on account of the lands in controversy. The payment of the money at some early day ought to have been made a condition precedent to the conveyance.

It follows from the views we have expressed that the judgment must be reversed and a new trial ordered.

Judgment reversed, and cause remanded for further proceedings, in accordance with the views expressed in this opinion.

Mr. Justice RHODES expressed no opinion.

JULY TERM, 1864.

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

JULY TERM, 1864.

HERMAN ENGLUND *v.* JOSEPH E. N. LEWIS, AND HERNDON BARRETT.

LIEN OF JUDGMENT PENDING APPEAL.—Where an appeal has been taken, and a bond sufficient to stay proceedings upon the judgment pending the appeal has been given, the lien of the judgment upon the real estate of the judgment debtor in the county where the same was docketed, owned by him at the date of the docketing of the judgment, or subsequently acquired, until the lien expires, remains a valid and subsisting lien until the end of two years from and after the date of the remittitur from the Supreme Court.

JUDGMENT IN FORECLOSURE CASES.—In foreclosure cases, a formal judgment *in personam* may be rendered against the defendant for the amount found due, with a provision for its enforcement against the property upon which the lien is established, or a judgment may be rendered in accordance with the old chancery practice, enforcing the lien and directing a sale of the property upon which it is established.

STAY OF PROCEEDINGS ON APPEAL.—If, in foreclosure cases, a judgment *in personam* is rendered against the defendants, and also one enforcing the lien, and an appeal is taken from the whole judgment in order to stay proceedings upon the whole judgment, the appellant must give an undertaking for costs, one in double the amount of the personal judgment, and one for the payment of waste and such deficiency as may remain due after the sale of the property, and all these undertakings may be in one instrument, or several, at the option of the appellant.

England v. Lewis et al.

SAME.—In such cases, if the undertaking is given only for costs, and waste and deficiency, an execution on the personal judgment is not stayed pending the appeal; and if the undertaking is given only for costs and double the amount of the personal judgment, an execution for the sale of the property upon which the lien is foreclosed is not stayed pending the appeal.

FORM OF UNDERTAKING ON APPEAL.—When the judgment is for the enforcement of a lien and a sale of the property, the undertaking to stay a sale of the property pending the appeal need not provide for the payment of the value of the use and occupation of the premises.

SAME.—In a case where the judgment directs a sale of real property, the undertaking on appeal, in order to stay a sale, need only provide security against waste, unless there is a provision in the judgment for the payment of a deficiency, in which case it must provide for the payment of such deficiency.

SAME.—When the judgment directs a sale for the purpose of satisfying any lien other than a mortgage lien, the undertaking on appeal, to stay a sale, need not provide for the payment of any deficiency which the judgment may direct to be paid.

WHEN LIEN OF JUDGMENT EXPIRES.—In foreclosure cases, where there is a judgment *in personam*, and also a judgment enforcing a lien and directing a sale of the property, and the undertaking on appeal only stays the sale and provides for costs, the lien of the personal judgment on the judgment debtor's property, in the county where it is docketed, attaches at the time it is docketed, and expires at the end of two years from the time the personal judgment is docketed.

CLOUD ON TITLE.—A sale by a Sheriff of real estate upon an execution against the grantor will, even if not effectual to pass the title to the purchaser, create a doubt as to the validity of the grantee's title, and cast a cloud upon it, and the grantee can maintain an action to enjoin the sale.

DECREE FOR SALE OF PROPERTY NOT A JUDGMENT LIEN.—In foreclosure cases, if the plaintiff does not obtain a personal judgment against the defendant, but contents himself with a decree enforcing the lien, and directing a sale of the property, such decree does not become a judgment lien on the other property of the judgment debtor until after a sale has been had and the deficiency, if there be one, ascertained and docketed, and then only for the amount of such deficiency.

EXECUTION ON PERSONAL JUDGMENT AND SALE UNDER DECREE.—In foreclosure cases, where there is a personal judgment rendered against the defendant, and also a decree in equity awarded, the plaintiff may either issue an execution upon his personal judgment or enforce his decree by a sale of the property, but he cannot do both at the same time, and if he issue execution on the personal judgment first, the money realized on it must apply on the judgment and a sale of the property under the decree afterwards made for the balance, and so *vice versa*.

APPEAL from the District Court, Tenth Judicial District, Yuba County.

The facts are stated in the opinion of the Court.

Hatch & McQuaid, for Appellant.

The lien of the Lewis judgment expired on the 14th of May,

1863, two years from the date of its being docketed, and could not be extended by appeal. The case of *Dewey v. Latson*, 6 Cal. 130, is not law. (Practice Act, sec. 204; *Isaacs v. Swift*, 10 Cal. 82; *Chapin v. Broder*, 16 Cal. 404; *Castro v. Ellis*, 13 Texas, 229.)

The appeal taken by Covillaud and Nye to the Supreme Court from the judgment recovered by Lewis against them in the District Court, did not stay the execution of the money judgment. The undertaking on appeal was insufficient for such a purpose, and only had the effect to stay the decree of the Court directing a sale of the particular property mentioned therein. (Practice Act, secs. 209, 349, 352.)

The money judgment of Lewis alone became a lien upon the real property of the judgment debtors, Covillaud and Nye. The undertaking on appeal being insufficient in amount, under section three hundred and fifty-two, Practice Act, to stay execution thereupon, the lien of the judgment was not extended by the appeal beyond two years from the time of its docketing; and more than two years having elapsed after the docketing of the judgment and before issuance of execution, the judgment ceased to be a lien upon the real property of the judgment debtors, Covillaud and Nye. (Practice Act, sec. 204; *Chapin v. Broder*, 16 Cal. 404; *Isaacs v. Swift*, 10 Cal. 71.)

W. C. Belcher and *Charles E. Filkins*, also for Appellant.

The case of *Dewey v. Latson*, 6 Cal. 130, is not law, and cannot be sustained by reason or authority.

The authority of that case has been directly or indirectly questioned in several later cases, and has never, in any case, been affirmed.

In *Isaacs v. Swift*, 10 Cal. 71, which was a closely contested and well considered case, decided by a full bench, the Court say: "As the question does not arise in this case, we express no opinion as to whether, in case the sale be prevented by injunction, or other legal impediment, the lien of the judgment must expire at the end of the two years." The case of *Dewey*

v. Latson had been specially called to the attention of the Court by counsel, yet it is apparent that the Court did not approve, and if the question had been before them, would have overruled it. All the Judges joined in the decision of this case, Mr. Justice Burnett delivering the opinion, and Mr. Justice Field and Mr. Chief Justice Terry, (who had concurred in *Dewey v. Latson*,) concurring.

In *Chapin v. Broder*, 16 Cal. 403, the authority of *Dewey v. Latson* was still further limited. It was there decided that execution is not stayed and the lien not extended, where the appeal bond is not in double the amount of the money judgment, including costs; and that it does not matter that the defendant intended the bond given to operate a stay, and both parties supposed it did so operate.

The language of the statute is plain and apparently unambiguous. It declares that "from the time the judgment is docketed, it shall become a lien upon all the real property of the judgment debtor, not exempt from execution, in the county, owned by him at the time, or which he may afterwards acquire, until the said lien expires. The lien shall continue for two years, unless the judgment be previously satisfied." Certainly there is no patent ambiguity about the language used. It is true that the rule is well established that the intention of the Legislature must always control in the construction and interpretation of statutes, but it is equally well settled that when the language of a law is plain and unambiguous, whether expressed in general or more limited terms, there is no room left for construction, and a resort to extrinsic circumstances is not permitted.

Expressio unius est exclusio alterius. The fixing the time during which the lien shall continue is the exclusion of all other times, and is just as distinct and clear a limitation as if the words of the statute had been: The lien shall cease and determine in two years from the date of its docketing, or shall continue two years from the date of its docketing, and no longer.

If the decision in *Dewey v. Latson*, as limited and controlled

by *Chapin v. Broder* and *Isaacs v. Swift*, is a correct exposition of the law, still, we say, the case presented by the respondent is not within that decision.

Respondent had a money demand against Covillaud and Nye, and, as he supposed, a vendor's lien upon certain real property to secure its payment, and he sued to recover a judgment for the money, and a decree foreclosing his lien and subjecting the real property to sale for its payment. The District Court gave him just what he asked, a complete money judgment for the sum of four thousand one hundred and sixty dollars and fifty cents, besides costs, and a decree foreclosing his supposed lien and directing a sale of the property, in the event that the money judgment was not paid within twenty days from the date of its rendition. The judgment and the decree were each complete in itself, and were just as separate and distinct as though they had been rendered in distinct Courts as under the old practice. Under that practice, it is well settled that the mortgagee may, at his election, sue at law upon his bond or note, or in ejectment for possession of the property, or in equity, to foreclose his mortgage and sell the property; and his remedies being concurrent, that he may pursue them all at the same time. Lord Mansfield said, in *Burnell v. Martin*, Doug. 417, that it had been "settled over and over again, that a person in such a case is at liberty to pursue all his remedies at once." (2 Hilliard on Mortgages, 83-5.)

Under our system, law and equity jurisdiction are in the same Court, and it is well settled here that under the law as it stood when the judgment in controversy was rendered, the mortgagee might have, in the same action, his judgment *in personam* at law and his decree *in rem.* in equity; and it would follow, as a matter of course, under section two hundred and nine of the Practice Act, that he could have execution for the enforcement of his judgment at any time within its life, unless the same were stayed by operation of law or the commands of a Court having competent jurisdiction. He could, also unless restrained, at any time after the entry of his decree

Englund v. Lewis et al.

proceed to enforce it by a sale of the specific property, and though he could collect his debt but once, he might have his execution and his order of sale at the same time. (*Rollins v. Forbes*, 10 Cal. 299; *Rowland v. Leiby*, 14 Cal. 156; *Chapin v. Broder*, 16 Cal. 422.) And, it would seem that under section two hundred and forty-five of the Practice Act, as amended in eighteen hundred and sixty and eighteen hundred and sixty-one, (Statutes of 1861, p. 306,) the plaintiff is still entitled to have his judgment as well as his decree, though by that amendment he must exhaust the mortgaged property before his judgment can become a lien or he can have execution thereon. (*Cormerais v. Genella*, 22 Cal. 116.)

The statute regulating appeals defines with great particularity what he must do. He must give an undertaking for costs in all cases, to render his appeal effectual for any purpose. (Sec. 348.) If his appeal be from a money judgment, he must give an undertaking in double the amount of the judgment and costs, or it will not stay execution. (Sec. 349.) If his appeal be from a decree directing the sale of mortgaged property, he must give an undertaking in a sum to be fixed by the Judge, that he will not commit waste, for the use and occupation, and for the payment of any deficiency, or the sale will not be stayed. (Sec. 352.) The language of the statute is plain and imperative, and its requirements must be strictly complied with. Intention to comply will not avail. In the case of a money judgment, if the amount of the undertaking be insufficient, though the party giving it may intend to make it sufficient, and both parties may believe it to be so, and act upon their belief, it will not operate a stay and cannot prolong the life of a judgment lien. (*Chapin v. Broder*, 16 Cal. 403.)

Jos. E. N. Lewis and *J. O. Goodwin*, for Respondents.

The appellants, as to the fourth point, say: "The lien of the Lewis judgment expired on the 14th of May, 1862, two years from the date of its being docketed, and could not be extended by appeal. The case of *Dewey v. Latson*, 6 Cal.

England v. Lewis et al.

130, is not law. (Practice Act, Sec. 204; *Chapin v. Broder*, 16 Cal. 104; *Isaacs v. Swift*, 10 Cal. 82; *Castro v. Ellis*, 13 Texas, 229.)" In this State there is "but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs." (Practice Act, Sec. 1.) "A judgment is the final determination of the rights of the parties to that action or proceeding, and may be entered in term or vacation." (Practice Act, Sec. 144.) Under the two hundred and forty-sixth section of the Practice Act as it stood before the Act was amended in eighteen hundred and sixty, "in an action for the foreclosure or satisfaction of a mortgage of real property, or the satisfaction of a lien or incumbrance upon property real or personal," the Court could render judgment for the amount found due upon the personal obligation, and by its judgment direct a sale of the property, or any part of it, and the application of the proceeds to the payment of the amount due on the mortgage, lien, or incumbrance, with costs and execution for the balance. (*Rollins v. Forbes and Wife*, 10 Cal. 299; *Rowe v. Table Mountain Water Co.*, 10 Cal. 44; *Rowland v. Leiby*, 14 Cal. 156; *Cormerais v. Genella*, 22 Cal. 116; *Chapin v. Broder*, 16 Cal. 422.) In all such actions, a judgment so rendered, when docketed, becomes a lien upon all real property owned at that time by defendants, or either of them, in the county, or that may be acquired by them in the county where such judgment is docketed. (See authorities last quoted.)

It is conceded by appellants, on agreement, that it is a judgment of such a character as, when docketed, would be a lien on real property in the county. We therefore submit, that the judgment in the case of *Lewis v. Covillaud and Nye* became and was, on the 14th day of May, 1860, the day it was docketed, a lien upon all real property then owned by them or either of them, or that they or either of them might acquire thereafter, within the lifetime of the judgment, in that county. The appellants contend that that judgment lien had expired by limitation; and to reach that conclusion, have argued at great length two propositions:

1st. Can the lien of a judgment be extended by appeal?

2d. If it can, was the lien of the judgment in *Lewis v. Covillaud and Nye* extended by the appeal in that case, or otherwise?

In discussing the first proposition, we shall assume that the appeal in the case of *Lewis v. Covillaud and Nye* stayed execution. If the execution was stayed, the Supreme Court of this State, in the case of *Dewey v. Latson*, 6 Cal. 130, has answered the appellants' proposition in the affirmative. The appellants contend that if the judgment by the appeal was stayed as to property ordered to be sold, it did not stay execution for the moneyed demand. That the undertaking not being in double the amount of the moneyed demand, Lewis could have ignored the order of sale and proceeded by execution. If to stay execution in such a case it be necessary to give an undertaking in double the amount of the moneyed demand, as contradistinguished from the undertaking required by section five hundred and fifty-two, it would equally require the giving of a second three hundred dollar undertaking for costs. To carry out appellant's proposition, predicated upon his theory that Lewis had two separate and distinct judgments that were in nowise dependent upon each other, it would require four undertakings on appeal to stay execution. There would be the three hundred dollar undertaking for costs on the foreclosure judgment, and the undertaking required by section five hundred and fifty-two to stay the decretal order. There would then have to be a second three hundred dollar undertaking for costs on the moneyed judgment, and then one in double the amount of the moneyed demand. A construction followed to its logical conclusion, that leads to such a complex system of bonds, cannot be the true one as against a more simple and equally effective one. The appellants seem to have forgotten that in this State we have but "one form of action," and that in that action the Court by its final judgment can grant legal and equitable relief as the facts in that action warrant. As there is but one action, whether it be for legal or equitable relief, or both, there can be but one final

judgment in favor of any one party as against the other. In the language of the Act, "a judgment is the final determination of the rights of the parties in the action or proceeding." It includes equitable as well as legal rights; and the Court may grant, except in case of default, "any relief consistent with the case made by the complaint and embraced within the issue." (Practice Act, section 117.)

Section two hundred and forty-six of the Practice Act, under which the Court rendered judgment in the case of *Lewis v. Covillaud and Nye*, reads: "In all actions for the foreclosure of or satisfaction of a mortgage of real property, or the satisfaction of a lien or incumbrance upon property real or personal, the Court shall have power by its judgment to direct the sale of the property or any part of it, the application of the proceeds to the payment of the amount due on the mortgage, lien or incumbrance, with costs, and *execution for the balance.*" (Wood's Dig. p. 200, Art. 980.) Under that section we submit, that a judgment creditor could not proceed to enforce his judgment by execution upon an action indicated by that section, until the encumbered premises had been sold. In all such cases it matters not whether the judgment was as in *Rollins v. Forbes*, or as in *Moss v. Flint et als.*, upon which the Freaner claim was predicated in the *Chapin v. Broder* case. Execution, by the terms of that Act, would be stayed until the sale of the property upon which the lien was established. The statute states when an execution may issue on such a judgment, and by implication denies the right to enforce the judgment by execution at any other time. *Expressio unius est exclusio alterius.* (*Zander v. Coe*, 5 Cal.) Appellants admit that the appeal stayed the sale of the premises; and if our construction of the Act be correct, it follows that execution for the moneyed demand was stayed until the legal impediment was removed by sale or otherwise.

England v. Lewis et al.

By the Court, SANDERSON, C. J.

This action was brought to enjoin a Sheriff's sale of a certain house and lot upon which the defendant Lewis claimed a judgment lien by virtue of the two hundred and fourth section of the Practice Act. The facts disclosed by the record are substantially as follows: Lewis commenced an action in the District Court of Yuba County against Covillaud and Nye in 1859 to recover judgment against them for an amount of money claimed to be due to him, and also to enforce a vendor's lien upon certain real estate in the City of Marysville belonging to Covillaud, and to obtain an order of sale thereof to satisfy the judgment that he might recover. On the 9th of May, 1860, he recovered judgment for four thousand three hundred and twenty-three dollars and five cents, and also obtained a decree foreclosing his vendor's lien and directing the sale of the real estate for the satisfaction of the judgment. This judgment was docketed on the 14th of May, 1860. Within the statute time Covillaud and Nye filed and gave notice of motion, and filed their statement, for a new trial. Afterwards, on the 17th of November, 1860, their motion for a new trial was overruled by the Court. Covillaud and Nye, within the statute time, gave notice of appeal to the Supreme Court from the judgment against them, and from the order overruling their motion for a new trial. They also, in proper time, executed and filed their undertaking on appeal, having first applied to the Judge of the Court for and obtained an order, under section three hundred and fifty-two of the Practice Act, fixing the amount of the undertaking at two thousand dollars, to stay waste and secure the value of the use and occupation of the premises ordered to be sold, and to pay any deficiency remaining unpaid upon said judgment, etc. The appeal thus perfected was passed upon by the Supreme Court on the 20th of December, 1862. The Court affirmed the money judgment, but reversed the order of sale or so much of the judgment as established a vendor's lien and directed a sale of the real estate. (*Lewis v. Covillaud*, 21 Cal. 178.)

The remittitur from the Supreme Court was filed in the Court below by Lewis on the 9th of January, 1863, when the judgment in that Court was modified so as to conform to the judgment of the Supreme Court. On the 20th of February, 1863, execution was issued upon the judgment so modified, and was afterwards levied upon the house and lot described in the complaint and belonging to the plaintiff, England.

At the time of the docketing of the Lewis judgment, on the 14th of May, 1860, neither Covillaud nor Nye, the judgment debtors, had any interest in this house and lot. One Levy was the owner of the premises. Nye purchased them of Levy on the 11th of June, 1861, more than a year after the docketing of Lewis' judgment. At the time he purchased, Nye was a married man and the head of a family. He had no residence of his own; he took possession of the premises, with his family, some ten or twelve days after he purchased, and as soon as he could get possession. Nye continued to reside upon the premises until the 23d of August, 1861, when he and his wife filed their declaration claiming the premises as a homestead. From that time Nye and family continued to reside upon the premises until the 19th of July, 1862, when, for a consideration of two thousand dollars, they conveyed the same to plaintiff, who took the possession thereof.

At the time this action was commenced a temporary injunction was granted, which was dissolved on the final trial, the Court below holding that the judgment in *Lewis v. Covillaud and Nye* was a valid and subsisting lien under the two hundred and fourth section of the Practice Act, upon the house and lot of the plaintiff at the time of the issuing and levy of the execution thereon, and that the defendant Lewis had a right to sell the premises to satisfy his judgment. From that judgment the plaintiff appeals.

Before entering upon the discussion of the various questions involved in this case it is important that the nature and character of the judgment which was rendered in *Lewis v. Covillaud and Nye* should be definitely settled. That judgment was rendered and docketed prior to the amendments of the two hun-

England v. Lewis et al.

dred and forty-sixth section of the Practice Act in 1860 and 1861, and its character and legal effect in all respects must be determined by the law as it stood prior to that time. The judgment, after the usual recitals, provides as follows: "The Court, being sufficiently advised in the premises, orders, adjudges and decrees that said plaintiff do have and recover from said defendants the sum of three thousand two hundred and five dollars, with interest thereon from the 12th day of February, 1859, amounting in the aggregate to the sum of four thousand one hundred and sixty dollars and fifty cents, and that said sum draw interest from the date thereof at the rate of two per cent per month until paid; and also for the sum of one hundred and fifty-two dollars and twenty-five cents costs, to be taxed in this action, including the sum of ten dollars and thirty cents costs taxed in the Burlingame suit.

"It is therefore ordered, adjudged and decreed that judgment be and the same is hereby rendered and entered up in favor of the plaintiff, Joseph E. N. Lewis, and against the defendants, Charles Covillaud and M. C. Nye, for the sum of four thousand one hundred and sixty dollars and fifty cents, and that said sum draw interest from the date thereof until paid at the rate of two per cent per month, and for the further sum of one hundred and sixty-two dollars and twenty-five cents, costs of suit," etc. The judgment then proceeds in the form of a decree in equity, under the old chancery practice, establishing a vendor's lien and providing for its enforcement in the usual manner.

Under our system of practice there is but one form of action "for the enforcement or protection of private rights, and the redress or prevention of private wrongs," and in a proper case legal and equitable relief may be had in the same action. The result in such cases is a judgment with a twofold aspect, one looking to the legal and the other to the equitable relief. Hence it has been held that in foreclosure cases a formal judgment *in personam* may be rendered against the defendants for the amount found due, with a provision for its enforcement against the property upon which the lien is established.

(*Rollins v. Forbes*, 10 Cal. 299; *Rowland v. Leiby*, 14 Cal. 156; *Chapin v. Broder*, 16 Cal. 422.) In *Rowland v. Leiby*, Mr. Chief Justice Field said: "In this State parties are at liberty to adopt in the foreclosure of mortgages the course pursued under the old chancery system, and take a decree adjudging the amount due upon the personal obligation of the mortgagor, and directing a sale of the premises and the application of the proceeds to its payment, and apply, after the sale, for the ascertainment of any deficiency, and execution for the same; or they may take a formal judgment for the amount due in the first instance. In the latter case the proceeds can be applied by the officer making the sale immediately upon the judgment, and no further proceedings will be necessary on the part of the Court to ascertain the deficiency."

The appellant contends that the judgment under consideration is in accordance with the latter form above described, and the respondents contend that it is in accordance with the former. Counsel for respondents seem to overlook one of the consequences of their theory, which would, if their theory is to prevail, prove fatal to their case.

The respondents seek to establish a lien under the judgment in question. If the judgment has the form which they claim for it, the docketing thereof created no lien, according to the rule in *Chapin v. Broder*. In that case the Court said: "We have held in reference to this section (246 of the Practice Act) that in actions of foreclosure its effect was to authorize a personal judgment against the mortgagor, in addition to the relief usually granted in such cases. Where such a judgment is rendered, there is no doubt that when docketed it becomes a lien in accordance with the statute. It is obvious, however, that nothing but a judgment establishing a definite personal liability can have this effect. A mere contingent provision, referring to no particular amount, and in abeyance until the contingency is determined, is not within the meaning of the statute. It may become a valid and perfect judgment, but until the amount to be recovered is ascertained and fixed no effect can be given to it as a lien."

England v. Lewis et al.

"In the present case, the provisions in question were of this character, and no general lien was acquired by the docketing of the judgment. It is no answer to say that the judgments contained a statement of the amount due. There was no *personal* judgment for this amount, nor was there anything in the nature of a personal judgment beyond the mere direction for the issuance of an execution in the event of the insufficiency of the mortgage property to pay the debt. The whole matter was contingent, indefinite and uncertain, and so long as this continued to be the case no effect whatever could be given to it." Under the doctrine in that case, the respondent Lewis never acquired a lien upon the premises in question, if his judgment is nothing more than the old chancery judgment in foreclosure cases; but, in our opinion, the judgment is a personal judgment for the amount of the debt, with the usual relief in equity superadded. Such being the case, it became a lien when docketed, as provided in the two hundred and fourth section of the Practice Act.

The first point made by counsel for appellant is as to the effect of an appeal upon a judgment lien, and it is claimed that the two years during which the lien is allowed to continue commences from the docketing of the judgment, notwithstanding an appeal may have been taken, and notwithstanding an undertaking on appeal may have been given sufficient to stay all proceedings upon the judgment in the Court below, pending the appeal.

And, in the second place, it is claimed that if an appeal, with a sufficient stay-bond, operates to postpone or suspend and continue the lien, so that the two years do not commence to run until after the date of the remittitur from this Court, no stay-bond sufficient for that purpose was given in the case of *Lewis v. Covillaud and Nye*.

1. The first proposition has been argued with much learning and ability by counsel upon both sides, but under the view which we have taken of the question, it becomes unnecessary to follow the line of argument which has been adopted.

Englund v. Lewis et al.

As long as eight years ago this question came before the late Supreme Court, in the case of *Dewey v. Latson*, 6 Cal. 130, and after mature consideration was there decided adversely to the appellants. In that case the only point made was the same as that now under consideration, and the Court said: "The first reading of the Act would seem to be conclusive in favor of the appellant, but when we come to examine the legal solecism of allowing a party by his own motion thus to defeat the remedy which the law has given the creditor, and to destroy the security furnished, which must inevitably result if the construction contended for be sustained, we are necessarily put upon inquiry as to the intention of the Legislature and the possibility of escape from such absurd consequences.

"The obvious intention was to charge the estate of the judgment debtor, and to give the creditor two years to make his money. The statute intended that this time should run from the date of the judgment or period at which the plaintiff was in a situation to take out execution and pursue his remedy to final satisfaction. By the defendant's own act the force of that judgment has been suspended, and the lien, which is merely an incident, must share a like fate. It would be absurd to say that a lien attached upon a judgment and expired by its own limitation while the judgment was still *in fieri*, and could not be prosecuted to full fruition.

"The defendant would thus be able to abridge, if not destroy the lien, and in all cases where a period of more than two years intervened between the date of the judgment in the Court below and the final judgment in this Court, to substitute personal for that security which the law gives the successful party. It was never intended that a party, by prosecuting a frivolous appeal, should thus be allowed to take advantage of his own wrong."

The case of *Dewey v. Latson*, has never been overruled. On the contrary, the construction of the two hundred and fourth section of the Practice Act came before that Court again only two years later, in the case of *Isaac v. Swift*, 10 Cal. 71, and

England v. Lewis et al.

again, two years thereafter, in the case of *Chapin v. Broder*, 16 Cal. 403.

In the former case, *Dewey v. Latson* was cited by counsel and brought directly to the attention of the Court. Had the Court become dissatisfied with the rule established in *Dewey v. Latson*, an opportunity thus early was afforded in *Isaac v. Swift* to overrule that case, yet in the opinion of the Court no word of dissatisfaction is found. In *Chapin v. Broder*, the case of *Dewey v. Latson* is expressly mentioned, commented upon and explained by Mr. Justice Cope, who delivered the opinion of the Court, without expressing any dissent from the rule there established. On the contrary, in his opinion delivered on the petition for a rehearing, he clearly shows that the doctrine in *Chapin v. Broder* does not conflict with that announced in *Dewey v. Latson*, but on the contrary is in harmony therewith. Thus, whether correct or not, the construction of the section of the Practice Act in question, as given in *Dewey v. Latson*, has remained undisturbed for more than eight years, during which time it has been the rule of decision in the Courts and of conduct with the people. Great interests may have been acquired under the law thus expounded which might be prejudiced by a contrary exposition at this late day. Where such is the case no change should be made by the Courts, but if a change be demanded a resort to the Legislature should be had. Ruinous consequences might follow a change resulting from judicial tergiversation by reason of its retroactive effect, but none such can result from legislative interposition. Without, therefore, discussing the merits of the question, we rest our decision solely upon the doctrine of *stare decisis*, holding the present to be a case to which that doctrine ought to be applied.

It follows that where an appeal has been taken and a bond sufficient to stay proceedings upon the judgment pending the appeal has been given, the lien created by the two hundred and fourth section of the Practice Act remains a valid and subsisting lien upon all the real property of the judgment debtor, not exempt from execution in the county where the

England v. Lewis et al.

judgment is docketed, owned by him at the date of the docketing of the judgment, or subsequently acquired, until such lien expires, and that the same does not expire until the end of two years from and after the date of the remittitur from this Court.

2. The next point made by counsel for appellant is to the effect (assuming the law to be as we have declared) that no appeal bond was given in *Lewis v. Covillaud and Nye* sufficient to stay proceedings on the personal judgment during the pendency of the appeal, and that as a consequence Lewis was not prevented by the appeal from proceeding at any time to enforce his money judgment by execution, and if so, that the lien expired at the end of two years from the time the judgment was docketed. If it be true, as contended, that the bond given on appeal was not sufficient to stay proceedings on the personal judgment, it follows, under the rule laid down in *Chapin v. Broder*, that the lien was not extended by the appeal beyond two years from the docketing of the judgment.

The three hundred and fifty-second section of the Practice Act, under which the undertaking was given, provides that, "If the judgment or order appealed from direct the sale or delivery of possession of real property, the execution of the same shall not be stayed unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the Judge of the Court by which the judgment was rendered or order made, and which shall be specified in the undertaking. When the judgment is for the sale of mortgage premises and the payment of a deficiency arising upon the sale, the undertaking shall also provide for the payment of such deficiency."

This section is double, and provides for two distinct under-

takings upon two distinct kinds of judgments, one directing a sale of real property, and the other directing a delivery of the possession of real property. In a case where the judgment directs a sale, the undertaking need only provide security against waste, unless such sale is of mortgaged premises and the judgment provides for the payment of a deficiency, in which case it must provide for the payment of such deficiency. In such a case no provision need be inserted in the undertaking for the payment of the value of the use and occupation of the premises pending the appeal, for the obvious reason that the judgment creditor does not become entitled to the value of the use and occupation until after a sale has been made. (Practice Act, Sec. 236.) Where the judgment directs a delivery of the possession of real property the undertaking must provide against waste and for the payment of the value of the use and occupation, and for those two only, for there can be, in such a case, no question as to deficiency. (*Whitney v. Allen*, 21 Cal. 233.) Where the sale is directed for the purpose of satisfying any lien other than a mortgage lien, the undertaking need not provide for the payment of any deficiency which the judgment may direct. To this extent the statute discriminates in favor of mortgage and against all other liens. The lien in *Lewis v. Covillaud and Nye* was not a mortgage, but a vendor's lien. Hence, the undertaking in question is good only as an undertaking for costs and waste; beyond that it was not required by law, and was utterly void. Was such an undertaking sufficient to stay all proceedings upon the judgment in question?

We are aware that an impression has prevailed to a considerable extent among the members of the profession to the effect that in foreclosure cases, regardless of the character of the lien, no undertaking on appeal is required except for costs, as provided in section three hundred and forty-eight, and for waste, use and occupation and deficiency, as provided in section three hundred and fifty-two; but from a careful examination of the several sections of the Practice Act touching undertakings on appeal it is manifest that this impression

is without a substantial foundation. The impression proceeds upon the theory that the lien remains a subsisting security for the payment of the money demand, but this is true only where there is no contest as to the validity of the lien; for if the contest be as to the validity of the lien, and the appellate Court finally decide against its validity, the security which it is supposed to have afforded is gone, or rather it has never had an existence. The only color which the statute gives to this theory is found in the three hundred and fifty-second section. By providing for an undertaking against waste and for the payment of any deficiency arising upon the sale, that section seems to proceed upon the theory that the land, if no waste be committed, is security for the debt to the extent of its value, and that no further security is needed except as to a deficiency, should one arise upon the sale. Such would undoubtedly be the case where the appeal makes no attack upon the validity of the lien, but the contrary is the result where the contest is as to the validity of the lien if the appellate Court decides against it.

But to this seeming theory of the three hundred and fifty-second section, the three hundred and fifty-fourth section is opposed. That section provides that "the undertakings prescribed by sections three hundred and forty-eight, three hundred and forty-nine, three hundred and fifty, and three hundred and fifty-two, may be in one instrument or several, at the option of the appellant." Thus the Legislature seems to have contemplated that a case might arise where the appellant would be required to give several or all of the undertakings provided for in cases of appeal, according to the character of the judgment and the extent of the appeal. This view is in harmony with that provision of the statute which enables a party to appeal from the whole or any specific part of the judgment, (Practice Act, sec. 337,) and with that which limits the stay of proceedings to the judgment or order appealed from, and allows the Court to proceed upon any other matter included in the action and not affected by the judgment or order appealed from. (Sec. 353.)

Our conclusions are, that where there is a money judgment only, the undertaking, in order to stay proceedings, must be in double the amount of the judgment; and if in addition to a money judgment there be a judgment for the delivery of documents, or the execution of a conveyance, or a sale of real property, or for the delivery of real property, an additional bond or bonds, as the case may be, must be given in order to stay proceedings upon each branch or part of the judgment, and that if there be a part or branch of the judgment as to which no bond is given, proceedings upon such branch or part are not stayed.

In the case of a judgment which directs the execution of a conveyance or other instrument, of course no bond, except for the money branch of the judgment, if such there be, is required, the appellant being required to execute and deposit with the clerk the conveyance or other instrument instead of the bond exacted in other cases.

In foreclosure cases, where there is no judgment *in personam*, but only a judgment in accordance with the old chancery practice, a bond for costs and a bond for waste and deficiency would be sufficient; but where the judgment is in the form authorized by our practice, as decided in *Rollins v. Forbes*, *Rowland v. Leiby*, and *Chapin v. Broder*, and it is desired to stay proceedings as to the whole judgment, there must be a bond for costs, a bond in double the amount of the personal judgment and a bond for waste and deficiency, all of which may be included in one instrument or several, at the option of the appellant. In the present instance the appeal was from the whole judgment, but no bonds were given except for costs, waste and deficiency. The first was sufficient for the purpose of perfecting the appeal, and the second was sufficient for the purpose of staying proceedings upon that branch of the judgment which directs a sale of the premises in question, but was not sufficient to stay proceedings upon that branch which gives a personal judgment against the defendants, and Lewis might at any time have proceeded by execution to enforce the collection of the money.

England v. Lewis et al.

This disposes of the case and makes it unnecessary to consider the homestead question presented by the record.

As to the point made by the respondents to the effect that a sale of the premises, if no lien exists, would not create a cloud upon the plaintiff's title, we think the facts of the case bring it within the rule announced in *Shattuck v. Carson*, 2 Cal. 588; in *Guy v. Hermance*, 5 Cal. 73; in *Alverson v. Jones*, 10 Cal. 11; and in *Pixley v. Huggins*, 15 Cal. 127.

The judgment is reversed and the Court below directed to render a judgment in favor of the plaintiff, in conformity with the prayer of the complaint.

By the Court, SANDERSON, C. J., on petition for rehearing.

So far as the character and legal effect of the judgment in *Lewis v. Covilland and Nye* are concerned we have announced no new principle, but have merely applied to the facts of this case principles which were established in *Rollins v. Forbes*, *Rowland v. Leiby*, and in *Chapin v. Broder*, cited in our former opinion. The following principles are established by those cases: In a foreclosure case the plaintiff may recover a personal money judgment and a decree foreclosing the mortgage and directing the land to be sold for the purpose of satisfying that personal judgment; and secondly, if he does not obtain a personal judgment, but contents himself with the decree in use under the old chancery practice, such decree does not become a lien, under the two hundred and fourth section of the Practice Act. On the contrary, no lien attaches under such a judgment until after a sale has been had and the deficiency, if there be one, is ascertained and docketed, and then only for the amount of such deficiency. This twofold judgment is the fruit of our system of practice and beautifully exemplifies its superiority. Under the old system two suits would have been necessary in order to accomplish the same result. The result being accomplished the plaintiff might, under the old system, proceed by *fi. fa.* upon his judgment at law, or he might proceed under his decree in equity, but he

could not proceed upon both at the same time. The same is true under our system. Where a personal judgment is rendered at law, so to speak, and also a decree in equity is awarded, the plaintiff may proceed to enforce either, at his election, but he cannot proceed upon both at the same time. Such is the result when the principle announced in those cases is carried to its logical conclusion. When it is said that a personal judgment may be rendered in foreclosure cases the right to enforce the same by *fi. fa.* is necessarily implied. A judgment which cannot be enforced is no judgment at all, and we know of no way by which a mere money judgment can be enforced except by *fi. fa.* The decree in such a case is enforced by the Sheriff or Commissioner under a certified copy. The hypothesis from which counsel argue that in such a case there is but one judgment with different members merely, bearing a dependent relation to each other, is unwarranted. The true theory upon which the question under consideration proceeds is to the effect that there are two judgments, either of which may be enforced regardless of the other, with the qualification that they cannot both be enforced at the same time, and that the satisfaction of one is the satisfaction of the other. When the late Supreme Court said that a personal judgment might be rendered "against the mortgagor in addition to the relief usually granted in such cases," they meant a judgment which could be enforced by *fi. fa.*, or they meant nothing. Hence we held in our former opinion, and still hold, that where the plaintiff takes this double judgment he may, at his election, proceeded by *fi. fa.* upon his money judgment or he may proceed to make his money by a sale of the mortgaged premises under his decree.

In this connection it is proper to remark that counsel have fallen into this fundamental error. They assume and argue that if A. gives B. his promissory note, and mortgages his land to secure its payment, B. thereby agrees to look to the land as a primary fund for the payment of his debt, and A. has the right to insist that he shall do so. We know of no such rule either at law or in equity. The mortgage is made for B.'s

security and not for A.'s protection. By taking security B. does not waive A.'s personal liability either *in toto* or *pro tanto*. B. may waive the security at any stage and proceed upon the personal liability created by the contract. (Of course, we limit this doctrine to cases where the rights of third persons are not involved.) This error seems to have become an *ignis fatuus* by which counsel have been misled through their whole argument. By its light they have sought to construe the judgment in *Lewis v. Covilland and Nye*, and the result is such as might have been expected—a nondescript judgment with a single head, but Janus-faced, characterized by counsel as “*in personam et rem*.” Counsel will not admit that there was no personal judgment, but claim that, although there was a personal judgment, it could not be enforced except through the decree of foreclosure. This is blowing hot and cold. It is tantamount to saying that there is a personal judgment and there is not.

The cause of this tergiversation is apparent. In *Chapin v. Broder* it was held that where there was no personal judgment there could be no lien, under the two hundred and fourth section of the Practice Act, until after a sale of the mortgaged premises and the docketing of the deficiency. To admit, therefore, that there is not a personal judgment is to admit that there is no lien, which is the sole question in controversy in the present case. Hence, in order to maintain their standing in Court, counsel are compelled to insist that there was a personal judgment. Then, having fortified themselves against Scylla upon the one hand, they are forced to guard against Charybdis on the other; but in order to do the latter they cannot admit that the personal judgment carries with it the right of a *fi. fa.*, for there is no appeal bond which stays its execution, and more than two years have elapsed since the judgment was docketed, and the lien is therefore lost. Hence they claim a personal judgment which cannot be executed until after a sale under the decree, and then only to the extent of a deficiency, should there be one—a judgment, when considered as a personal one, confessedly *felo de se* in part, and perhaps

Englund v. Lewis et al.

in toto. It is a misnomer to call a judgment which has such incidents annexed to it a personal judgment. It is nothing more than the old chancery decree.

In support of the theory that the personal judgment is not full fledged, counsel call attention to the fact that it does not terminate with the ordinary phrase "for which let execution issue," and that nothing is said about the issuing of an execution until we come to the end of the decree, where the issuing of an execution, for any deficiency which may be found to exist, is authorized, and that therefore the judgment, by its own terms, is made to prescribe the order of its own execution, and that the order thus prescribed cannot be departed from except by special license of the Court. Admitting this to be so, it is not a little surprising that counsel do not perceive that a consequence must follow which is fatal to their case, by destroying entirely the judgment lien, upon which alone they rely. By this construction the money part of the judgment is made dependent upon the decree for its enforcement, and the mortgaged premises are made a primary fund, which must be exhausted before a *fi. fa.* can issue. Thus the judgment is provided with a special lien, resulting from its own terms. To such cases the two hundred and fourth section does not apply. That section creates no additional lien where one already exists, until after the special lien has been exhausted, and then only to the extent of the deficiency. It was so held in *Chapin v. Broder*. That section was intended to secure a lien only for such judgments as are purely money judgments, without any lien resting in contract, or in other words judgments which are to be enforced by *fi. fa.* Thus, only theory upon which it can be claimed that the judgment in *Lewis v. Covillaud and Nye* became a lien under that section is the one which we have adopted, to the effect that there was a personal money judgment, so far independent of the decree that it could, at the election of the plaintiff, be first enforced by a *fi. fa.* That there was such a judgment we have no doubt. The mere fact that it did not conclude with the phrase "for which let execution issue," has no significance. That phrase is unnecessary.

People v. Foren.

It is of the form and not the substance. The judgment being pronounced by the Court, the law, *ex proprio vigore*, directs the final process to issue. That there was such a judgment, in the opinion of the late Supreme Court also, is apparent from the judgment which they rendered on the appeal, which is in these words: "Our conclusion is, that as to the lien, the judgment should be reversed, but that in other respects it should be affirmed." That is, so far as the decree is concerned the judgment is reversed, but as to the personal judgment it is affirmed. Under this personal judgment, as we held in our former opinion, the respondent acquired a lien, but he failed to enforce it within the two years through which it extended. It was not suspended during the appeal, for the obvious reason that no undertaking on appeal from the personal judgment was given, as required by the three hundred and forty-ninth section of the Practice Act.

Rehearing denied.

THE PEOPLE v. JOHN FOREN.

MURDER.—One who slays his fellow being with that degree of malice which is implied when no considerable provocation appears to have existed, or which is implied when all the circumstances show an abandoned and malignant heart, is guilty of murder; but the degree of the crime must be determined by the jury from all the circumstances of the case.

MURDER IN FIRST DEGREE, AND MURDER IN THE SECOND DEGREE.—The classification of murder of different degrees into two kinds, does not render the offense of the minor degree less than murder. It is for the jury to say, under instructions of the Court as to the law, of which degree it is; and if they find that the slayer deliberately resolved before the homicide was committed to kill the deceased, it is murder in the first degree; but if, on the other hand, they find that there was no deliberate, preconceived intention to kill, except that which is implied from the circumstances showing no considerable provocation to have existed, or an abandoned and malignant heart, or that the defendant did not intend the fatal blow to produce death, yet intended the blow, then it is murder in the second degree.

APPEAL from the District Court, Fifteenth Judicial District, Butte County.

The facts are stated in the opinion of the Court.

L. C. Granger, for Appellant.

J. G. McCullough, Attorney-General, for Respondent.

By the Court, CURREY, J.

The defendant was indicted for the murder of Tim Malony. Both the defendant and the deceased were drunk when the homicide was committed. Under our law drunkenness is no excuse for crime, unless it be occasioned by the fraud, contrivance or force of some other person or persons for the purpose of causing the perpetration of an offense. The homicide was caused by the defendant, who used a knife from the "cup-board," as one witness testified, with which he stabbed the deceased in a vital part of his body, so that he died within a very short time afterward. At the trial the defendant was found guilty of murder in the second degree, and was sentenced by the Court to be imprisoned in the State Prison for the term of fifteen years. The defendant has appealed to this Court from the judgment.

The Court below, in charging the jury, said: "In murder of the second degree, malice may be shown, and the law, in case a killing has been proved, will imply malice, unless extenuating circumstances are shown; but although the law implies malice from the killing alone, yet there must be no mixture of deliberation or premeditation in the act of killing, and there must be no intent to kill in giving the fatal blow, otherwise the crime would be murder in the first degree."

The counsel for the defendant requested the Court to instruct the jury in the following words: "That the difference under our statute between murder in the first and second degrees does not consist in the degree of malice necessary to effect the killing, since in each case malice accomplishes its wicked purpose; but the difference consists in the amount or degree of deliberation beforehand with which the malice effects its fell purpose. The same kind or quality of malice is requisite in each case; but the less degree or amount of cool deliberation

beforehand constitutes the lesser degree of murder. Therefore the jury must find, beyond a reasonable doubt, that of his malice, and not of any mere passion, defendant resolved beforehand to kill and murder the deceased, and influenced by such motive and not by mere passion, defendant carried the same into execution, in order to find defendant guilty of murder in the second degree."

The Court refused to so instruct the jury, and the defendant excepted; and the defendant also excepted to the instruction given by the Court above set forth, and now seeks to reverse the judgment because of these alleged errors of the Court below.

The statute defines murder to be the unlawful killing of a human being, with malice aforethought, either express or implied. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart. These are statutory definitions. (Wood's Digest, 330, 331, Secs. 19, 20, 21.) The twenty-first section of the Act concerning crimes and punishments has divided the crime of murder into two classes—murder in the first degree and murder in the second degree. The statute declares that "all murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery or burglary, shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder in the second degree."

The statutory definition of murder is substantially in the language of the common law defining that term, and the classification of murders of different degrees of atrocity, into two kinds, does not render the lesser crime any other than murder; and if the homicide committed be murder, it is for the jury,

under the instructions of the Court as to the law, to say of which degree it is, and to render their verdict accordingly.

There is no complaint that the Court incorrectly charged the jury as to what constitutes murder in the first degree, or when a homicide amounts to manslaughter, or is justifiable or excusable; but the chief ground on which the counsel for the defendant places his objection to the charge is that the jury were instructed in substance that premeditation, deliberation, or intention to kill in giving the fatal blow, were not essential to constitute the homicide murder in the second degree, and that, therefore, the jury may have found the defendant guilty of murder in the second degree, when they would not have done so had they been correctly instructed as to the law on the subject.

It is a cardinal doctrine of criminal law, founded in natural justice, that it is the intention with which an act was done that constitutes its criminality. The intent and act must both concur to constitute the crime. (3 Greenleaf's Evidence, Sec. 13; 1 Bish. Crim. Law, Secs. 80 and 253.) The felonious intent may be proved directly, or it may be presumed from the proved existence of other facts. (3 Greenleaf's Evidence, Sec. 14.) Nothing short of an intent to do a forbidden thing will make a person a criminal in law; but it is not necessary that the interdicted thing actually done, should have been designed, but it must appear that such result was attained in the attempt to do on unlawful act.

The common law measures an act which is *malum in se* substantially by the result produced, though not contemplated, holding the doer of the act guilty of the thing done in the same manner as if it were specially intended, though not always guilty of the crime committed in the same degree. (Rutherford's Institutes, B. 1, O. 18, sec. 11.) On this principle, if one intending to murder a particular person attempts to shoot him, but, missing his mark, shoots another; or in an attempt to poison one, another accidentally loses his life by means of it, it is murder in the first degree. (1 Bishop on Crim. Law, sections 255-257.)

In *The People v. Bealoba*, 17 Cal. 395, the Court quote from the decision of the Supreme Court of Pennsylvania in the case of *Commonwealth v. Green*, 1 Ashmead, 296, in which is the following language: "To constitute murder in the first degree, the unlawful killing must be accompanied with a clear intent to take life. This is the great and distinguishing feature between murder in the first, and murder in the second degree." Our statute creating and defining the degrees of murder was transcribed from the Pennsylvania Act on the subject, under which the *Commonwealth v. Green* was decided. That decision seems to have been carefully considered, and was followed and approved by other decisions of the same Court, and we see no reason for disapproving of the construction of the statute given by that Court, and adopted in the case of *The People v. Bealoba*, when properly understood. (See *The People v. Vincente Sanchez*, 24 Cal. 17.)

It does not follow, from the language which we have quoted from the decision in *Commonwealth v. Green*, and adopted in *The People v. Bealoba*, that criminal intent is not an element in the crime of murder in the second degree. In those cases, "the clear intent to take life constituting the killing, murder in the first degree" was evidently intended to mean the deliberate and fixed purpose existing in the mind of the slayer to kill the object of his malice, as contradistinguished from that minor quality of intention which lacks the marked and distinguishing characteristic of deliberation or cold premeditation, and such was the manifest sense of the charge of the Court to which the defendant objects; for, immediately following the language of the charge to which the exception is taken, the Judge illustrates his meaning by an example, saying; "A man actuated by malice may attack another with the intention of not killing, but of committing some bodily injury; here, though death ensued, the crime would be murder in the second degree; because, although there was malice in the act, the killing was not premeditated, nor done with deliberation, nor was there any intent to kill in giving the mortal blow."

The commission of murder, as we have already seen, neces-

sarily involves the intent, either actual or by imputation, to kill the person slain. Where the intent is actual it is manifested by circumstances that show the immediate and direct design of the author of the crime. When, by imputation, the intent is presumed from the proved or admitted existence of acts or conduct of the criminal, which are *malum in se*. Thus when the death of one person ensues from the felonious acts of another, the law imputes to the perpetrator the intention to produce the result which was the natural consequence of the primary act, and in such cases the circumstances must determine the degree of the crime. Though the charge was not entirely accurate, we think it manifest that the jury were not misled by it to the defendant's prejudice, when considered as a whole. Murder in the first degree was correctly defined and explained by the Court to the jury, and so was manslaughter, both voluntary and involuntary, as also the law respecting justifiable and excusable homicide. The effect of the verdict was that the defendant was not guilty of murder in the first degree, nor of manslaughter only, as defined by the statute, nor was the homicide justifiable or excusable, but still the defendant was guilty of slaying his fellow being with that degree of malice at least, which is implied when no considerable provocation appears to have existed or which is implied when all the circumstances connected with the act done show an abandoned and malignant heart, and that though the defendant did not directly and expressly intend that the fatal blow which he gave, should produce death, yet that the act of stabbing was expressly intended, and that from such act the law imputed to the perpetrator of it the intent to produce its natural effect and consequence, which was the death of the person slain.

Then viewing the charge in its plain meaning, as it must have been understood by a sensible jury, we are of the opinion the defendant had no ground to complain of it as erroneous. If we had any doubt upon the subject we should not hesitate to reverse the judgment.

In respect to the defendant's second assignment of error, we

Macley v. Love et al.

think the Court properly refused the instruction requested. If the defendant resolved before the homicide was committed to kill and murder the deceased, he was guilty of murder in the first degree. A resolve implies deliberation. Resolving to kill and murder a human being falls directly among the descriptive elements constituting murder in the first degree. Hence the Court could not with propriety have instructed the jury as requested.

We are of the opinion the judgment should be affirmed.

Judgment affirmed.

CHARLES MACLAY v. HARRY LOVE AND MARY LOVE.

SEPARATE PROPERTY OF MARRIED WOMEN.—The rights of married women, as to their separate property and their power over it in California, do not depend alone on the principles of the common law, or upon the doctrines of Courts of equity, but mainly upon the Constitution and statutes of the State.

PERSONAL LIABILITY OF MARRIED WOMEN.—Except in special cases, as under the Sole Trader's Act, a married woman cannot, by contract, create a personal liability against herself in any form.

MARRIED WOMEN'S SEPARATE ESTATE.—Under the laws of California a married woman, by the mere execution of a promissory note in the ordinary form in consideration of services rendered, or moneys furnished for her benefit or the benefit of her separate estate, or by the purchase of goods in the ordinary mode for her separate use, with the intent and understanding that the demand thus arising shall be satisfied out of her separate estate, cannot create a charge or incumbrance upon such separate estate; nor can a Court of equity impose and enforce such claim or demand as a charge or incumbrance upon such separate estate.

SAME.—A Court of equity in this State has no power to enforce any claim or demand as a charge or incumbrance on the separate estate of a married woman, unless such claim or demand has become a charge, lien, or incumbrance thereon by virtue of a contract evidenced by an instrument in writing, signed and acknowledged by the wife, in accordance with the sixth section of the Act defining the rights and duties of husband and wife, passed April 17, 1850.

SEPARATE ESTATE OF MARRIED WOMEN.—A married woman in this State has no power to create any charge, or lien, or incumbrance, upon her separate estate, except by an instrument in writing, signed and acknowledged by the wife, in accordance with the sixth section of the Act defining the rights and duties of husband and wife, passed April 17, 1850.

SIXTH SECTION OF THE ACT CONCERNING HUSBAND AND WIFE.—The sixth section of the Act defining the rights and duties of husband and wife, passed April 17, 1850, is not unconstitutional. Even if that part of said section which requires the husband's signature to the instrument is unconstitutional, it can be stricken out without vitiating the remainder of the section.

MacIay v. Love et al.

CONSTRUCTION OF ACT OF APRIL 17, 1850.—The Act of April 17, 1850, defining the rights and duties of husband and wife, applies to property held as separate by women married in this State after the passage of the Act, without reference to the time when the property was acquired.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

In 1845 the Mexican Government granted to the defendant, Mary Love, (then Mary Bennett,) a tract of land lying in the present County of Santa Clara. The land was confirmed to her by the United States District Court, and she afterwards married defendant, Harry Love. In 1857 both defendants executed to H. S. Washburne their note for two hundred dollars for surveying said tract of land. In 1860 plaintiff sold defendant, Mary Love, goods of the value of twenty-seven dollars and forty cents, and about the same time the note was assigned to him. For the sum due on the note, and for the goods, the action was commenced.

The Court sustained a demurrer to the complaint, and plaintiff declining to amend, gave judgment for defendants. Plaintiff appealed.

The other facts are stated in the opinion of the Court.

C. T. Ryland, for Appellant.

Plaintiff says that property acquired previous to the Act of April 17, 1850, (Wood's Dig. 487,) is not affected by it.

The Mexican law prevailing in California, at and before its cession to the United States, declared this the separate estate and property of Mrs. Mary Love, and the quality of her estate was such that she might, by her own act, alienate it without the necessity of procuring the signature of her husband, or without being compelled any more than a *feme sole*, or a man, to procure the consent of others to a deed or contract concerning her property; but the husband's bare assent, or his previous license, or his subsequent express or implied ratification, or rather his mere failure to make objection, would be sufficient; and his subsequent ratification would make her sale, or lien, or contract, definitely valid, etc.

The case of *Harvey v. Hill*, 7 Texas, 595, is illustrative of this view, and was an action of ejectment. The instrument of conveyance (which was a conveyance of the wife's separate estate) under which the defendant derived title was made in the year 1837, and was governed by the Mexican law, and not by the statute of Texas. (See opinion in that case.)

In *Ingoldsby v. Juan*, it is said that the wife could, before the statute, dispose of her property with the bare assent of her husband as she chose, by any informal instrument, or possibly without writing. (12 Cal. 575.)

The husband could ratify what the wife had done. In the case at bar both husband and wife sign the note for the work done on her separate premises. (Law of Toro, 58; Novissima Recopilacion, p. 4, book 10; Title Law 14, vol. 5; 8 Texas, 397; 10 Texas, 123, 286; 21 Barb. S. C. 286.)

The above authorities show that a married woman could dispose of her property, and could bind it for her debts.

It is not disputed that a married woman's separate estate would be bound for debts contracted on the faith of it, or for the betterment or enhancement of such separate property. (8 Texas, 897; 10 Texas, 123; 5 Texas, 195, 152; 21 Barb. S. C. 286; 3 John. Ch. 77; 17 John. 548; 6 Wend. 13; 4 Coms. 9.)

The estate and right of Mrs. Love, formerly Mrs. Bennett, was the same under the Act of 1850 as under the Spanish law, and right of alienation was not restricted by that statute. If her right of alienation was not restricted, her contracts for the benefit of her separate property must be valid. (*Edrington v. Mayfield*, 5 Texas, 365. See authorities last above cited.)

Such as her estate was, such as her rights were, and such as her power of disposition was, became unalterably fixed by the sixteenth section of Article first of the Constitution of California. No bill of attainder, *ex post facto* law, or law impairing the obligation of a contract, shall be passed.

Her right was secured by that clause in the Constitution, "because property consists as well in the *jus disponendi* as in

the *jus proprietatis*, for of what real value is the latter if the former may be practically defeated." (7 Iredell's Equity R.)

By the fourteenth section, eleventh Article, and the eighth section, first Article, of the Constitution of California:

Property consists in the right to enjoy and dispose of certain things, etc. (Bouv. Law Dictionary, Vol. II, Title—Property; Jacob's Law Dictionary, Title—Property.) Property means the highest right a man can have for anything—being used for that right which one hath to lands or tenements, goods or chattels, which no way depend on another man's courtesy.

It is a rule of common law that the power of alienation is an inseparable incident to the right of property. (10 Barb. 597.)

If the position of the defendants be sustained this right is impaired. The "*jus disponendi*" is virtually taken away, making her power of disposition depend upon the arbitrary will of another, and even the obtaining the assent of that other in a particular way and before a particular officer. Indeed, it is made subject not only to the arbitrary will of her husband, but upon the writing of a particular certificate of acknowledgment by a certain officer, for it is decided that the certificate of acknowledgment by a Notary Public, etc., to a conveyance made by a married woman of her separate property, is and must be a part of the conveyance itself.

This is in fact giving the property to the husband and clogging it not only with his will but with acts of others; because we have seen that the right to dispose of property is a part of the *jus proprietatis*, and by the Act of eighteen hundred and fifty, the husband is made the owner that far of his wife's separate property, and the wife is rendered powerless in relation to her separate property—just as powerless as she is over the separate property of her husband. In the case at bar, Mrs. Love owned the real estate in her own right, with the power of using and disposing of the same before the Act of eighteen hundred and fifty. After that Act, according to the theory of the defendants, she could not protect it without the

assent of her husband. She could not dispose of it without his assent in writing first had, and without some Notary would write a proper certificate of her and her husband's acknowledgment. This makes the wife's disposition of her separate property depend upon the will of one who is not the owner.

The effect of the statute, if made to apply to property acquired before the making of the Constitution, and before the making of the Act of April seventeenth, eighteen hundred and fifty, is unconstitutional because it impairs the obligation of contracts. (*Ingoldsby v. Juan*, 12 Cal. 576.)

Appellant contends that the Act of eighteen hundred and fifty does not apply to the past but to the future, and that it does not affect the position of property acquired before its passage.

The Legislature had no power to affect or change marital rights or regulations fixed by law previously, and if they had, the Court will not presume, in the absence of an express declaration to that effect, that they so intended. (*Ingoldsby v. Juan*, 12 Cal. 580.)

No retrospective operation was intended, or perhaps could have been given to such an Act. (*Ingoldsby v. Juan*, 12 Cal. 580; *Morrison v. Wilson*, 13 Cal. 497.)

For the rule of interpretation of statutes see *Grimes v. Norris*, 6 Cal. 622, and brief of Judge Baldwin in that case.

The Act of eighteen hundred and fifty positively shows the intention of the lawmakers was to exclude estates and rights already vested.

See sections fourteen and fifteen, Wood's Digest, page 489. "*Expressio unius est exclusio alterius.*"

A legislative enactment must be express to convince the Court that it is to have any other than a prospective operation. (*Diwart v. Purdy*, 29 Penn. 113; U. S. Digest, Anno 1858, p. 681, Sec. 5; *Sanders v. Carrol*, 12 La. 793; U. S. Digest, Anno 1858, p. 681, Sec. 7.)

If the Act of eighteen hundred and fifty gives the control and management of the separate property of wife to the husband and requires his mind to act before she can make any

MacLay v. Love et al.

disposition of it, it is clearly an *abridgment* of her rights, and unconstitutional. (*George v. Ransom*, 15 Cal. 322.)

The term "separate property" in the fourteenth section, eleventh Article, of the Constitution, is used in its common law sense, and by that law "separate property" means an estate held both *in its use* and in its title, for the exclusive benefit of the wife. Hence, a law taking away the right of the wife to dispose of her property must be unconstitutional, particularly as to property the rights to which were absolutely hers before the passage of the Act of April seventeenth, eighteen hundred and fifty. (12 Cal. 322.)

If the Legislature can deprive a married woman of the disposition of her separate property, a right which she had under Mexican or Spanish law, why cannot they deprive her of its use or its profits?

To deprive a *feme covert* of the right to dispose of her property, or to transfer that right to another—for example, her husband—is obnoxious to the eighth section of Article first of the Constitution, which says, among other things, that no persons
 * * * shall be deprived of life, liberty or property, without due process of law, etc. (*Westervelt Exec. v. Gregg*, 2 Kernan, 202.)

T. H. Laine, for Respondents.

It appears from appellant's bill that the separate estate of the wife sought to be charged with the payment of this account for goods, wares, etc., consists in real estate—land. Now, upon the most liberal construction of the doctrine of appointment, the property sought to be charged being real estate, there must be some allegation in the bill showing a clear intention to charge that estate, and that intent must be evidenced by some written agreement or instrument, and not a verbal contract, as this most clearly is. The execution of a note, or the indorsement of a bill of exchange, has been regarded as manifesting an intention by a *feme covert* owning a separate estate to charge that estate; but the doctrine of appointment has never been held to go so far to make verbal contracts an evidence of such

intention. In the case of *Burch and Wife v. Breckinridge, etc.*, reported in 16 B. Monroe, Kentucky Reports, pages 482 to 492, holds the doctrine here contended for. On page 487, the Court in that case say:

“The extent to which her separate property (speaking of a married woman) may be subjected to the demands of creditors claiming under parol agreements, has not been determined by this Court. So far as the separate property consists of land, it cannot be made liable by a verbal contract. The wife cannot alien or dispose of her real estate except by a written agreement, and as a charge upon it for the payment of debts operates as a disposition of it *pro tanto*, it can only be created by a contract in writing.” (See the opinion and authorities therein cited.)

This we take to be the correct doctrine, and it fully sustains the position we have taken upon the case at bar. If the appellant's position be true, there can be no protection thrown around the separate estate of a *feme covert*, the husband and his creditors may easily evade the whole law as regards the alienation of the wife's separate estate; the Courts, however, cannot lend themselves to the perpetration of such frauds upon married women.

By the Court, SAWYER, J.

Plaintiff seeks to charge the separate property of Mary Love, the wife of defendant, Harry Love, with the payment of a note executed by both defendants, for services alleged to have been rendered for the benefit of the separate estate of the wife, and at her request, with an alleged intent on the part of the wife to make the same a charge upon her separate estate. Also, for goods sold and delivered during coverture to the wife for her own use, and at her request, with a like alleged intent.

Section six of the Act of April 17, 1850, “defining the rights and duties of husband and wife,” provides, with respect to the separate property of the wife, that, “no sale or other alienation of any part of such property can be made, nor any

lien or incumbrance created thereon, unless by an instrument in writing, signed by the husband and wife, and acknowledged by her upon examination separate and apart from her husband," etc. (Wood's Digest, 488.)

It was repeatedly held by our predecessors, that no title to the separate property of the wife, either real or personal, could be conveyed, except by an instrument in writing, executed and acknowledged by her in the mode prescribed by this Act. (*Selover v. Am. Rus. Co.*, 7 Cal. 266; *Barrett v. Tewksbury*, 9 Cal. 13; 13 Cal. 501; and other cases.) The statute is as emphatic in its provisions against creating "any lien or incumbrance thereon" as against conveyances. The rights of married women as to their separate property, and their power over it in California, do not depend alone upon the principles of the common law, or upon the doctrines of Courts of equity; but mainly upon the Constitution and statutes of this State. It is not pretended that the defendant, Mary Love, is personally liable upon the contracts sued on; but it is insisted that being the owner of separate property, as a necessary incident to such ownership, and to the *jus disponendi*, she has a right by contracts not imposing liabilities against her personally, to create a charge upon such property, which the Courts will enforce. Admit this to be so, yet such charge must be created in some mode not prohibited by statute.

If a demand can be enforced as a charge against the separate property of the wife, it must in some form ultimately become a lien upon it, and result in a sale and conveyance of the property. The lien or incumbrance must originate in some action on the part of the wife, to be perfected and enforced by the Courts by means of a sale. But the statute says that no sale or other alienation shall be made, nor any lien or incumbrance created thereon, except in a certain prescribed form. It is prohibitory in its terms. Aside from exceptional cases — as under the Act relating to sole traders — the wife has no power by contract to create a personal liability against herself in any form. If she can create a charge upon her separate property, to be satisfied out of the separate

property *alone*, independent of any personal liability, the charge must be to that extent a disposition or alienation of, or an incumbrance upon such separate property. That she has the power to create such a charge there is no doubt, but she has no power to create it in any other mode than the one prescribed by the express provisions of the statute. And in this consists the difference between the case under consideration, and those found in the Chancery reports of England and the older States. In the latter cases, there was no statutory limitations as to the mode of contracting, while here there is. The wife, under our statute, can create no right against her separate property except in the mode prescribed. The prohibitory provisions of the Act would be of little avail if the wife, by simply contracting a debt to be paid out of her separate estate, could create a valid and binding charge upon it. But she has no such power, and an attempt to create a charge by her contract in the form alleged would be simply void. Nor can a Court of law or equity, in the face of the statute, create a right where none exists independent of its action. The office of a Court is limited to the enforcement of rights already existing by applying the appropriate remedy. The statute prescribes the only mode by which debts can be created, and made a charge, or incumbrance upon the separate estate of a married woman; and they must become a charge before a Court of equity, in the language of Lord Cottenham, can "take upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property as the only means by which they can be satisfied."

A claim for which no person is individually liable, and which cannot by the simple act of any person be charged as an incumbrance upon property, is simply a nullity, and cannot serve as the foundation of a right upon which a Court can build a superstructure for divesting a married woman of the ownership of her separate property.

In the case of *Miller v. Newton*, 23 Cal. 554, a majority of the Justices — Mr. Chief Justice Cope dissenting — took a dif-

ferent view of the question, holding that the provisions of the statute under discussion had no application to cases of this kind.

The prevailing opinion says: "The respondent refers to the cases of *Selover v. The American Russian Com. Co.*, 7 Cal. 266, *Barrett v. Tewksbury*, 9 Cal. 13, and other decisions of this Court, founded upon the statute relating to conveyances of property by a married woman. Those cases relate to the power of a married woman to execute instruments conveying or incumbering her separate property, and the mode in which such conveyance or incumbrance must be executed and acknowledged to be binding upon her, and they therefore differ entirely from the case now before us, in which no such question is directly involved. The statutes upon this subject, and upon which these decisions were founded, do not in any way abrogate or impair the powers of a Court of equity over the rights and property of married women, or the long established rules of those Courts upon this subject upon which this case depends. While these statutes confer upon married women a power to dispose of their property which they did not before possess, yet there is no expression of any legislative intention to thereby divest Courts of equity of their long established powers and jurisdiction. To effect such an object would require a clear expression of legislative will. These statutes are a substitute for the ancient common law proceeding by fine and recovery, which was the only mode by which, at common law, a married woman could convey her real estate."

With due deference to the learned Justice who delivered the opinion, we are unable to perceive any principle upon which the class of cases he was considering, so far as he refers to that part of the demand accruing during coverture, can be distinguished from the cases cited.

The terms of the statute are very broad. It uses among others the precise term "*incumbrance*," which the learned Judge in this very opinion (unconsciously, perhaps, but naturally enough) employs to characterize demands charged upon separate estates. The opinion says: "In accordance

with this principle, her separate estate will in equity be held liable for all the debts, charges, *incumbrances* and other engagements which she expressly or by implication charges thereon."

So also in the passage from the decision of Lord Chancellor Brougham in *Murray v. Barlee*, cited in the prevailing opinion, it is said: "In all these cases I take the foundation of the doctrine to be this: the wife has a separate estate, subject to her own control and exempt from all other interference or authority. If she cannot affect it no one can, and the very object of the settlement which vests it in her exclusively is to enable her to deal with it as if she were discovert. The power to affect it being unquestionable, the only doubt that can arise is whether or not she has *validly incumbered it*."

So appropriate is the word "incumbrance," or "incumbered," to express the idea of a charge upon property without any personal liability against the owner, that Judges naturally, and almost necessarily, hit upon that very term to convey the idea in discussing the question. The last clause of the passage just cited is especially applicable to the case in hand. "The power to affect it (the separate property) being unquestionable," the only question "that can arise is, whether she (in this instance Mary Love) has *validly incumbered it*." The statute says that *no incumbrance* can be created thereon unless by an instrument in writing executed and acknowledged in a certain way, and the method designated was not pursued. There never was a time when a Court of equity was authorized to enforce an incumbrance, until an incumbrance existed. And now, as before, a right must be created before the Courts can be called upon to apply a remedy. It is not claimed, as seems to be supposed, that the statutes under consideration in any respect abrogate or impair the powers of the Court to afford a proper remedy where the right exists. The Act containing the prohibitory clause relates to the *powers of the wife, not of the Courts*, and the statute was not intended to relate to conveyances merely, as seems to be intimated. Its purpose

was not to provide a substitute for fine and recovery and enable the wife to convey her property.

This Act was passed on the 17th of April, 1850. On the day before—the 16th—the Legislature had passed “An Act concerning conveyances,” which was a substitute for the mode of conveyance under the Mexican law, and not in any sense, as applied to California, for conveyance by fine and recovery, a mode of conveyance never in use in this State. That Act was a general Act relating to conveyances, and it made full provisions for the *conveyance* of the property of married women, as well of other parties. There was no necessity for any other provision on that head. The object and scope of the Act under consideration was entirely different from that of the “Act concerning conveyances.” Its object, as its title briefly indicates, and an examination of its various provisions will demonstrate, was, to “define the rights and duties of husband and wife,” and particularly to prescribe the powers of both husband and wife with reference to their property, separate and common. And it is this Act relating to the precise subject matter under consideration, and not the Act concerning conveyances, that contains the prohibitory clause. The minds of the legislators were particularly directed to the question. The whole object of the statute was to define the rights pertaining to the marriage relation, and particularly the rights and powers of the wife with respect to her separate property; and these rights were placed upon a basis entirely different from that which prevails under the common law. This Act did not, in our view, “confer upon married women a power to dispose of their property which they did not before possess,” as also seems to be supposed in the prevailing opinion in *Miller v. Newton*, but it was a limitation of a power which already existed to a particular mode of conveyance and charging or incumbering their separate estates; and in the language of Mr. Chief Justice Cope, “the object of the statute (in thus limiting the power to the mode) was to protect the wife, not only as against her husband, but as against her own improvident acts, and persons dealing with her must see that

the forms necessary to give validity to their contracts are complied with."

It is not to be supposed that the legislators, with their minds especially directed to the subject and having these objects in view, used the comprehensive terms in the prohibitory clause of the statute in the restricted sense supposed in the prevailing opinion in *Miller v. Newton*—a sense that would defeat the only purpose and render nugatory that important provision of the Act. We think the case within the purview of the prohibition.

The prevailing opinion in *Miller v. Newton* appears to us to concede too much to the powers of Courts of equity, and too little to the statutory modifications of the power of the wife.

It was a well settled doctrine in England, and the older States, that a married woman in equity could deal with her separate estate as though she were a *feme sole*. Originally, it is true, the establishment of separate estates in a married woman was an innovation upon the principles of the common law created by the Courts of equity. These estates originated in trusts for the separate use of married women. When Courts of equity sustained the validity of these trusts and recognized the wife's estate under them, it seemed to be a necessary result that she should have the power of disposition, and the power was accordingly conceded. (*Yale v. Dederer*, 18 N. Y. 269, and 22 N. Y. 451, where the subject is fully and ably discussed.)

"The right to charge her separate estate in equity resulted from the *jus disponendi* which Courts of equity regarded her as having, and it was a necessary incident of the full enjoyment of her property." (18 N. Y. Rep. 272.) The power of the wife to dispose of her separate estate is very generally made the basis of its liability to be charged with the debts incurred for her benefit, by the English Chancellors, even including Lord Cottenham, (who comes the nearest to repudiating the doctrine,) though hardly any two of them agree in their reasoning by which the liability is worked out or deduced from the *jus disponendi*, as will be seen from an examination

of the elaborate review of the cases in *Yale v. Dederer*, 22 N. Y. Rep. 451. Mr. Justice Selde, in concluding his comments on the cases, and particularly referring to the reasoning of Lord Cottenham, says (page 459): "the truth would seem to be that, this mode of dealing with the estates of married women, to the extent to which it has been carried by the English Courts, could not be sustained by any process of legal reasoning, and hence the grounds upon which it was made to rest have been repeatedly changed, and the rule itself has been fluctuating and uncertain." * * * "The views of Lord Cottenham are no more likely to be permanent than those of his predecessors. Some future Lord Chancellor may detect the fallacy of his reasoning, as he detected that of Lord Brougham. No rule can ever be stable the reasons for which are constantly changing. If we desire precision and certainty in this branch of the law, we must recur to the foundation of the power of a *feme covert* to charge her separate estate; and this has heretofore arisen solely from her incidental power to dispose of that estate."

"Starting with this point, it is plain that no debt can be a charge which is not connected by agreement, either express or implied, with the estate. If contracted for the direct benefit of the estate itself, it would of course become a lien, upon a well founded presumption that the parties so intended, and in analogy to the doctrine of equitable mortgages for purchase money. But no other kind of debt can, as it seems to me, be thus charged without some affirmative act of the wife evincing that intention."

But these remarks refer to countries where there is no express limitation upon the power or mode of making the contract with reference to incumbering the estate, as under the equity system of England, and under the statute of New York, which, unlike ours, contained no restriction in this particular.

Thus, it will be seen, that, though separate estates and their incidents were originally the creations of Courts of equity, established, perhaps, by a usurpation of powers, yet the liability of the separate estate is based upon the recognized own-

ership of the property; a power of disposition as an incident to the ownership; and a contract actually made by the owner, by which a charge upon the estate is created, thereby making to the extent of the charge an inchoate disposition of the property. A right is thus created, for the enforcement of which — a Court of law being inadequate — a Court of equity affords the remedy.

But in our State, the rights of the parties are fixed by statute, and the only duty or power of the Court is to enforce those rights in accordance with the spirit of the statute, as plainly indicated by the letter. Had we never been educated under the double system of common and equity law, as they prevail in England and the older States, we should have little difficulty with the statute before us, as we apprehend, in determining the rights of the parties in respect to the questions under consideration.

The following remarks of Mr. Justice Selden in the case last cited, (page 460,) are not inappropriate on the present occasion:

“But there is a strong additional reason why this Court should decline, at this time, to adopt the fictitious theories on this subject, which have so long prevailed in the English Courts. Married women are not hereafter to be indebted to equity merely for protection or the enjoyment of their separate estates. They hold them by a legal title, and have a legal right to dispose of them. The Acts of 1849 and 1860, [in this State the Act of 1850,] are henceforth, if not repealed, to be the source of their power over such estates. There is no longer any foundation for the argument, that as equity creates and protects these estates, equity has a right to control them. Rules, therefore, which have grown up under this idea, which I regard as to some extent illusory, will be hereafter inappropriate.”

Under our statute, as we read it, the wife is endowed with a capacity to hold separate property as fully, at least, as she could under the principles recognized by Courts of equity. She also has the power to dispose of or incumber it, as she had in equity; but in this she is restricted as to the manner of

effecting the disposition or incumbrance by the prohibitory clauses of our statute, whereas in equity there was no such restriction. When a charge or incumbrance has been created in the mode recognized by law, the Courts will afford the remedy by enforcing it, as Courts of equity would have done. But until such charge or incumbrance is legally created, there is no right to enforce, and of course no remedy can be afforded; neither could there have been under the principles of a Court of equity. The whole question is narrowed to the form in which the incumbrance is to be created, and not to the power to create it.

But if the case is held to be within the prohibitory clause of the sixth section of the "Act defining the rights and duties of husband and wife," it is insisted that the provision is unconstitutional. Conceding, for the purposes of the argument, that portion of the section requiring the instrument to be signed by the husband to be unconstitutional—a question we do not now intend to decide—this will not vitiate the remainder of the section, if valid in other respects. Requiring the signature of the husband is only an additional safeguard, and it is not so vitally connected with the object and scope of the Act, that it cannot be stricken out without vitiating the whole section. It will, therefore, only be necessary to consider the constitutionality of that part of the section which prohibits the wife from alienating or incumbering her separate property in any other manner than by an instrument in writing manifesting her intention, signed by her and acknowledged in the mode prescribed. We do not think this portion contravenes any constitutional provision. It does not prohibit her from disposing of, or incumbering all, or any part of her separate estate upon such terms as to her may seem proper. It does not in the slightest degree interfere with her free will. It only prescribes the mode in which she shall manifest that will. It was undoubtedly the object of the statute to provide a mode of alienation and of incumbering her estate, uniform, simple, and conclusive, which should protect both the wife and the purchaser; one that should secure entire freedom of will and

- action to the wife, and afford the least possible opportunity for subverting her interest through the medium of undue influence, threats, or fraud. It is a beneficent provision intended for her benefit, and not as an encroachment upon her rights. And we think its obvious tendency is, to throw a safeguard around, without in any degree impairing, the *jus disponendi*.

But it is further insisted, that the statute was not intended to apply to cases where the property was acquired before the passage of the Act, and for this reason the provision is inapplicable, and *Ingoldsby v. Juan*, 12 Cal. is cited to sustain this position. But if this case can be said to decide the question at all, it recognized the applicability of the provision "to property held as separate by women married after the passage of the Act," (page 580,) without reference to the time when it was acquired, and such seems to be the express provision of the statute. Section fourteen provides, that, "in every marriage *hereafter contracted* in this State, the rights of the husband and wife shall be governed by this Act, unless there is a marriage contract containing stipulations contrary thereto." There is no allegation that the marriage took place before the passage of the Act, or that there is a marriage contract containing stipulations in any respect contrary thereto. As the allegations of the complaint must be construed most strongly against the plaintiff, we cannot presume that any fact exists taking the case out of the operation of the statute, and none is alleged.

It follows that the facts stated do not constitute any cause of action against Mary Love, and there is a misjoinder of parties. As to the second cause of action for the goods alleged to have been sold to the wife, no cause of action is shown against the wife, for the reasons already stated — and none is pretended to be shown against the husband. No sale to him, or to his wife on his credit or account, and no promise by him, is alleged. The contract alleged is entirely upon the theory that plaintiff contracted with the wife alone, as the owner of separate property, on the basis and credit of her separate property, the debt to be charged upon that alone.

McGlynn *et al.* v. Moore *et al.*

No contract with the husband is averred. No cause of action, therefore, is shown against either. This leaves the action as against the husband to rest upon the note, which is only for two hundred dollars.

We think the demurrer was properly sustained.

Judgment affirmed.

Mr. Justice CURREY dissented.

Mr. Justice RHODES expressed no opinion.

JOHN A. MCGLYNN AND ANDREW J. BUTLER, EXECUTORS OF THE LAST WILL AND TESTAMENT OF DAVID C. BRODERICK, DECEASED v. GEORGE H. MOORE AND FRANCIS B. FOLGER.

FORFEITURE OF TERM IN A LEASE.—Previous to the passage of the Act of April 25, 1862, amending the Act "concerning forcible entries and unlawful detainers," in order to work a forfeiture of the term of a lease for non-payment of rent under the thirteenth section of said Act, the landlord was required to make a demand for rent with all the strictness required at common law.

CONSTRUCTION OF LEASE.—Where, in the *habendum* clause in a lease, it is provided that the lessee is to have and hold the premises demised from a certain day of the month for a period named, and the rent is also made payable monthly on the last day of each and every month during said term, the word "from" will be construed as exclusive or inclusive of the day named in the *habendum* clause as will best express the intention of the parties, to be gathered from the whole instrument, and if construed as exclusive of that day, the rent will be payable on that day; but if construed as inclusive of that day, the rent will be payable on the day previous.

DEMAND FOR RENT.—In order to work a forfeiture of the term in a lease under the common law, it was necessary for the landlord to make a demand for the precise sum due for rent on the day it fell due, at the most notorious place on the demised premises; and if there was a dwelling house on the demised premises, the demand was required to be made at the front door of the same.

PLEADINGS IN ACTION TO REMOVE LESSEE.—If the complaint in an action to remove the lessee from the demised premises on the ground of a forfeiture of the term for non-payment of rent, alleges generally that a demand for rent was duly made of the defendants on the premises, an answer, denying that the plaintiffs demanded of defendants the payment of the rent, is sufficient as a denial.

WAIVER OF FORFEITURE OF THE TERM BY LESSOR.—If rent is received by the lessor after a forfeiture of the term by the lessee by reason of a breach of a covenant in a lease, the receipt of the rent is a waiver of the forfeiture, unless the covenant which has been violated by the lessee is a continuing covenant, or the lessor was ignorant that a forfeiture had been incurred.

COVENANT IN LEASE.—If the lessee covenants in the lease to build within a given time on the demised premises, the covenant is not a continuing covenant; and if the lessee fails to build, the receipt of rent by the lessor, accruing after the end of the time given, is a waiver of the forfeiture.

APPEAL from the County Court of the City and County of San Francisco.

Defendants recovered judgment in the Court below, and plaintiffs appealed.

The other facts are stated in the opinion of the Court.

Ralph C. Harrison, and Hoge & Wilson, for Appellants.

Leases, with a term commencing at a time preceding the date, are not without precedent, but on the contrary, are well known to the law and have a fixed construction. "A lease, dated one day, *habendum* from a day preceding, commences in point of computation from the time marked in the *habendum*; in point of interest, from the date." (2 Platt on Leases, 50, 53, and cases cited.)

"By appointment of law, the rent is payable on the demised premises, if no other place be appointed by the parties for the purpose,"—in the lease. (See 2 Platt on Leases, 100, and cases cited, where he is treating of the contents and parts of a lease; *Ib.* 333-4, and cases cited.)

The breach of such a covenant, and the consequent forfeiture, is not waived by the subsequent receipt of rent. It is a *continuing covenant*, and therefore the continuance of the failure to observe it works a continual right to a forfeiture. (See Taylor's Landlord and Tenant, Sec. 500, and cases cited; 2 Platt on Leases, 471-2; *Fryett ex dem. Harris v. Jeffrey*, 1 Esp. 393; *Beach v. Crain*, 2 N. Y. 86.)

"Where there is a *continuing cause of forfeiture*, the landlord will not be precluded from taking advantage of it by receiving rent which accrued after the breach was originally committed." (Taylor's Landlord and Tenant, Section 500; *Bleecker v. Smith*, 13 Wend. 530; *Sheppard v. Allen*, 3 Taunton, 78; *Fryett v. Jeffries*, 1 Esp. 393; *Doe v. Rancks*, 4 B. & Ald. 401.)

S. F. & J. Reynolds, for Respondents.

The demand was made one day too soon. The *last* day of each month of the *term* of this lease occurs on the *first* day of each calendar month.

When time is to be computed from or after a certain day, that day is excluded, even though it be the date of the instrument, unless it appears from the instrument itself that a different computation was intended.

“Touching the time of the beginning of a lease for years, it is to be observed that if a lease be made by indenture, bearing date the twenty-sixth of May, etc., to have and to hold for twenty-one years *from the date* or *from the day of the date*, it shall begin on the twenty-seventh of May. If the lease bear date the twenty-first of May, to have and to hold from the making thereof, or from henceforth, it shall begin on the day on which it is delivered, for the words of the indenture are not of any effect till the delivery, and thereby from the making, or from henceforth, take their first effect. But if it be ‘*a die confectionis*,’ then it shall begin the next day after the delivery.” (Coke on Litt. p. 46, Chap. 7, Sec. 58.)

In *Dyer*, 218, (b,) it is held that the words “next after the date of the deed” were exclusive of the day of the date.

In *Clayton’s Case*; 3 Coke’s Rep. 1, it is held that “from the day of the making” was exclusive. (*Cornish v. Cawsey*, Style, 118; *Bacon v. Waller*, Bulstrode, 204; *Llewellyn v. Williams*, 1 Roll. Rep. 387.)

In *Bigelow v. Willson*, 1 Pick. 494, the Court say, “that the words ‘from the date,’ and ‘from the day of the date,’ when used in a lease to designate the commencement of a term, have precisely the same meaning. This has been denied in some old cases, but these cases have been overruled, and the principle has been long established.”

The Court then refers to Coke on Littleton, and also reviews the case of *Pugh v. The Duke of Leeds*, Cowper, 714, and shows that the principles laid down by Lord Mansfield in that case are not at all in conflict with the cases above

referred to. But that when from other parts of the lease it clearly appears that a different computation of time was intended, then such intention shall not be defeated. We refer the Court also to *Henry v. Jones*, 8 Mass. 453; *Higgins v. Peters*, 1 Metcalf, 127; *Cornell v. Moulton*, 3 Denio, 13.

When "the demand is only in order for a distress, there it is sufficient if it be made on *any notorious* part of the land, because this is only to entitle him to his remedy for his rent, and therefore the whole land being equally the debtor, and chargeable with the rent, a demand upon it, without going to any particular part of it, is sufficient." (Bacon's Abridg., Ed. of 1854, p. 487, title Rent, I, 3.)

The distinction between a demand for purpose of forfeiture and re-entry, and a demand for the purpose of distress, are marked and well defined.

The right to re-enter, for breach of this covenant to build, was waived by the acceptance of rent for seven months after the alleged breach. The lessors erected a large warehouse, but not of the dimensions required by the covenant. And, by the acceptance of rent after it was so built, it was accepted by the landlord, and its variance from that provided for was waived, so far at least as the question of re-entry was concerned.

Hoge & Wilson, in reply.

The demand in front of the warehouse was sufficient.

The cases cited by the respondents' counsel are numerous, but upon examination they will be found either to have no relevancy to the question or not to sustain his position.

Of the cases cited in the respondents' brief the following have no reference to the *place* or *manner* of demand, but refer exclusively to the *proper day* or *time* of making demand: *Chipman v. Emeric*, 3 Cal. 283; *Gaskill v. Trainer*, 3 Cal. 339; *Smith's Landlord and Tenant*, 119, 120; *Taylor's Landlord and Tenant*, sec. 297; those cited in the note to sec. 493 of *Taylor's Landlord and Tenant*, to wit: *Chen's Case*, 10 Rep. 129 a; 1 Leonard, 141; Cro. Eliz. 209.

In *Connor v. Bradley*, 1 Howard, 216, cited in note to section 493 of Taylor's Landlord and Tenant, the Court upon this subject merely say: "The demand must be made in *the most notorious place of the land*, even though there be no person on the land to pay," citing several authorities. Taylor himself, in section 493, says: "The demand must be made at the most notorious place upon the land, which, if there be a dwelling house, is the front door."

So, also, 1 Saunders, 287, also cited in above note.

Coke on Littleton, 202 a, cited in the note to the above section, says: "If one place be as notorious as another, the lessor has his election to demand it at either, and although the lessee be in some other part ready to pay the rent, yet that will not avail him."

The same language is found in 2 Platt on Leases, pp. 333, 334, cited by respondents' counsel.

In 2 Platt on Leases, pp. 333, 334, cited by respondents' counsel, the following is the language used: "If a house or a house and lands form the *subject* of demise, the lessor must appear at the front door, being the most notorious part of the house, and there demand the rent, whether the lessee or any one on his behalf be there or not; a demand at the back door is not sufficient."

Coke on Littleton, 153 a, cited in the notes to the above authority, has the following language: "If there be a house and land, a demand on the land is sufficient." These are all the authorities cited by the respondents' counsel, and from them it will be seen that his position cannot be sustained. It is further to be observed that not one of them is an opinion in a case adjudicated upon the point, but that they are all either propositions laid down by elementary writers, or loose dicta uttered by Judges in determining some other question.

The rule to be deduced from all the cases is, that the demand must be made in *the most notorious place*.

By the Court, RHODES, J.

David C. Broderick, the appellant's testator, on the fourteenth of July, 1859, executed to the respondents a lease of certain real estate in the City of San Francisco, for the term of nine years and three months. The *habendum* clause is as follows: "To have and to hold said premises unto said parties of the second part, from the first day of July, 1859, for and during and until the end and term of nine years and three months thence next ensuing." The time for the payment of the monthly instalments of rent is specified in these words, "payable monthly on the last day of each and every month during said term." The lease contains a covenant on the part of the lessees, to construct on the demised premises, within two years from the date of the lease, a warehouse of a specified description and dimensions.

In April, 1862, the appellants, as Broderick's executors, commenced an action against the respondents, under the thirteenth section of the Forcible Entry Act, to remove them from the possession of the premises, on the ground that the term was forfeited. They alleged that on the thirty-first day of March, 1862, four hundred dollars became due for rent; that on that day they demanded the same on the premises, and that the lessees did not then, and have not since paid the rent then falling due. They allege that a forfeiture was also incurred, in consequence of the neglect of the lessees to construct a warehouse, according to the covenants in the lease.

The case has been presented by both parties on the theory that the lessor, in seeking to avail himself of the benefits of a forfeiture for the non-payment of rent, must pursue the strict rules of the common law in all respects; that the statute (Sec. 13, Forcible Entry Act) worked no change of those rules in any manner. We shall therefore consider the case in that view. The first point for consideration is to determine the time for the payment of the rent. The time stipulated in the lease for the commencement of the term, has some tendency to determine this point, though it may not be

conclusive. The parties to the lease, provided for the commencement of the term at a time anterior to the time of the execution of the lease. We have no means of ascertaining precisely the object of the parties, in thus having the term begin at a time before the execution of the lease, and in the absence of all proof or explanation upon the matter we will be justified in presuming that they resorted to this mode for the purpose of making the months of the term accord with the calendar months.

They said in the lease, that the rent should be paid on the "last day of each and every month during said term." If they had said the last day of each and every month of said term, instead of *during* said term, there would be less difficulty in upholding the construction claimed by the respondents. They insist that the parties, having provided that the lessees should hold *from* the first day of July, intended to exclude that day, and that therefore the month of the term would begin on the second day of each calendar month. The old rule doubtless was to exclude the day of the date in all cases where the holding was *from* a given date, but since the decision of *Pugh v. Duke of Leeds*, Cowper, 714, the word *from* has been construed as exclusive or inclusive, as would best express the intention of the parties, to be gathered from the whole instrument, the Court holding that the word '*from*' may, in vulgar use, and even in strict propriety of language, mean either inclusive or exclusive."

In *Deyo v. Blakely*, 24 Barb. 9, the lease was executed on the twenty-fifth of January, to hold from the first day of April, the rent payable quarterly, on the first day of April, etc., and the Court in ascertaining whether the rent was payable in advance held the first day of April to be included. No present interest passed upon the execution of the lease, and the construction was not given to prevent a penalty, forfeiture or estoppel, nor to uphold the validity of the instrument, but merely to afford the lessor a better security for the payment of the rent, according to the intention of the parties, as collected from the whole instrument. Mr. Justice Birdseye

in that case says: "No transposition is resorted to. There is, in fact, no construction, in the primary signification of that word, for the parties have made a complete and intelligible work in the contract as they executed it, and it needs not the reforming hand of the Court to make it clear and unambiguous. There is no room for construction, and nothing for construction to do." The parties here having covenanted for the lessees holding from the first day of July—a day then past—and for their payment of rent on the last day of each and every month, could not have made their intention plainer, if they had said that the rent should be paid on the last day of July and of each month thereafter. If the parties could give a construction to the lease by their subsequent acts, and it should be said that they had done so, by the fact that no rent was paid on the last day of the calendar month, it may be answered that the rent does not become due until the last minute of the natural day. (1 Williams' Saunders, 287, b, note.)

We see no reason for adopting the respondents' construction, except the fact that such was the rule until the decision in *Pugh v. Duke of Leeds*; but the terms of the lease are harmonized by adopting the appellants' construction, and holding that the months mentioned in the lease, were intended as calendar months.

The next point of controversy is whether the demand was made at the proper place. The agent of the appellants demanded the rent at each door of the warehouse, but did not make demand at any other place. He states in his testimony, that he made the demand with his "face turned in all directions—toward the frame building as well as toward the warehouse." There was on the premises, besides the warehouse, a frame building, standing fifteen to twenty feet east of the warehouse, its northern side being about ten feet south of the northern line of the warehouse, and the front door being on the northern side. The office door of the warehouse is on its eastern side, near the northeast corner. In making the demand at the office door, the agent stood only a few feet distant from the frame building, but he made no demand except as above

stated, at that building or at its front door. We do not understand that it is pretended by the appellants, that a demand was made elsewhere than at the doors of the warehouse. At the time of the demand the frame building was, and for four years previously had been, occupied by a man with his family, by the license of the lessees, and he and his family were in the building at the time the agent says he made the demand, but the occupant of the building did not hear the demand.

The respondents contend that the demand should have been made at the dwelling house on the premises—that in order to work a forfeiture, if there is a dwelling house on the demised premises, the demand must be made there. When it was required by the common law rule, that the lessor should demand the rent upon the leased premises, it was not intended that he should perform a mere idle ceremony, but that he should thereby apprise the lessee of the fact that the rent was then demanded. He was required to go to the premises, because the rent issued out of them, and to make the demand at the most notorious place thereon, because the lessee, or some one who might inform him, would be more apt to be at that place and hear the demand, than elsewhere on the land. It is said in the notes to *Duppa v. Mayo*, Williams' Saunders, 287, in treating of the demand of rent: "It must be made upon the land, and at the most notorious place of it. Therefore, if there be a dwelling house upon the land, the demand must be made at the front or fore door, etc." Sergeant Williams' notes to that case have long been regarded as the leading authority upon the subject of the demand of rent to create a forfeiture. (*Van Rensselaer v. Jewett*, 2 Coms. 147.) The demand not having been made at the front door of the dwelling house, was not sufficient as a demand of rent, at common law, to work a forfeiture of the term.

The appellants, however, contend that the place of demand is not in issue, and say that the respondents "merely denied that any demand had been made." The appellants aver in their complaint that a demand for the payment of the rent "was duly made of the said defendants on the premises on

the said 31st day of March, etc.;" and the respondents in their answer deny "that on the 31st day of March, 1862, or at any other time, the said plaintiffs demanded of the said defendants the payment" of the rent. The appellants have not alleged that they made the demand at the most notorious place, or at any certain place, on the premises, and the respondents were not required to deny the demand at the most notorious place or any place on the premises, in advance of the allegation of the demand at such place."

The denial is as broad as the allegation. If under the allegation that the demand was duly made on the premises—which amounts to no more than that the demand was made on the premises—the appellants were authorized to prove that the demand was made at a particular place on the premises, then under the denial in the answer the respondents might prove that such place was not the most notorious place on the premises. A demand, to be of any avail to work a forfeiture at common law, must be made at the proper time and place, and for the precise sum then falling due, and a denial of the demand puts the lessor upon proof of all the essentials of the demand; and if the lessor is authorized to allege generally, in any respect, the fact of the demand, the lessee would be authorized to make his denial in as general terms. No specific objection seems to have been made on this ground in the Court below; but on the contrary, a large part of the oral testimony in the record was offered to prove the places where the demand was made, and to show what was the most notorious place on the premises. If the pleadings of either party would be considered insufficient in a Court of record, for the want of a more specific averment or denial of the place of the demand, yet they are sufficient in proceedings commenced before a Justice of the Peace.

The appellants also claim a forfeiture of the lease, by reason of the breach, by the lessees, of their covenant to build the warehouse, as specified in the lease, within two years from the date of the lease. Provision is made in the lease for the re-entry of the lessor, "if default shall be made in any of the

covenants on the part and behalf of the said parties of the second part, to be kept or performed," and under it the lessor had the right of entry for a forfeiture incurred in consequence of a breach of the covenants to build. But the respondents claim that the forfeiture was waived, by the lessors receiving the rent after the forfeiture. Rent was received by the appellants for the months of July, August, September, October, November and December, 1861, and January, 1862. The warehouse was to be completed, according to the covenant, by the 14th of July, 1861. The appellants, to avoid the consequences of the receipt of the rent, and to show that it did not amount to a waiver of the forfeiture, say that the covenant to build is a continuing covenant; that the failure of the lessees after the 14th of July, 1861, to build was a continuing breach of their covenant, and that if the receipt of rent accruing after that time was a waiver of the forfeiture, the neglect of the lessees to build after such receipt of rent was a continuing cause of forfeiture.

There can be no doubt that the receipt of rent accruing subsequent to the act which works the forfeiture, waives the forfeiture. (*Jackson v. Allen*, 3 Cow. 229, and cases cited; *Bleeker v. Smith*, 13 Wend. 530; *Jackson v. Sheldon*, 5 Cow. 448; 2 Platt on Leases, 468; Taylor, Land. and Ten. sec. 497.) But it must appear that the lessor, at the time of the receipt of the rent accruing subsequent to the breach of the covenant or condition, knew that the forfeiture had been incurred. (*Jackson v. Brownson*, 7 John. 234; *Jackson v. Shultz*, 18 John. 174; *Clark v. Cummins*, 5 Barb. 359; 2 Platt on Leases, 468-471.) It appears from the stipulation of the parties, that since the 14th day of July, 1861, the appellants with full knowledge of the facts constituting the breach of the covenant to build, accepted the rent from the lessees, on seven different occasions, but none that accrued since February 1st, 1862. The appellants have waived the forfeiture unless the covenant to build is a continuing covenant.

No case is cited by the appellants that asserts the doctrine,

that a covenant to build within a given period, is a continuing covenant, and we have been unable to find such a case.

A covenant to pay rent by instalments, to keep the premises in repair, to keep them insured, to pay the taxes, to properly cultivate the land, and many others that indicate or necessarily imply the doing of the stipulated acts successively, or as often as occasion may require, are continuing covenants; but the covenant to repair or insure on or before a time certain, or forthwith, to pay a gross sum as rent for the term, or not to assign the lease, and others of a like character, are not continuing covenants, because the parties contemplated by such covenants, to provide for the doing or the omission of a single act. The distinction between the two classes of covenants, is well illustrated by the covenants against sub-leasing, and against the assignment of the term. If the lessee assigns contrary to his covenant, it is a "breach once for all," but a forfeiture accrues to the lessor each time the lessee sub-leases the premises contrary to his covenant. If the lessee should, after his assignment, contrary to his covenant, procure a re-assignment of the lease to himself, a forfeiture would not be worked by his assignment the second time.

In *Stuyvesant v. Mayor etc., of New York*, 11 Paige, 247, the plaintiff had conveyed a certain portion of his land to the city, subject to the covenant on the part of the city to proceed immediately to regulate, inclose and improve the land in a designated manner, and to hold and use the same for a public square. The Chancellor held that the covenant to proceed immediately to regulate, inclose and improve the lands for a public square was "like a covenant to build a house for the benefit of the covenantor, or for the enhancement of the value of his property," and said it was "an entire, not a continuing covenant," differing in that respect from the covenant to hold and use the land solely for the purposes of a public square. The plaintiff had long previously sued the city and recovered a judgment for a breach of the covenant to "regulate, inclose and improve;" and the Court held that such judgment exhausted the plaintiff's remedy on that covenant; that there

was not a new breach produced by the continued failure of the city to keep the covenant. There is nothing in the nature of the covenant to build by a given time, that indicates that a continued failure to perform the covenant will produce a succession of breaches; but, on the contrary, it more nearly resembles, in this respect, the covenant not to assign, or for a re-entry in case of the bankruptcy of the lessee, in either of which cases the breach, if it takes place, is once for all. We are of the opinion that the proposition of the appellants, that the covenant under consideration is a continuing covenant, is unsupported by reason or authority; and it follows, therefore, that their receipt of the rent accruing after the breach, with a full notice thereof, was a waiver of the breach; and that, they once having waived the breach, had no right of entry thereafter for the forfeiture.

Judgment affirmed.

Mr. Justice SAWYER, having been attorney in the case in the District Court, did not sit on the hearing of the case.

Mr. Justice SHAFER, having been consulted in this case, when at the bar, did not participate in the decision nor hearing.

By the Court, RHODES, J., on petition for rehearing.

The appellants insist that a sufficient demand of the rent was made at the dwelling house; and they made the same point in their brief, but it was overlooked by us, probably in consequence of their holding that the demand at the warehouse was sufficient. The Court below found "That the demand was made at each of the doors, on the north, west, and east sides of the warehouse, but that no demand was made at the said dwelling house, or in front, or at the front door thereof." Although the person, while making the demand at the office door, stood near the dwelling house, we doubt if he intended to make a demand at the front door of the dwelling house, and we cannot say that the Court committed an error in finding the fact to be, that no demand was made at that place.

Turner et al. v. Tuolumne County Water Company.

We are satisfied that we have correctly stated the law in respect to the place where the demand was required, at common law, to be made. The remarks of Sergeant Williams, in the notes to *Duppa v. Mayo*, 1 Saund. 287, may have been founded on mere dicta, as stated by the appellants, but that learned writer's notes have for many years been regarded as high authority, and the doctrine that the demand must be made at the front door of the dwelling house, if there is a dwelling house on the leased premises, has been generally recognized by the Courts, except when the rule has been changed by statute.

We are asked to grant a rehearing, that the question may be argued, whether the common law demand was required, when the landlord proceeded under section thirteen of the Forcible Entry Act. If the question was now for the first time before the Supreme Court, we should have great hesitation in holding, that in such a case, the demand as required at common law was necessary to be made; but, in *Chipman v. Emeric*, 3 Cal. 273, and *Gaskill v. Trainer*, 3 Cal. 334, it was held, that in order to work a forfeiture for the non-payment of rent, the landlord must make the demand with all the strictness required at common law. Those decisions have been too long recognized as the correct construction of section thirteen of the Forcible Entry Act, to be now changed by the Courts; and the rule has, in fact, been changed by the Legislature since the commencement of this action. (See Statutes 1862, page 420.)

Rehearing denied.

S. S. TURNER AND H. G. PLATT v. THE TUOLUMNE COUNTY WATER COMPANY.

How VERDICT OF JURY IMPACHED.—The affidavits of jurors cannot be received for the purpose of impeaching their verdict unless it is a chance verdict within the meaning of the second subdivision of the one hundred and ninety-third section of the Practice Act.

CHANCES VERDICT.—The jury entered into an agreement that each should mark

Turner et al. v. Tuolumne County Water Company.

down upon a separate piece of paper the amount which he thought the plaintiffs were justly entitled to recover, and that the several sums thus marked should be added together, and the total amount divided by twelve, and that the quotient, whatever it might be, should be their verdict, without further consultation or discussion; *held*, that this was not a chance verdict, within the meaning of the second subdivision of the one hundred and ninety-third section of the Practice Act; *held*, further, that such verdict was vicious, and should be set aside if the facts were proved by competent testimony.

CONSTRUCTION OF STATUTE.—A statute, in derogation of the common law, must be strictly construed.

LIABILITY OF DITCH OWNERS FOR DAMAGES.—When, by means of an artificial ditch, the waters of a stream are conducted from the bed of the stream over the adjacent country, crossing other small natural watercourses, the beds of which are dammed up by the embankment of the ditch, and by the fall of rain the waters of the streams become so swollen as to render it necessary to cut the embankment of the ditch to preserve it from injury, and the owners of the ditch cut the embankment at a point where there is no natural water course, so that the waters are turned on to cultivated land, causing injury thereto, the injury thereby sustained is not the act of God, but results from negligence, and the owners of the ditch are liable therefor.

DESTRUCTION OF PROPERTY.—A. may not, in order to save his own property, destroy the property of B., however urgent the necessity.

EXCEPTION TO EVIDENCE.—If an objection is taken to evidence by counsel, and the objection is overruled by the Court, and no exception is taken to the ruling, the presumption is that the counsel acquiesced in the ruling.

APPEAL from the District Court, Fifth Judicial District, Tuolumne County.

The facts are stated in the opinion of the Court.

H. P. Barber, for Appellant.

H. H. Hartley, for Respondents.

By the Court **SANDERSON, C. J.**

This action was brought to recover damages from the defendant, a ditch corporation, for the negligent, careless and wanton discharge of the waters accumulated in defendant's ditch in and upon the lands of the plaintiffs, whereby the same were injured to the amount of ten thousand dollars, as alleged in the complaint. The jury rendered a verdict in favor of the plaintiffs for the sum of six thousand one hundred and thirty-seven dollars and fifty cents. Thereupon the defendant moved for a new trial upon the following grounds:

First—Misconduct and irregularity in the proceedings of the jury in determining their verdict by chance.

Second—Insufficiency of the evidence to justify the verdict, and that it is against law.

Third—Error in law occurring at the trial and excepted to by defendant.

The motion for a new trial was denied, and the defendant appeals.

1. As to the first ground, both parties rely solely upon the affidavits made by most, if not all, of the jurors by whom the verdict was rendered, no other evidence being offered by either. As to the facts established by these affidavits the parties disagree. Under the view which we have taken of the question presented, it becomes unnecessary for us to determine this dispute, and we shall assume that the facts presented by the affidavits are as claimed by the appellant. For the purposes of our decision, we therefore assume that the verdict, so far as the amount of the damages was concerned, was rendered in pursuance of an agreement between the jurors to the effect that each should put down upon a separate piece of paper the amount which he thought the plaintiffs were justly entitled to recover; that the several sums thus marked should be added together and the total amount divided by twelve, and that the quotient, whatever it might be, should be their verdict, without further consultation or discussion.

Where damages are to be assessed by a jury, it not unfrequently, if not always, happens that there is a great diversity of opinion as to the amount which ought to be given. Where such is the case the verdict must necessarily be the result of mutual concession, and the jury are bound to seek for a medium sum upon which their conflicting views may harmonize. It will frequently happen that this medium sum will be the average, or approximately so, of the different sums advocated by each. To ascertain this average, the jury may properly adopt the method which was used in the present case, but they ought not to agree to be bound by the result, whatever it may be. If they do so agree, and such result is made the verdict with-

Turner et al. v. Tuolumne County Water Company.

out further consultation or assent, such verdict is vicious and irregular, and must be set aside whenever the fact is made to appear by proper and competent evidence. If, on the contrary, they do not agree to be bound by the result, but reserve to themselves the right to dissent, such a proceeding is not irregular; and if afterwards, upon consultation and discussion, they finally agree to adopt such result as their verdict, the verdict so found is good. (*Dana v. Tucker*, 4 John. 487; *Harvey v. Rickett*, 15 John. 87; *Smith v. Cheetham*, 3 Caines, 57; *Grinnell v. Phillips*, 1 Mass. 541; *Warner v. Robinson*, 1 Root, 194; *Wilson v. Berryman*, 5 Cal. 44; *Roberts v. Failis*, 1 Cowen, 338.)

Under the facts of this case, as we have assumed them to be, the verdict is undoubtedly vicious, and ought to be set aside. The only question for us to determine is, whether the affidavits of the jurors can be received for the purpose of establishing those facts. Although there is some conflict of authority upon this question, the better opinion seems to be, that by the common law, the affidavits of jurors cannot be received for the purpose of impeaching their verdict, but may be admitted in support thereof. (*Vaise v. Delaval*, 1 Term Rep. 11; *Dana v. Tucker*, 4 John. 487; *Sargeant v. Deniston*, 5 Cowen, 106; *Ex parte Cayhendall*, 6 Cowen, 53; *The People v. Columbia Common Pleas*, 1 Wend. 297.) But this rule of the common law has been changed, in this State, to a certain extent, by statute. The second subdivision of the one hundred and ninety-third section of the Practice Act provides that the misconduct of the jury shall be cause for new trial, "and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict, or to a finding on any question or questions submitted to them by the Court, by a resort to the determination of chance, such misconduct may be proved by the affidavits of any one or more of the jurors." Being in derogation of the common law, this statute must be strictly construed, and cannot be held to include such kinds of misconduct as do not come clearly within the descriptive terms of the Act. Why the Legislature should sanction different modes of prov-

ing different kinds of misconduct is not readily perceived: If the affidavits of the jurors are to be received for the purpose of establishing certain kinds of misconduct, there seems to be no good reason why they should not be received as to all kinds without distinction. But that the Legislature has made such a distinction is manifest, and we are bound to take the law as we find it, regardless of its incongruities. As the law now stands, there are certain irregularities fatal to a verdict which may be proved by the affidavits of the jurors, and certain other irregularities equally fatal which can only be proved in the manner authorized by the rules of the common law; and it only remains to determine whether that which is alleged in the present case belongs to the former or latter class. If the method adopted by the jury for the purpose of arriving at a verdict may be properly characterized as "a resort to the determination of chance," the affidavits in question are admissible; otherwise, not.

We have not been able to find a case in which such a verdict has been held to be a chance verdict, but we have found several where the contrary has been maintained. In *Cowperthwaite v. Jones*, 2 Dallas, 55, the jury adopted the same method of ascertaining the amount of damages which was resorted to in this case, and the Court said: "The first objection as to the manner of the jury collecting the sense of its members, with regard to the *quantum* of damages, does not appear to us to be well founded or at all similar to the case of casting lots for their verdict." This case was afterwards affirmed in the Supreme Court of Pennsylvania. In *Thompson's Case*, 8 Grat-tan, 637, the Supreme Court of Virginia, in commenting upon this method of ascertaining the amount of damages to be inserted in a verdict, said: "What more, we would ask, have the jury done in this case than what we know is of every day occurrence in trials of Courts of equity, where, when a question of damage, or value or compensation arises before the Master, and when witnesses of equal credibility or integrity and intelligence differ in their estimates, the Master adopts as his assessment an average of the estimates of such witnesses; and

Turner et al. v. Tuolumne County Water Company.

this practice is sanctioned by a Court of equity, which is a Court of conscience as it is of law and justice. Indeed, in some cases, it may be considered a rule of necessity as well as conscience." In *Smith v. Cheetham*, 3 Caines, 61, Mr. Chief Justice Kent said: "If the jury cast lots for whom they shall find, it would, no doubt, vitiate the verdict. * * * The charge here is not that the jury cast lots whether they should find for the plaintiff or defendant, but only that in ascertaining the amount of the damages they took the average sum deduced from the different opinions of each other. This has no analogy to the case of casting lots or determining by chance for whom they shall find." In *Wilson v. Berryman*, 5 Cal. 46, Mr. Chief Justice Murray said: "Such verdicts are regarded in the same light by the Courts as gambling verdicts, and will be invariably set aside, just as if the jury had thrown dice or resorted to any species of gambling to determine the amount." Thus he admits that such a verdict is not a chance verdict, while he holds it to be equally vicious.

But independent of authority, it is manifest that there is no element of chance in such a verdict. Each juror marks a sum which, in his judgment, represents the true amount of damages. Neither of these sums is the result of chance; on the contrary, each is the result of the judgment or will of the juror by whom it was marked. Neither is the aggregate of these sums, nor the quotient resulting from a division of the aggregate by twelve, the result of chance; but, on the contrary, the result of the most accurate of the sciences. Thus from the commencement to the end of the process no quantity which enters into the final result is determined by a resort to chance.

We are therefore of the opinion that the verdict in this case is not a chance verdict, within the meaning of the second subdivision of the one hundred and ninety-third section of the Practice Act, and that for that reason the affidavits of the jurors by whom it was rendered cannot be admitted to impeach it. There being no other evidence, it follows that the

verdict, so far as the point under consideration is concerned, must be allowed to stand.

2. It is next claimed by appellant that the verdict is contrary to the evidence, and ought to be set aside upon that ground.

The cause of action specified in the complaint is the negligent, careless, and wanton discharge of the waters of defendant's ditch upon the lands of the plaintiffs by the act of the defendant. This was done during the great flood of eighteen hundred and sixty-two, and it is claimed by the appellant that the damages sustained by the plaintiffs were occasioned by the act of God. The extraordinary storms of that year, it is true, were the acts of God; but the evidence shows that those storms would not have caused the damage in question but for the agency of the defendant. But for defendant's ditch and their management of it, the plaintiffs' farm would have remained uninjured. As appears from the evidence, the storm was not sudden, but gradual, affording the agents of the defendant ample time to take such steps for the protection of the ditch against its effects as their judgment dictated. To that end they adopted such measures as they saw proper, and it is of those measures that the negligence, carelessness and wantonness which are the foundation of the action are predicated. The evidence shows that had other measures been taken the defendant's ditch would have been equally protected and no damage would have been done to the plaintiffs' farm. While the defendant had an undoubted right to ward off from its own property the damaging effects of the storm, yet in exercising that right it was bound to take care not to injure that of the plaintiffs. The defendant had no right to adopt measures for the protection of its own property which would lead to the destruction of the plaintiffs. A., for the purpose of saving his own life, may, if it be necessary, take the life of B. Thus, if A. and B. are wrecked at sea and both cling to the same spar, as the only means of saving life, and the spar is insufficient to sustain both, A. may wrest the spar from the grasp of B. although the death of B. may be the immediate

Lick v. Faulkner et al.

consequence. This is allowed by the law of self-preservation. But this rule does not extend to property, and A. may not, in order to save his own property, destroy the property of B. however urgent the necessity. The evidence shows that the defendant's ditch passed along the side-hill, crossing and damming up ravines and gulches which in times of freshet constituted natural watercourses into which defendant could have turned the water without any injurious result to the plaintiffs' farm; yet this was not done, but on the contrary the water which was so destructive to the plaintiffs' farm was turned out of the ditch at a point where there was no ravine or gulch. The agents of the defendant seem to have acted solely for the safety of the ditch, regardless of consequences, so far as the property of others was concerned. Whether in so doing they were guilty of negligence was a question for the jury to determine from the evidence under the instructions of the Court. That the evidence tends to prove negligence cannot be denied, and that the jury was correctly instructed by the Court as to the law of the case we are bound to presume, for the record does not contain the instructions. It results that, in our judgment, the evidence sustains the verdict.

3. The only error of law assigned which we have not already considered is as to the admission of certain evidence as to the construction of the ditch. This evidence was objected to by counsel for the appellant, and the objection was overruled by the Court, but it nowhere appears in the record that counsel took an exception to the ruling of the Court. Such being the case, he is presumed to have acquiesced therein.

Judgment affirmed.

JAMES LICK v. WILLIAM FAULKNER AND GEORGE L. FAULKNER.

TREASURY NOTES — BILLS OF CREDIT.—The Constitution of the United States confers upon Congress the power to issue treasury notes or bills of credit—

not in express terms, but as a power necessarily implied — whenever Congress in its wisdom shall determine that it is necessary to issue them in order to carry into effect a power expressly granted.

TREASURY NOTES A LEGAL TENDER.—The Act of Congress of February 25, 1862, authorizing treasury notes to be issued, and making them lawful money and a legal tender in payment of debts, was an exercise of sovereign authority within the scope of the powers granted in the Constitution, "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions," and "to raise and support an army," and "to provide and maintain a navy."

POWERS OF CONGRESS.—Whenever an express power is granted to Congress in the Constitution of the United States, the choice of the means by which the power expressly granted is to be carried into effect is left to the wisdom of Congress, with only this qualification: that the means adopted must bear a relation in the nature and fitness of things to the end to be accomplished.

TREASURY NOTES A LAWFUL TENDER.—The making of treasury notes lawful money, and a legal tender in payment of debts, is one of the means which Congress may constitutionally adopt to enable the General Government "to raise and support an army, to provide and maintain a navy," and "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions."

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

This action was brought to recover the sum of four hundred and fifty dollars, due from the defendants to the plaintiff for the rent of a store in the City of San Francisco. The rent was two hundred and twenty-five dollars per month, and the sum sued for accrued for the months of September and October, 1862. The defendants in their answer admitted their indebtedness, but set up that after the same had accrued, and before the commencement of the action, they tendered to plaintiff the amount in United States notes, issued by virtue of an Act of Congress, entitled "An Act to authorize the issue of United States notes, and for the redemption or funding thereof, and for funding the floating debt of the United States," approved February 25, 1862, and that the plaintiff refused to receive the same. Upon the commencement of the action the defendants brought the notes into Court and deposited them in the Clerk's office, ready to be delivered to plaintiff when he would accept of the same.

Plaintiff demurred to the defense set up in the answer, and

make paper money a tender as a distinct and separate one from either the power to emit bills or to coin money.

In section ten of Article one, the States are prohibited from the exercise of certain powers specified, some of which are expressly granted to Congress and some withheld.

Among the powers specified in that section are, the powers "to coin money," "to emit bills of credit," "*to make anything but gold and silver coin a tender in payment of debts,*" "grant letters of marque and reprisal," "enter into treaties," etc.

Of the powers specified, the Federal Executive is allowed the power to enter into treaties.

Congress is allowed the power to coin money, and to grant letters of marque, but the power to make anything but gold and silver a tender in payment of debts is carefully withheld.

It cannot be pretended that the Convention supposed this power involved in the power to coin money, because, then there would have been no necessity to specify it, and, after specifying it as a power separate from the power to coin money, it would most certainly have been enumerated among those granted, if it had been the design that Congress should ever exercise such a power. This conclusion seems inevitable. The prohibition of the States to exercise such a power was necessary, for otherwise, the States might have exercised it; but to authorize Congress to exercise it required an express grant, especially after the prominence given it among the powers prohibited to the States.

The Convention, having singled it out as an independent power, the exercise of which by the States was prohibited, and then, having declined to confer it upon Congress, there is no possible sophistry that can justify the latter in its exercise. It is too clear to require argument, that, where any power is enumerated in the Constitution, and not granted to Congress, it is impossible for that body to exercise it without doing violence to rules of construction universally recognized and established.

The Supreme Court of the United States, in *Craig v. State of Missouri*, 4 Peters, 411 and 423-4, held that "The Con-

Lick v. Faulkner et al.

the business transactions of the people. In the journals of Congress we find but one instance, prior to the last year, of a proposition to make treasury notes a legal tender.

On the 12th of November, 1814, at a period of the war with Great Britain when there was most desperate need for funds, Mr. Hall, of Georgia, introduced into the House of Representatives a series of five resolutions.

The first directed an inquiry into the expediency of authorizing the Secretary of the treasury to issue — millions of treasury notes, convenient for circulation, etc.

The second resolution was to the effect "that the treasury notes which may be issued as aforesaid shall be a legal tender in all debts due or which may hereafter become due between the citizens of the United States, or between a citizen of the United States and a citizen or subject of any foreign State or kingdom."

The third resolution provided for the purchase of as much supplies in each State and district as the amount of taxes levied therein. The fourth authorized the exchange of notes for six per cent. bonds, and the fifth pledged taxes, imposts, duties, and proceeds of public lands, for the redemption of the notes. After some remarks by Mr. Hall, the question on the consideration of the resolutions was taken separately.

The House agreed to consider the first, third, fourth, and fifth resolutions, but *refused to consider* the second (the *legal tender one*) by a vote of forty-two in favor and ninety-five against.

Among the negative votes was that of Daniel Webster, then a member of the House. (Benton's Abridg. Vol. V, 361; see, also, Annals of Congress.)

This is the only recorded instance in the history of the Government of any attempt to make treasury notes a forced medium of exchange, and this is the reception which it then met with: *a refusal even to consider it, by a vote of more than two to one.*

If Congress can make paper a legal tender, it can of course prohibit the discharge of a debt by gold and silver. Suppose

efficacious and useful at one time, or under certain circumstances, may at another be ineffectual, or even mischievous.

Government presupposes a perpetual mutability in its own operations in behalf of its citizens; and a perpetual flexibility in adapting itself to their wants and interests, their habits, occupations, and infirmities. This is the language of the Supreme Court in every case touching a general power. And we ask if, tried by these rules and tested by this language, there can exist a doubt that under the general power to "coin money," Congress is authorized to make this paper the "lawful money" of the land?

It will be instructive to call to mind the very words themselves, the interpretation of which gave rise to the decisions relied on, and to the rules in them embraced. And we distinctly state that in every instance the construction given by the Federal Judiciary to the words and phrases now to come under review is infinitely more liberal than that for which we contend. That the words upon which the doctrine has been made to rest are far less able to support it than those which are here presented. That the circumstances of each and every case rendered it far more laborious to reach those conclusions, and causes much greater difficulty to maintain them when arrived at, than can be experienced here.

Thus the word "*necessary*," was held not to mean "indispensable;" it was decided that it did not always import absolute and physical necessity; but that if reference was had to the common affairs of life, or to approved authors, it would be found to mean nothing more than convenient, useful, essential. (*McCulloch v. Maryland*, 4 Wheaton, 413.)

"*Commerce*" is held to mean "intercourse," "navigation." "The subject to be regulated is commerce; our Constitution being, as was aptly said at the bar, one of enumeration and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word." (*Gibbons v. Ogden*, 9 Wheat. 189; *Brown v. State of Maryland*, 12 Wheat. 419.)

In the Passenger Cases, the word "commerce" was extended

not only to vessels carrying passengers, as was the case in *Gibbons v. Ogden*, and to the *articles* or *things* imported, as in *Brown v. Maryland*, but to the passengers themselves; for it was decided that the word "imports" also applied to passengers. We are aware that Mr. Webster denied the right of Congress to make a legal tender of the paper issued "on the coinage power alone." The question of legal tender is not now under consideration, but simply the power to create money out of paper. That, confessedly, is derived from the "power to coin money and regulate its value." Hereafter it will be demonstrated that whatever money can be created on the coinage power, the same can be made a legal tender.

The power of coinage granted to the United States, is much more liberal in its terms than that given to the old Confederation. As contained in the Constitution, it is: Congress shall have power to coin *money*, with a prohibition on the States from its use in any maner, save making a legal tender of gold and silver in payment of debts. In the Articles of Confederation it was: "The United States in Congress assembled, shall also have sole and exclusive power of regulating the alloy of *coin* struck by their authority, or by that of the respective *States*." It was only a power to strike coin — the specific, not the generic term money — with the power, too, not exclusive, but shared with the individual States. Nor was there any right in the Confederation to regulate the value of foreign coin; this, also, being reserved to the States. It was such limitations, such restrictions, that caused the Confederacy to expire from mere debility. Our proposition is, that the United States can coin *money*," the reply is, that it can only "strike *coin*." We claim this paper to be *money*, and it is said it is not *coin*. The framers of the Constitution well knew that the word money could not be construed to mean gold and silver only; they knew that to prohibit the States from making anything but money a tender, would be an absurdity; that instead of an inhibition, it would be an invitation to each and every State to make that a tender which to them seemed good. They undertook to limit the States to gold and silver, and have

Lick v. Faulkner et al.

accomplished their undertaking by exactly saying what they meant. Had they adopted the word "money," in place of the words "gold and silver coin," all know that long ere this the States would have declared the paper of the individual banks a tender in payment of debts. Thus it is in every case; where words of limitation are required, they are expressed; where terms comprehensive and generic are needed, as in granting a great power to the Federal Government, they are used; to the end that the power "may be varied to meet the exigencies of the times, and not confined to one mode of operation exclusive of all others."

The question now to be asked is, can the money which Congress by the Constitution is authorized to coin (*create*) be made a legal tender? That Congress can make some thing, some substance, a legal tender, is admitted; we have never heard it doubted except by the counsel for appellant, when this case was argued in the Court below, and even there it was but feebly intimated, and is here silently abandoned. It would be useless to deny it. The practice of the Government throughout its entire history, proves it; and every authority that has been, or can be cited as opposed to the exercise of the power upon paper or the inferior metals, affirms the right to make gold and silver a tender in payment of debts of every kind and nature. Without doubt, therefore, this right to make tender of some material, is vested in the United States. But where? From what clause of the Constitution is this power derived? There is no grant of it in express words; nothing which declares, affirmatively, that Congress shall have power to create gold and silver, or any substance whatever, a legal tender. Why, then, does Congress possess, and from whence does it obtain this right, which confessedly exists? The answer must be — can only be — from the power to "coin money and regulate *its* value." The coinage power, then, contains this right; it is implied, included in it. (Story on Con. Secs. 449, 1,117.) This being the case, all other questions are of easy solution. Why is gold a legal tender? It is manifest gold, as *gold*, does not answer the purpose; not gold dust, gold quartz, gold bars,

but gold converted into *money*, constitutes the legal tender of this nation; and the reason, as money it constitutes it, springs from the fact that it is "*coined money*." The same is true of silver. It is not from "the intrinsic value" these two metals possess, but because Congress can convert them, as materials, into money, that they are now, or that they ever have been, a legal tender in the United States. We affirm then, that as the power to coin money is also the power to make that money, when coined, a legal tender, *whatever substance or thing, by virtue of this power, can be converted into money, the same can be made a legal tender*. Can Congress make gold and silver a tender? Certainly, since it can coin gold and silver into money. Can Congress make a tender of copper, iron, or lead? Yes. Because they are materials which can be fashioned into money. Can paper be made a legal tender? Assuredly it can; for, "Upon the coinage power alone, it can be converted into money."

By the Court, CURREY, J.

This case involves the constitutionality of the Act of the Congress of the United States, passed on the 25th day of February, 1862, entitled "An Act to authorize the issue of United States notes and for the redemption or funding thereof, and for funding the floating debt of the United States," so far as it provides and declares that the notes to be issued by virtue thereof shall be lawful money and a legal tender in the payment of all debts, public and private, within the United States, except duties on imports and interest on the bonds and notes of the United States. If the notes issued by the authority of this Act be lawful money and a legal tender in payment of private debts, then the judgment in this action must be affirmed, otherwise it must be reversed.

With a sense that the question to be considered is one of extraordinary interest, and of paramount public importance, we have given to the subject a thorough and careful examina-

tion, and the conclusion to which we have come is the result of anxious inquiry and deliberation.

In order the better to appreciate what may follow, it is deemed appropriate to refer briefly to the character of the Government of the United States, as it existed under the Articles of the Confederation, if indeed that compact could be regarded as rising to the dignity of a Government, in the true sense of that term.

The Confederation seems to have been a league of friendship between the thirteen original States, entered into for their common defense, the security of their liberties, and for their mutual and general welfare; and by this league the States which were parties to it bound themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever. The style of the Confederacy was declared to be "The United States of America," and by the fifth of these Articles it was provided, that for the management of the interests of the United States, delegates should be annually appointed in such a manner as each State should direct, to meet in Congress. No State could be represented in Congress by less than two nor more than seven members, and in determining questions therein each State was entitled to a single vote.

To this Congress, composed of a single House of Delegates, and which was the only department of the Government, was granted a list of powers which, in appearance, placed the Confederation on an equal footing with the other civilized and enlightened nations of the world; but this was so in appearance only, for it was expressly declared by the sixth section of Article Nine that the United States, in Congress assembled, should never engage in war, nor grant letters of marque and reprisal in time of peace; nor enter into any treaty alliances; nor coin money; nor regulate the value thereof; nor ascertain the sums or expenses necessary for the defense or welfare of the United States; nor emit bills, nor borrow money on the credit of the United States; nor appropriate money; nor agree

upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised; nor appoint a Commander-in-Chief of the army or navy, unless nine States should assent to the same; and by the second section of the First Article it was declared that each State retained its sovereignty, freedom and independence, and every power, jurisdiction and right which, by the Confederation, was not expressly delegated to the United States, in Congress assembled. The means to carry into execution the powers granted were reserved to the States; and in respect thereto, each State could act as it deemed proper; so that whatever measures Congress might devise for the common defense, for the security of the liberties of the States, or for their mutual and general welfare, were subject to be defeated, because of the utter want of all coercive authority to carry them into effect. In truth, all the power Congress possessed was the power of recommendation. It depended on the good will of the States whether a measure should be carried into effect or not. (*Federalist*, No. 15; 1 Story on Cons., Secs. 248, 253.) Hence it was that the acts of Congress were disregarded, and the Confederation, which it was intended should possess the efficient powers of a Government, was found to be destitute of the elements essential to its perpetuity.

This Confederation which, as time rolled on, was expiring from its inherent debility, was finally given over by its friends as impracticable and devoid of the faculties of a vital Government. But the necessity for a Government, composed by the union of the States, possessing the powers of a sovereign nation, was realized by the people. Without such a Government, it was known that the independence recently won could not be retained, and hence the people of the same United States, conscious from experience of the weakness and infirmities of the Confederation as a Government, did, in order to form a more perfect union than that which existed under the Articles of Confederation, and to establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare and secure the blessings of liberty to them-

selves and their posterity; ordain and establish the Constitution for the United States of America under which, for more than seventy years, the Government has grown in power and material wealth, until as a nation it has become one of the most potent of the earth.

The manifest design of the framers of the Constitution, and of the people of the States who adopted it, was to organize an efficient consolidated Government, possessing all the elements of power essential to a great nation, with capacity to perform all things necessary to accomplish and secure the ends enumerated in the preamble of the Constitution. For this purpose and to these ends, the Government was made to consist of three departments—the legislative, the executive, and judicial—and to the legislative department was committed certain powers, among which are the following:

1. To lay and collect taxes, duties, imposts and excises; to pay the debts and provide for the common defense and general welfare of the United States.

2. To borrow money on the credit of the United States.

3. To regulate commerce with foreign nations, and among the several States and with the Indian tribes.

4. To coin money, regulate the value thereof, and of foreign coin, and to provide for the punishment of counterfeiting the securities and current coin of the United States.

5. To establish post offices and post roads.

6. To declare war, grant letters of marque and reprisal.

7. To raise and support an army; to provide and maintain a navy.

8. To make rules for the government and regulation of the land and naval forces.

9. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions.

10. And to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all powers vested by the Constitution in the Government of the United States or in any department or officer thereof.

Here is an array of powers which were granted, to be exercised.

cised as occasion might demand. If the exigency requiring the exercise of any power granted to Congress exists, then Congress, as the legislative department of the Government, cannot, consistently with duty, do otherwise than exercise the power for the accomplishment of the object demanded, and for this purpose may adopt such measures as are appropriate to that end.

Congress has power to raise and support armies; to provide and maintain a navy; and to provide for calling forth the militia to execute the laws, suppress insurrections and repel invasions. But these things cannot be done merely by legislative enactments, to the effect that armies shall be raised and supported, that a navy shall be provided and maintained, or that the militia shall be called forth for the purposes designated. To accomplish these objects men and material are indispensable; and money, as a means and medium of exchange, is necessary to obtain the services of men, and the material requisite can only be provided by an expenditure of labor and money. That wars, invasions and insurrections of fearful and direful magnitude might arise was foreseen by the wise men who framed the Constitution and by the people who adopted it, and ample powers were expressly granted to Congress to provide for every conceivable emergency requiring the exercise and exertion of governmental power and authority, for the maintenance and preservation of the United States as a sovereign and independent nation.

Though the Government of the United States is one of enumerated and limited powers, it is supreme within its sphere of action. The Constitution emanated from the people, who, in its adoption, declared and decreed that "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." (*McCulloch v. Maryland*, 4 Wheat. 405, 406.)

The enumerated powers are general and comprehensive, and were manifestly supposed to be ample for the purposes declared in the preamble of the Constitution. But they could not be carried into execution without legislation; of this the framers of the Constitution were aware, and hence Congress was empowered to make all laws necessary and proper for carrying into execution the powers specified, and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

In *McCulloch v. Maryland*, 4 Wheat. 407, Mr. Chief Justice Marshall said: "A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which it may be carried into execution, would partake of the prolixity of a political code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."

In *Martin v. Hunter*, 1 Wheat. 326, Mr. Justice Story, in delivering the opinion of the Court, said: "The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution."

In the thirty-first number of the *Federalist* Mr. Hamilton said, in reference to the clause of the Constitution conferring on Congress the authority to make all laws necessary and proper for carrying into execution the express powers granted, that it was only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of establishing the Federal Government and vesting it with certain powers; and in respect to the same clause Mr. Madison said: "Had the Constitution been silent on this head there can be no doubt all the particular powers requisite as a

means of executing the general powers would have resulted to the General Government by unavoidable implication. No axiom is more clearly established in law or in reason than that wherever the end is required the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included," (*Federalist*, No. 43;) and as a reason why it was inserted in the Constitution Mr. Justice Story said: "Such a clause was peculiarly useful in order to avoid any doubt which ingenuity or jealousy might raise on the subject. Much plausible reasoning might be employed by those who were hostile to the Union and in favor of State power to prejudice the people on such a subject and to embarrass the Government in all its reasonable operations. Besides, as the Confederation contained a positive clause restraining the powers of Congress to powers expressly granted, there was a fitness in declaring that that rule of interpretation should no longer prevail. The very zeal, indeed, with which the present clause has been always assailed is the highest proof of its importance and propriety. It has narrowed down the grounds of hostility to the mere interpretation of terms." (Story on the Const., Sec. 1,242; *Federalist*, No. 31.)

There can be no doubt that Congress has the power to make all laws which may be necessary and proper to the complete execution of the powers enumerated, and to which we have referred, because the Constitution itself has so declared; and the only question to be settled by the Courts is as to what laws are necessary and proper for the purpose; for it must be conceded that laws might be enacted upon the pretext that they were necessary and proper to carry into execution an enumerated power granted to Congress, which might be repugnant to the Constitution or in violation of common right, which the Courts would be bound to pronounce invalid; but "it is not on slight implication or vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void." (*Fletcher v. Peck*, 6 Cranch, 128.)

The question of the necessity and propriety of the Act of

the 25th of February, 1862, is involved in the consideration of this case, but it is not, with the authorities before us, of difficult solution. In fact, it may be regarded as settled in principle by the application of the rule of construction declared and vindicated in the masterly and exhaustive argument of the Chief Justice in *McCulloch v. Maryland*, 4 Wheat. 418, 421. In that case the clause of the Constitution which conferred the power on Congress to make all laws necessary and proper for carrying into execution the powers vested in the Government of the United States, was elaborately and ably considered, and in conclusion the Court, by its learned Chief Justice, said: "The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge it cannot be construed to restrain the powers of Congress or to impair the right of the Legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the Government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble.

"We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow the National Legislature that discretion with respect to the means by which the powers it confers are to be carried into execution which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." (See also *Gibbons v. Ogden*, 9 Wheat. 187, and *Ogden v. Saunders*, 12 Wheat. 332.)

That the necessity for raising, equipping and supporting large armies, and for providing and maintaining a navy of

unprecedented power, and for providing and furnishing the supplies and munitions indispensable to the prosecution of war, existed when the Act of Congress in question was passed, Congress determined in the affirmative; and recognizing the condition of the country, as we must, as in a state of war, engaged in the endeavor to suppress an insurrection and rebellion that was at the time and is still mighty and wicked beyond any example furnished by the history of the past, we cannot doubt the necessity of the Act now before us in judgment, or some other measure, adequate as a means to accomplish the objects of the war; nor can we doubt its propriety, provided it be within the scope of the Constitution and consistent with its letter and spirit. (Story on Const. Secs. 1,243 to 1,256.)

In *United States v. Fisher*, 2 Cranch, 358, Mr. Chief Justice Marshall, in reference to the clause of the Constitution under consideration, said: "In construing this clause it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specific power. Where various systems might be adopted for that purpose, it might be said with respect to each that it was not necessary, because the end might be attained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution."

Thus it appears, upon authority which commands our highest respect, that to Congress pertains the choice of means to carry into effect a power granted in express terms, though it must be admitted that in the adoption of means for the purpose there must be a relation, in the nature and fitness of things, between the means used and the end to be accomplished.

The power to declare war, to raise and support armies and a navy, to suppress insurrections and repel invasions, is, as already appears, expressly granted to Congress by the Constitution; and the power to pass laws for carrying these express

powers into execution is also granted in terms. Then, with respect to these express powers, the Government must be considered as supreme; and in carrying them into effect, its powers are not limited, except by constitutional provision. (Story on Const., Secs. 417 to 426, and 433, 434.)

Congress having passed the Act in question, as a means to carry into effect the power to raise and maintain an army and a navy to suppress the existing insurrection and rebellion, it devolves on those who object that the means selected are repugnant to the Constitution to point out and show wherein is the repugnancy. If the Constitution contains no provision operating in restraint of the emission of treasury notes, and making the same lawful money and a legal tender in the payment of debts, in order to make them the more efficient for the end to be attained, then upon what principle would a Court be authorized to proceed to the conclusion that the law is unconstitutional and void, in so far as these notes are made lawful money and a legal tender in the payment of debts?

The objection interposed to the binding obligation of the tender clause of the Act is sought to be maintained on the ground that the power to make treasury notes or bills of credit a tender for the payment of private debts is not conferred on Congress by the Constitution, either expressly or by implication.

It must be admitted that this power is not granted in express terms. If it exists, it is to be found in that vast mass of incidental powers involved in the Constitution, which are to be exercised by Congress when necessary and proper to carry into effect powers expressly granted. But though the Act in question be one depending for its constitutional warrant in the exercise of authority which is subordinate and ancillary to a principal and specific power, it may be equally valid as a law enacted to accomplish, in the most palpable and direct mode, an object specifically designated by the clearest constitutional expression. The Act is one relating to the *means* which Congress may adopt to attain an end; and the whole controversy is narrowed down to the constitution-

ality of the *means*; because, as we have seen, the end is legitimate and within the scope of the Constitution, and Congress has determined that a necessity existed for some measure adequate to secure the objects for which the Government was formed, and to secure which ample powers were granted in the Constitution.

The able argument of the appellant's counsel against the policy of the legislation of Congress making these treasury notes a legal tender in the payment of private debts, which he has enforced by an array of examples which should cause legislators to pause in their deliberations, would have been particularly appropriate could it have been addressed to Congress before passing the Act in question; but the evils portrayed as the consequence of making anything besides gold and silver a medium of exchange and a tender in the payment of debts would not alone authorize this Court to pronounce against the law. As an argument *ab inconvenienti*, it would have its just weight in the determination as to the validity of a law of doubtful authority, and this is the use to which, we apprehend, the learned counsel intended it should be applied.

The Constitution does not deny to Congress the authority to emit bills on the credit of the United States, nor is this power expressly conferred. If it can be exercised it must be in subordination to some specific power, when necessary and proper for carrying such power into execution. That the framers of the Constitution intended to leave the subject in the condition in which it is left, we think is manifest from the debates that transpired in the Convention in respect to it. From these debates it appears that the subject was considered and that the Convention refused to confer on Congress the power in express language to emit bills of credit. From this it seems apparent that the framers of the Constitution and the people who adopted it intended that this power should not be granted to Congress as a principal power; and as the authority was not inhibited, we think it follows that it was intended Congress might exercise the power as ancillary to the powers expressly granted, when in its wisdom it should

be deemed necessary and proper, else why was not the power to issue bills of credit forbidden to the National Government as well as to the States?

Mr. Calhoun, in his speech on the bill to establish a national bank, delivered in the House of Representatives in February, 1816, argued that, taking into view the prohibition against the States issuing bills of credit, there was a strong presumption that this power was intended to be given exclusively to Congress (Calhoun's Works, 2 Vol. 155, 156.) It is certain that from a very early period in the history of the Government the power to issue bills of credit, or, in other words, notes on the credit of the United States, has been exercised; and if legislative exposition, acquiesced in and maintained by the Courts, is ever of paramount force, it would seem that the power of Congress over this question must be considered as settled.

The next question that occurs in the discussion, after having arrived at the conclusion that Congress has the power, under circumstances of necessity, to issue treasury notes or bills of credit, is as to the power of Congress to make such notes or bills lawful money, or the equivalent of lawful money, and a legal tender in the payment of private debts.

What constitutes money, and its use as a measure of values, has ever been, among political economists, an important element in the consideration of subjects relating to material wealth. Money, in its enlarged sense, is that general medium of exchange by reference to which the value of other things is estimated, and is the representative and equivalent of such value. Those who desire, may learn from history that since society had its first existence many different commodities have been used as a circulating medium or medium of exchange. Some of these were most inconvenient and ill adapted to the purposes of exchange, but seem to have been adopted for want of something better. The precious, as well as the base metals, were used in some countries at an early date, though in others, at a comparatively modern period, other substances were employed as the currency, by which exchanges were effected.

Shekels of silver were current money in the time of Abraham. The Spartans adopted iron; the ancient Romans copper; the Russians, at one time, platinum; the North American Indians used wampum, with which the Puritans, at one time, effected their own exchanges. To this enumeration might be added others, and also instances of the use of the products of labor as a medium of exchange or money. The writers on political economy generally agree that whatever comes to be used as the common equivalent for other things, and the standard by which their values are measured, be the commodity whatever it may be, is money. (McCullough's Political Economy, Ch. 4; John Stuart Mill's Political Economy, Book 3, Ch. 7; Bowen's Political Economy, Ch. 18; Rees' Cyclopedia.)

In all ages of the world, and in nearly all countries, metals seem to have been used, as if by common consent, to serve the purposes of money; other articles have been and still are used as money, such as paper in highly civilized countries, and *courrie* shells and like articles of insignificant intrinsic value among barbarous nations. Metals, in all times of which we have any historical knowledge, were esteemed of value for practical uses, and were employed in commerce, probably not so much as a general standard of the value of other things as an article which facilitated exchange by barter. In the earliest annals of commerce metals are spoken of as objects of value; and it may safely be assumed that metallic money was selected as a medium of exchange because its value was less fluctuating than that of most other substances. Especially, says Mr. Mill, was gold and silver fixed upon by the tacit concurrence of almost all nations to serve this purpose, for the reason that no other substances unite the necessary qualities in so great a degree with so many subordinate advantages. The contrivance of fabricating gold and silver into coins, by which the weight and value of each coin was ascertained and indicated by its face, is of remote antiquity. And in order to secure the advantages of uniformity and public confidence in the currency, Governments in modern times have usually exercised the exclusive right to coin money and regulate its value. By the

Constitution of the United States this right was conferred on Congress as a principal power. Without a means of this kind to ascertain the value of coin, it would be difficult if not impossible to determine the sufficiency of tenders made for the discharge of pecuniary obligations.

Gold and silver fashioned into coins are not exempt from the laws which govern the prices of other commodities, though generally they have been less subject to fluctuations in value than almost any other articles of production, for the reason that their production has not, except perhaps in two instances of modern times, exceeded their ordinary demand. The instances referred to stand connected with the discovery of the mines of Spanish America, in the sixteenth century, and the more recent and transpiring discoveries of the precious metals in Australia and upon the Pacific slope of the United States of America. In the course of a century and a half immediately following the discovery of the Spanish American mines, the depression in the value of gold and silver was as three to one; and we who live at this day have not failed to observe the great and permanent increase in the price of commodities within the last fifteen years, consequent upon the increased production within this time of the precious metals; so that, though moulded into coins and impressed with the stamp of the mint, they retain all their properties as articles of commerce, and are a measure of the value of other things in the same manner as the latter are a measure of the value of gold and silver.

Mr. Mill says: "The relations of commodities to one another remain unaltered by money; the only new relation introduced is their relation to money itself; how much or how little money they will exchange for—in other words, how the exchange value of money is determined. And this is a question not of any difficulty, when the illusion is dispelled which caused money to be looked upon as a peculiar thing not governed by the same law as other things. Money is a commodity, and its value is to be determined with that of other

commodities, temporarily by demand and supply, permanently and on the average by cost of production."

Professor Colton, in treating of the subject of paper money, and banking, says that gold and silver, used as money are a mere credit currency, representing all the values arising from the great variety of their uses, and their credit is based upon these values, their value as money being but a fraction of the whole, itself borrowed from these other values. (Public Economy, Ch. 16.)

Both gold and silver, as to their value, are alike subject to the laws of change consequent upon the extent of their demand and production, and are therefore imperfect standards of value. Affected by the same law or principle, each of these metals is subject to change in its own value, and in relation to the value of the other, and also to that of other commodities; and hence it is that the inequalities in the relations of value between these two metals have been sought to be adjusted by Governments, as the exigencies of change required, by altering the quality or weight of the coin without changing its denomination.

In the time of and prior to the reign of Henry III of England, silver was the universal medium of exchange in that country, and it was not until the time of Edward III that gold, as well as silver money, became a legal tender; and from that period until the year 1774, both these kinds of money were recognized by law as authorized standards of value, in all payments whatever, when it was provided by statute (14 George III, c. 42) that thereafter silver coins should not be a legal tender in payment of any sum exceeding twenty-five pounds, except according to their value in weight, at a specified valuation per ounce. In 1816 the legal tender of silver coins was still further restricted to payments not exceeding forty shillings. (1 Blackstone Com. 277.)

A writer, whose name we have been unable to learn, in an able article on the subject of money, argues that, as a matter of convenience, "the metal of which the chief medium of exchange is fabricated should have reference to the wealth and

commerce of the country for which it is intended; that copper or silver coins of the lowest denominations suffice for the convenience of a very poor country; but that as a country advances in wealth its commercial transactions are more costly and require coins of corresponding value." (Standard Library Cyclopedia, Vol. 3, page 351.) This writer maintains that a large circulation of coins is the most extravagant mode of furnishing a people with a medium of exchange, because of accidents and contingencies by which they are irretrievably lost or destroyed, thus diminishing the wealth of the country and wasting the products of labor; and he then says "some cheaper kind of money therefore should, as far as possible, be used as a substitute for gold and silver—and such a substitute has been found in paper;" which he argues is not only more economical than gold or silver, but is more convenient than either for effecting large payments or for transmitting large sums to a distance; and that in this respect it excels gold more than gold excels silver.

Mr. Ricardo, in his work on political economy, at page 507, expresses the opinion that money, in its most perfect state, is paper money; and Adam Smith said: "The substitution of paper in the room of gold and silver money replaces a very expensive instrument of commerce with one much less costly and sometimes equally convenient." (Wealth of Nations, Vol. 1, page 447.) Professor Colton argues that money, in all its forms and substances, is a credit currency, and derives its credit from considerations extraneous to itself; and that the invention of paper money was, in the march of civilization, as much an improvement on metallic currency, in its adaptation to the necessities of the commercial world, as metallic money was an improvement on the system of barter.

Thus much has been said respecting metallic and paper money for the purpose of furnishing a general idea of the causes which induced and necessitated the use of these substances as a medium for effecting exchanges, and particularly with the object of dispelling the illusion which, having become inveterate from misleading associations, has caused the precious metals

to be esteemed as the only substances of which money can be made, and as the only legitimate currency for the uses of commercial exchanges.

Money is, as we have before observed, in a general and enlarged sense, a medium of exchange, by which the value of other things is estimated, and is the representative and equivalent of such value, and in the sense of the term as thus defined we must understand the words "lawful money," as used in the Act of Congress under consideration.

The principal objection on the part of the appellant is that Congress had not the power under the Constitution to make the notes issued in pursuance of the provisions of the Act in question a legal tender in the payment of private debts. If Congress has the power to make gold and silver coined at the Mint a legal tender in the payment of debts, upon what argument can the objection to the making of treasury notes issued on the credit of the United States a like tender, be maintained? It may, perhaps, be answered that the power to coin money is granted, and that coining money means the fabricating of metals into coins, and that therefore nothing except coined metals can be made a legal tender in the discharge of pecuniary obligations. Were it admitted that the power "to coin money" is limited to a coinage of metals, it would not result from this that no other kind of money could be made a legal tender, unless it were first conceded that Congress had no power to adopt means for the execution of a designated power except the means were specified. Such a concession, however, has never been made by the judiciary, nor by any enlightened statesman, however narrow have been his views of constitutional power. We do not maintain, nor do we believe, that Congress possesses any powers not granted in the Constitution, but it cannot be conceded that no powers are granted except those expressed in terms. The powers to levy and collect taxes, to pay the debts and provide for the common defense and welfare of the United States, to borrow money, to regulate commerce, to coin money, to establish post offices and post roads, to raise and support an army and to provide and maintain

a navy, involve in their execution the means for the accomplishment of the objects proposed; and those who framed the organic law of the nation, many of whom were profound jurists, recognized as axiomatic truth that whenever a general power to do a thing is given the means necessary to its execution results as an incident of the power.

The truth that the United States of America was constituted by the people a consolidated Government, sovereign and supreme within the scope of the powers specified, should ever be kept in view when estimating the measure of its capacity and power. In *Cohens v. Virginia*, 6 Wheat. 414, Chief Justice Marshall said: "America has chosen to be, in many respects and to many purposes, a nation; and for all these purposes her Government is complete; to all these objects it is competent. The people have declared that in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or Governments within the American territory." In the same case this venerated Judge, who never failed, when the occasion for an opinion demanded a construction of the powers of the Government as a nation, to show how utterly fallacious and destructive of nationality was the doctrine of a narrow and illiberal construction of the Constitution, said: "A Constitution is framed for ages to come, and is designed to approach immortality as near as mortality can approach it. Its course cannot always be tranquil; it is exposed to storms and tempests, and its framers must be unwise statesmen indeed if they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it is sure to encounter." (6 Wheat. 387.) And in the course of his exhaustive argument in the same case he further said: "We think that in a Government acknowledged supreme, with respect to objects of vital interest to the nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of Government, in making all its departments supreme in so far as is necessary to their attainment." (Id. 415.) "The sword and the purse," he said in *McCulloch v.*

Maryland, "and all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its Government. It can never be pretended that these vast powers draw after them others of inferior importance merely because they are inferior. Such an idea can never be advanced. But it may be, with great reason, contended that a Government intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation depend, must also be intrusted with ample means for their execution." (4 Wheat. 407.)

To declare war and to suppress insurrections and repel invasions are sovereign powers in a Government, necessary for its defense, perpetuity and the general welfare. It must be intended that those who organized the Government of the United States were well aware that the republic, which had its origin in their day, would be exposed to perils from without and also to dangers from within, and hence the power was granted to declare war as the exigencies for war might arise; as also the power to repel invasions, to suppress insurrections and to punish treason, that thereby the general welfare might be promoted, and the blessings of liberty secured for themselves and their posterity, who, through succeeding generations, should possess the land for ages to come.

The power to declare war, suppress insurrections and repel invasions is paramount among the specifically enumerated powers granted to Congress, to which all other express powers stand in auxiliary relation. Among these is the power to raise and support an army, and to provide and maintain a navy; and directly to this end every able-bodied citizen may be compelled, as exigencies require, by pains and penalties involving his liberty and life, to leave the peaceful avocations of his home to meet in arms the enemies of his country; and to the same end all material and munitions necessary to the successful prosecution of war may be appropriated if need be. Fortifications may be constructed, and ships for the navy may be built and equipped, at the cost of labor and money; and to accomplish these and like objects, all of which are auxiliary

to the ultimate ends of war, money may be borrowed on the credit of the nation, to repay which the faith of the Government, together with its property and that of its citizens will stand pledged; also taxes, duties, imposts and excises may be laid and collected, by which the citizen may be drained of his last dollar. To the same end the power to regulate commerce may be exerted to the extent of enforcing embargoes and non-intercourse with nations unfriendly to the cause of the Government. Upon this topic illustrations might be multiplied, but those given seem to us ample for all who are willing to know the truth and to be conducted to the goal to which truth ever leads its votaries.

Without the power to defend against invasions and to suppress insurrections and rebellions, our Government would rise to a degree of importance no greater than a "splendid bauble." But happily for the people who organized it and their posterity, its powers were and are sufficiently comprehensive to constitute the union of the States a consolidated Government and a sovereign within the scope and measure of the powers granted, which powers not only comprehend those specified in terms, but also all incidental powers, necessary and proper for carrying into execution the powers particularized. (Story on Const. sections 430-435.)

As we view the question, it is not necessary to seek for the power to make the treasury notes issued under the Act of Congress of the 25th of February, 1862, a legal tender in the payment of debts alone among the powers to borrow money, to regulate commerce and to coin money, though we do not say it may not be deduced from some one of these; but we think it appropriately belongs to the power which Congress has over the subject as a *means*, ancillary to the accomplishment of the legitimate object for which they were really issued, and that the Act of Congress upon this particular point was an exercise of sovereign authority within the scope of the powers granted in the Constitution.

The general conclusion to which we have been conducted has been reached by the Court of Appeals of New York, in

Meyer v. Roosevelt, and other cases, in able opinions maintaining the power of Congress under the Constitution to make United States notes lawful money in the sense herein indicated and a legal tender in the payment of debts; and though we have traced this power to its authoritative sources by a somewhat different course of reasoning from that pursued by the New York Court of Appeals, the great fundamental principles upon which that Court and this place the decision of the question are the same. We may also refer to the case of the *Bank of Commerce* against *New York City*, decided by the Supreme Court of the United States, involving the principle of the supremacy of the national authority, exempting the bonds and notes issued under the Act of Congress of February 25, 1862, from taxation by or under State authority as maintaining in some degree, at least, the doctrines which we have upon reason and authority sought to support. (2 Black's R. 620.)

This law having emanated from the sovereign authority, by which the notes issued in pursuance of its provisions are made lawful money and a legal tender in the payment of debts, is the supreme law of the land, and is with us the rule of judgment.

Therefore the judgment must be and is hereby affirmed.

**FREDERICK KRAMER v. THE SAN FRANCISCO
MARKET STREET RAILROAD COMPANY.**

ACTION FOR CAUSING DEATH.—A civil action for damages for the death of a person, *per se*, cannot be maintained by any one at common law.

WHO MAY MAINTAIN ACTION FOR DEATH OF PERSON.—In this State a civil action for damages for the death of a person can be maintained only by the administrator or executor of the deceased.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Kramer v. Market Street Railroad Company.

W. P. C. Whiting, for Appellant, cited *Green v. The Hudson River R. R. Co.*, 28 Barber, 9.

Whitcomb, Pringle & Felton, for Respondent.

By the Court, SANDERSON, C. J.

This action is brought to recover damages for the death of the plaintiff's son, a child of the age of five years and ten months, caused, as is alleged in the complaint, by the carelessness, negligence, and unskilful management of the defendant. The child, as appears from the complaint, was run over by a railroad car belonging to the defendant, and thereby instantly killed. The defendant demurred to the complaint. The demurrer was sustained by the Court below, and final judgment rendered thereon, from which the plaintiff appeals.

That a civil action for the death of a person, *per se*, cannot be maintained by any one at common law is too well settled to admit of discussion at the present time. This rule is so well and firmly established that an investigation of its reason and philosophy would be idle and useless. A citation of a few authorities is deemed sufficient. (*Higgins v. Butcher*, Yelverton, 89; *Baker v. Bolton*, 1 Camp. 493; *Carey v. Berkshire R. R. Co.*, 1 Cush. 475; *Hollenbeck v. Berkshire R. R. Co.*, 9 Cush. 480, 109; *Safford v. Drew*, 3 Duer, 637; *Quin v. Moore*, 15 N. Y. 436; *Green v. Hudson River R. R. Co.*, 28 Barb. 9.)

In *Baker v. Bolton*, cited above, Lord Ellenborough used these words: "In a civil Court the death of a human being cannot be complained of as an injury." These words are in harmony with the legal maxim which has obtained since the earliest days of the common law—*actio personalis moritur cum persona*.

An action for the death of a person can only be maintained in this State by virtue of the provisions of the Act entitled "an Act requiring compensation for causing death by wrongful act, neglect, or default," passed April 26, 1862. (Statutes of 1862, p. 447.) The eleventh section of the Practice Act—

Kramer v. Market Street Railroad Company.

which provides that the father, or, in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward—does not create a right of action where none existed before, but merely designates the persons by whom an action, for the causes therein mentioned, which then existed or might thereafter be created by statute, should be brought. At the time the Practice Act was passed the death of a person constituted no cause of action; and the eleventh section of that Act, so far as it designates the parties by whom an action for the death of a person may be brought, is repealed by the Act of 1862, which provides that “every such action shall be brought by and in the names of the personal representatives of such deceased person.” The words “personal representatives,” as used in that Act, mean the administrator or executor of the deceased, and not the heir or next of kin, as claimed by counsel for appellant. If the words “personal representatives” leave it doubtful whether the administrator and executor or the heir and next of kin are intended, such doubt is removed by the provision immediately following, to the effect that “the amount recovered by such personal representatives shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin, in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate.”

The Act of 1862 is in derogation of the common law, and must, therefore, be strictly construed. The cause of action thereby created can be prosecuted only by the persons therein designated. The plaintiff does not sue as the administrator or executor, but as the father and sole heir of the deceased person. That as “father and sole heir” he cannot maintain this action, we have no doubt.

Judgment affirmed.

Mr. Justice SHAFTER, having been of counsel in a similar case now pending, and in the result of which he is now interested, did not participate in the decision of this appeal.

JOSHUA B. LYLE v. WILLIAM ROLLINS AND S. P. HARVEY.

ACTION TO DETERMINE ADVERSE CLAIM TO REAL PROPERTY.—An action cannot be maintained for the purpose of determining an adverse claim to or estate or interest in real property, under section two hundred and fifty-four of the Practice Act, unless the plaintiff, at the time of the commencement of the action, is in the actual possession of the property himself, or in possession by his tenant.

EVIDENCE TO SUPPORT FINDING.—Where there is a conflict of testimony on any question of fact, the Supreme Court will not ordinarily disturb the finding, but where the testimony is all one way on any one point essential to sustain the judgment, and the finding is contrary to the evidence, a new trial will be granted.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

Plaintiff recovered judgment for all the land described in the complaint, and defendants appealed.

The other facts are stated in the opinion of the Court.

E. W. F. Sloan, for Appellant.

Brooks & Whitney, for Respondent.

By the Court, SAWYER, J.

This action was instituted under the two hundred and fifty-fourth section of the Practice Act. The plaintiff alleges that he is in possession of certain lands described, claiming title in fee, and that the defendants set up some claim of title adverse to the plaintiff. He asks a judgment that defendants have no title, and that they be barred from ever thereafter setting up any title or claim to the premises.

An essential condition to the maintenance of this action under section two hundred and fifty-four is, that the plaintiff must, at the time of the commencement of the action, be in possession of the real property, either by himself or his tenant. If the plaintiff was not thus in possession at the time of filing his complaint, he must fail in this action, even though he may have a perfect title in fee simple, and the right to immediate possession. (*Rico v. Spence*, 21 Cal. 511.) In *Van*

Winkle v. Hinckle, 21 Cal. 342, possession by tenant was held to be insufficient when the action is brought by the landlord against the tenant in possession setting up a claim adverse to his landlord.

The action was tried without a jury, and the Court found that plaintiff was in possession at the commencement of the suit. The finding as to a portion of the premises is claimed to be entirely unsupported by the evidence.

The plaintiff put in evidence a record of a judgment for the possession of the premises in question, recovered in 1854, in the case of *Sindle v. McKenna et al.* Also, a writ of restitution issued in the same year on said judgment, and the Sheriff's return, by which it appeared that Sindle was put in possession. Plaintiff then deraigned title from Sindle, and introduced some further testimony tending to show possession at some time prior to the commencement of this suit, which was in September, 1862. Plaintiff then testified on his own behalf as follows: "I am in possession of a portion of the premises claimed in this action. I am in possession of the sixty-eight foot lot on Howard street, corner of Michigan avenue. I have a house on it; live there; I have a fence around it. Of the rest I have only the possession conferred by my deed." This is the only evidence of present possession on the part of the plaintiff other than the presumption, that a possession once shown continues until the contrary appears.

On the part of the defense, Shultz testified that in 1861 he helped build a fence on a part of the premises in question on the corner of Mission and Johnson streets for defendant, Rollins; that about three months afterward Rollins built a house upon that lot; that he knew the gentleman who occupied the house, by sight, but did not know whether he had a lease or not; that the fence he helped put up was not there then; that the fence was standing three weeks; but, when he passed three months after, it was gone.

The defendant, Rollins, on his own behalf, also testified to fencing the lot on the corner of Mission and Johnson streets,

colored red on the diagram, in December, 1860, and then said: "The house on the corner of Mission and Johnson streets I built. I commenced it March 18, 1862. Martin Conroy occupies the house as my tenant, and pays me rent; he has so since April, 1862. He occupied it when this suit was commenced. * * * The house was ten by twenty-eight, boarded up and clapboarded over. * * * The fence of 1861 was of two boards. That was taken away. * * * Commenced building the house March 18, 1862. It was six weeks before it was finished. My tenant moved in on the 29th. That was on the fifty-five foot lot." Some further testimony was introduced by defendant tending to show that there was no fence round this corner lot prior to the fence built by defendant in 1861; some conveyances under which defendant claimed, and some further testimony on the part of plaintiff tending to show that Cottle, one of plaintiff's grantors, built a fence round Block Three in 1860, and this constitutes all the evidence on the question of possession.

There is, then, not the slightest conflict in the evidence as to who was in possession of that part of the premises in dispute on the corner of Mission and Johnson streets on the 13th of September, 1862, the date of the commencement of this suit. The plaintiff may have had possession at some prior period of time. But if so, at this time all the testimony shows, that there had been an ouster as to this particular portion. Plaintiff himself testifies, that, as to all the premises in dispute, except the sixty-eight foot lot where he lives, on Howard street, "I have only the possession conferred by my deed." While it clearly appears by uncontradicted testimony, that the defendant built a house on the lot on the corner of Mission and Johnson streets in March, 1862—that he immediately placed a tenant in it, who occupied it, paying defendant rent down to and at the time of the commencement of this suit, in September—a period of some six months. As plaintiff lived on the same block, he must be presumed to have had notice of this occupancy, and he was aware that it was under claim of title by defendant, for he alleges such claim in his complaint,

and institutes this suit expressly to have this claim of title adjudicated. Clearly the defendant, by his tenant, and not the plaintiff, was in the actual possession of this portion of the premises in dispute, at the time of the commencement of the suit, and the Court erred in not excepting it, as well as the other two parcels excepted from its findings.

Where there is a conflict in the testimony on any question of fact, this Court will not ordinarily disturb the finding of the Court, or the verdict of the jury upon that point; but where, as in this case, the testimony is all one way upon any one point essential to sustain the judgment, and the Court below has by any means overlooked it, and found contrary to the evidence, we feel called upon to grant a new trial.

The plaintiff may have shown a prior possession, and title sufficient to enable him to recover possession of the land, but he does not show a possession of the part referred to at the time of the commencement of the action, and for this reason he is not entitled to the relief prayed for under section two hundred and fifty-four of the Practice Act, as to that portion, and his judgment is too broad.

The extent of the portion of the premises in the actual possession of the defendant, at the time of the commencement of the suit, is not very clearly indicated by the record. We call attention to this fact, in order that it may be fixed with precision on the next trial.

For the error indicated, the judgment must be reversed and a new trial had, and it is so ordered.

THOMAS E. KIMBALL v. CHARLES D. SEMPLE *et al.*

ACKNOWLEDGMENT OF DEEDS OUT OF THIS STATE.—A Master in Chancery is not one of the officers authorized by law to take the acknowledgment of deeds out of this State, and within any other State.

CERTIFICATE OF ACKNOWLEDGMENT OF DEED.—A certificate of acknowledgment to a deed must state that the maker of the deed is either known to or proven to the officer taking the acknowledgment to be the person who executed the same; and if it state that he is proven to be the person who executed the same, it must also state that it was the sworn testimony of a credible witness, giving the name of the witness.

DESCRIPTION OF LAND IN DEED.—In order to give a proper construction to a description of property conveyed by a deed, the Court will place itself, as nearly as possible, in the position of the contracting parties, and their intent will be ascertained in the same manner as in the case of any other contract, and if, when the Court has placed itself in that position, the intent of the parties is not apparent from the deed, it is to be sought by a resort to the rules of construction which give greater effect to those things about which the law presumes the parties are least liable to mistake. Arbitrary rules of construction are not to be invoked, if the intention of the parties can be plainly discovered without their aid.

WARRANTY IN DEED CONVEYING GRANTOR'S INTEREST IN LAND.—Where a deed, conveying to the grantee whatever interest the grantor then has in the land mentioned in the deed, contains a covenant that the grantor will "warrant and defend the premises conveyed from and against all or any incumbrances, claims, or demands, created, made, or suffered by, through, or under him, and against none other," the warranty in the deed attaches itself to the interest conveyed, and not to the land itself, and does not estop the grantor from setting up an after acquired title, nor does it cause an after acquired interest of the grantor to feed the estoppel, and inure to the benefit of the grantee.

CONSTRUCTION OF DEED BOUNDING LAND ON A RIVER.—L. executed to W. a deed, conveying all his estate, right, title, etc., in and to an undivided half of nine Spanish leagues of land on the Sacramento River, described as "commencing at a point on the said river two Spanish leagues in length along the said river below a point on the same made by the intersection with the river of the lower or southerly boundary line of a tract of land on said river, known as the Rancho of Larkin's children; thence running southerly, (its eastern boundary for the whole length being the said river) nine Spanish leagues, more or less," to the southern boundary of the Jimeno grant, and back from the river one league more or less, the whole length of the tract conveyed. The grantor further recited in his deed that he meant and intended to convey all his rights, etc., in and to the Jimeno grant, "with the exception of a tract of two Spanish leagues in length, along and with said river, on the upper or northerly part of said Jimeno grant." *Held*, that the surrounding circumstances showed that the parties did not contemplate an accurate measurement of the land, and that the place of beginning to survey the nine leagues conveyed is to be ascertained by measuring two leagues in length from the southern boundary of Larkin's children's rancho in a straight line, without following the meanderings of the river, to such point on the river as the straight line two leagues in length would strike it, and that the land conveyed extended down the river nine leagues more or less from the point of beginning, following the meanderings of the river to the southern boundary of the Jimeno grant.

DEED OF EXECUTORS AS EVIDENCE.—An Act of the Legislature which empowers the executors of a deceased person to sell and convey lands of the deceased is not sufficient to lay the foundation for introducing in evidence a deed executed by the executors without proof of the death, and that deceased made a will appointing executors who had entered upon the discharge of their duties.

PATENT.—A patent of a confirmed Mexican grant of land issued by the United States cannot be called in question in an action brought by those claiming under it to recover possession of the land, by evidence showing that the Mexican Government had granted to the grantee more than eleven leagues of land, previous to the grant on which the patent was issued.

APPEAL from the District Court, Fifteenth Judicial District, Colusa County.

The defendants recovered judgment in the Court below, and plaintiff appealed.

The other facts are stated in the opinion of the Court.

A. C. Whitcomb, for Appellant.

Upon the general question of how measurements are to be made when the descriptions in deeds are very indefinite, or are silent upon the point, the reports contain but few cases that have not arisen in Kentucky or upon the Ohio River.

And the following appear to be rather the leading cases: *Pannell's Heirs v. Johnson*, 2 Wheaton, 206; *Littlepage v. Fowler*, 11 Id. 215; *Whitaker v. Hall*, 1 Bibb, 79; *Hite v. Graham*, 2 Bibb, 143.

And by them the following general principles appear to be established:

1. That when distance is indicated by a road, it is computed by the meanders of the road.
2. That distances on navigable streams—like the Ohio River—are computed by the meanders.
3. That in fixing, in a description, the point of commencement from another known point, the measurement is made invariably by the meanders, whether it is by road or by navigable stream.

We claim, therefore, in reference to the deed from Larkin to Whitcomb:

1. That the language of the description is unmistakable; that the expression, "two Spanish leagues in length along and with the said river," does not mean, and cannot be interpreted to mean, a tract of land two Spanish leagues in quantity, or even two Spanish leagues in a straight line.

As a deed of Larkin to Whitcomb contains a full covenant of warranty as to the acts of the grantor, we claim for the benefit of the grantee therein the full benefit of a general covenant of warranty as to any act or conveyance of the

grantor. That covenant so contained has all the force and vigor of a general covenant of warranty; but is limited in its operation to the acts of one person, to wit: the grantor. So far as any act of his is concerned, it is in all respects equivalent to the general covenant; for the whole theory of a subsequent title inuring to the benefit of the grantee in a former deed containing a covenant of warranty, is based upon the anxiety of the law "to avoid circuitry of action and to enforce complete justice without delay and further litigation." (*Clarke v. Baker*, 14 Cal. 630.)

The breach of covenant of warranty in this case was made (if made at all) by the sole act of Larkin, acting for himself, and as the attorney in fact of Missroon, in the deed of September 23d, 1851, to Hastings and Seawell. If any interest was conveyed by that deed in conflict with the interest conveyed in the deed to Whitcomb, it was of course a breach of the covenant in the latter deed. Then, if Larkin re-acquired (by the deed to him of March 26th, 1856) that former interest, it inured to the benefit of Whitcomb and his successors in interest, because the law will not encourage a multiplicity of suits by forcing Whitcomb or his grantees to sue Larkin upon that covenant, after the latter had re-acquired and could convey the very interest which was the foundation of the breach of covenant.

The only question presented by the Colus title as against the Jimeno patent, is that which arises from the attempt made by the defendants to show that prior to November 4th, 1844, the Mexican Government had granted to Manuel Jimeno twelve square leagues of land.

Even if this were true as a matter of fact, there are two good and sufficient reasons why it cannot avail the defendants:

1. The defendants are not the third persons who can raise the question, as they are still confessedly seeking a final confirmation of a survey making their general gift a specific one as of the date of January 31st, 1861.
2. Even if they were in a position to raise the question, it

could not avail them, as the grant to Jimeno would not be *void*, but only *voidable* at the instance of the granting power.

Upon the cession of California to the United States, this granting or controlling power became vested in the Government of the United States. (*Teschmacher v. Thompson*, 18 Cal. 24, 25.) The latter Government provided for the exercise of this power, as well as all others in reference to claims for land in California prior to the treaty, by the passage of the Act of Congress of March 3, 1851, creating a Board of Land Commissioners, with the rights of appeal from its decisions, first to the District Court of the United States, and finally from its decree to the Supreme Court of the United States.

This controlling power, then, was exercised in the matter of the Jimeno grant:

1. By the approval and confirmation thereof by the said Board of Commissioners.
2. By the approval and confirmation thereof, on appeal, by the United States District Court.
3. By the approval and confirmation thereof, on appeal, by the Supreme Court of the United States.
4. By the approval and confirmation of the survey thereof by the consent decree of the said United States District Court of April 6, 1861.
5. By the issuance by the Government of the United States of the patent dated July 18, 1862, for the said rancho under the hand of the President and the seal of the General Land Office.

Semple and Goodwin, for Respondents.

The Jimeno grant and patent is void because it was issued against law, the thing granted being prohibited by statute, and the officer granting having exhausted his power, and therefore having no power—having granted twelve leagues of land in the Californias prior to the grant under consideration. (See *Colonization Laws of 1824 and 1828; United States v. Hartnell's Executors*, 22 Howard; 1 Black, 132.) That a void patent may be attacked collaterally, see 2 How. 284 and 318; 13

Peters, 434; U. S. Condensed Reports, Vol. 3, p. 324; 1 Wheat. 112; *Patterson v. Winn*, 11 Wheat. 380; 10 John. 25; *Doll v. Meador*, 16 Cal. 330, 331, and 324, 325; Attorney-General Toucey's opinion and authorities, *Lester's Land Laws* of the United States, p. 661.

The power of attorney from Missroon to Larkin, dated in 1850, is sufficiently acknowledged. (See Cowan's notes to Phillips on Evidence, Vol. 2, pp. 585, 586; Statutes of California, 1860, p. 357.) The two deeds of 1851, and those of 1856, between Larkin, Seawell, and Hastings, must be construed as one instrument. (See *Stow v. Tift*, 15 Johnson, 458; 7 Mass. 496; 4 Mass. 266; 1 Johnson's, page 91; 3 Wend. 233; 9 Cowen, 274.) Even if these were a clause of warranty, title would not inure to Whitcomb. (*Stow v. Tift*, supra.)

A deed ought to be construed with a view to the thing sold. Larkin sold one half of *nine square leagues* of land. (See 18 John. 110.) The *intention* of the parties, which may be shown by parol, and *dehors* the deed must control. (See 1 Metcalf, 378; 3 Mass. 352; 10 Cal. 106; 1 John. 399; 3 John. 388.)

The computation of the distance to the beginning ought to be by a straight line—particularly as a *tract of land* was reserved, two leagues, etc. (See general rule in index, under head seven, title "Entry," 1 Bibb's Ky. Rep. and authorities there cited, some of which are: 1 Bibb, 55; Id. 123; 2 Bibb, 254; Id. 370, 371, 359-361; Id. 478; Id. 251; 3 Monroe, 185; 2 A. K. Marshall, 594.)

The deed ought to be construed according to the understanding of the parties *at the date of the deed*. (See 18 Wend. 451; 2 A. K. Marshall, 184; 3 A. K. Marshall, 574; 2 Ohio, 11; 1 Cranch, 45; 13 Peters, 81; Id. 133; 15 Peters, 173; 16 Peters, 162.)

By the Court, RHODES, J.

This action was brought to recover a tract of land which, it is claimed, formed a part of the Jimeno Rancho. The defendants claim that the premises in controversy are included within

the Colus Rancho, and the defendant Semple also claims under the Jimeno title. The consideration of the case will first require the solution of a number of questions arising upon the construction of certain deeds of conveyance.

The Jimeno Rancho was granted to Manuel Jimeno in 1844, and consisted of eleven Spanish leagues of land, (the *diseño* containing a much larger tract,) and is bounded on the east by the Sacramento River. The Colus Rancho was granted to John Bidwell in 1845, and is a grant of two Spanish leagues within a larger area, the whole tract being bounded by the Sacramento River on the east, and the larger portion of it being included within the Jimeno Rancho. Larkin and Missroon purchased from Jimeno.

The defendants offered in evidence a power of attorney executed by Missroon to Larkin, authorizing him to sell lands, etc., which was acknowledged before a Master in Chancery, in the State of New Jersey, who certified, among other things, that he was "satisfied" that Missroon and wife were the grantors named in the deed, but not that they were known or proved to him to be such. No proof was offered of the execution of the power, except what was afforded by the certificate of acknowledgment.

The plaintiff objected to its introduction as evidence, on the ground that it was neither proven nor properly acknowledged. A Master in Chancery is not one of the officers authorized by law to take the acknowledgment of deeds, out of this State, and within any other State; and the certificate, by whomsoever made, must state that the maker of the instrument was known to him, or proven to him to be the person who executed the instrument. If he is "satisfied," he must state how, whether by personal knowledge, or by the sworn testimony of a credible witness, whose name is inserted in the certificate. The power of attorney should not have been admitted without proof of its execution.

On the 23d of September, 1851, Larkin and Missroon, by Larkin (who professed to act by virtue of the power of attorney just mentioned,) executed to Seawell and Hastings a deed

of conveyance, purporting to quitclaim to them the undivided two thirds of two Spanish leagues of land, "formerly known as the Colus tract," including the Town of Colusa, being a part of the eleven Spanish leagues "granted to Jimeno." "Said two leagues of land is supposed to have been granted by Don Pio Pico, formerly Governor of Alta California, to John Bidwell." And at the same time, Seawell and Hastings quitclaimed to Larkin and Missroon the undivided third of the same land. The evident intent of the parties was to make Seawell, Hastings, Larkin and Missroon tenants in common of the two leagues, so that Seawell and Hastings should hold each one third, and Larkin and Missroon the remaining third. The deed of Larkin and Missroon was inoperative as to Missroon's interest, in the absence of proof of power in Larkin to convey; but it will be unnecessary to inquire what interest—whether the one third or one half—passed by the deed of Larkin to Seawell and Hastings; for in March, 1856, Seawell and Hastings re-conveyed to Larkin all the right, title and interest they acquired by the deed of the 23d of September, 1851, except in certain town lots in the Town of Colusa, before that time sold and conveyed by Seawell and Hastings. On the 2d of February, 1853, Missroon executed a deed which was recorded November 24, 1853, by which he conveyed to Larkin all Missroon's "right, title and interest in the upper or northern two leagues of a rancho or grant of eleven leagues of land granted to Manuel Jimeno * * *, which two leagues join the rancho or grant of land on said Sacramento River called rancho of Larkin's children." The description of the premises in the deed last mentioned, does not include any of the Colus tract, when surveyed so as to include the Town of Colusa, except a strip of land of the width of five eighths of a mile, and extending from the Sacramento River to the west, about one league in length. In March, 1856, at the same time that Seawell and Hastings executed their deed to Larkin, he executed to them a deed of the undivided two thirds of the northern or upper two leagues of the Jimeno Rancho—one of the objects of the parties to the conveyances being to correct a misunder-

standing between them as to the true location of the lands described in their deeds of 1851.

On the 22d of April, 1852, Missroon conveyed to Coghill all his right, title, and interest in the one undivided half of nine Spanish leagues of land, "commencing two Spanish leagues below or southerly from the tract of land on said river known as the rancho of Larkin's children; thence running with said river southerly nine Spanish leagues, and one Spanish league back or westwardly from said river, being part of a tract on said river known as the Jimeno grant," excepting therefrom one thousand two hundred acres conveyed to Belden; and on the 23d of July, 1852, Larkin conveyed to Whitcomb all his estate, right, title, etc., in and to an undivided half of nine Spanish leagues of land, "commencing at a point on the said river, two Spanish leagues in length along the said river, below a point on the same made by the intersection with the river of the lower or southerly boundary line of a tract of land on said river known as the rancho of Larkin's children; thence running southerly (its eastern boundary for the whole length being the said river) nine Spanish leagues, more or less," to the southern boundary of the Jimeno grant, and back from the river one league, more or less, the whole length of the tract conveyed. The one thousand two hundred acres conveyed to Belden was excepted. The grantor recites in his deed that he means and intends to convey all his right, etc., in and to the Jimeno grant, "with the exception of a tract of two Spanish leagues in length along and with said river on the upper or northerly part of said Jimeno grant," and with the exception of the Belden tract. The title that passed by the last two deeds to Coghill and Whitcomb subsequently vested in the plaintiff.

In July, 1856, Seawell and Todd conveyed to defendant Semple, all their interest, "supposed to be two fifths of two thirds, in and to two leagues of land known as the Colus tract;" also whatever interest they had in the Jimeno tract. It does not appear that Todd had any interest, and the deed simply passed Seawell's undivided third in the upper two leagues

conveyed to him by Larkin. In 1861, Hastings and Lincoln conveyed to Semple a tract, described by metes and bounds, including a portion of the Jimeno and Colus Ranchos, as surveyed, and in the same month Hastings conveyed to Semple all his interest in the Colus Rancho. The record does not show that Lincoln had any interest other than that derived from the deed of Larkin's executors to him. That deed will be hereafter considered, but it will be sufficient now to say that the deed, as offered in evidence, did not pass Larkin's title.

The parties present the question, whether the place of beginning in the deed from Larkin to Whitcomb, is to be ascertained by measuring two leagues in length from the southern boundary of Larkin's children's rancho, in a straight line, or following the meanderings of the river. If measured in a straight line, the excepted portion will be five eighths of a mile longer than if measured by the meandering line. The plaintiff insists upon the meandering line, and the defendants upon the straight line. It is the duty of the Court to give the deed the same construction that the parties gave it, at the time of its execution. The Court will place itself, as nearly as possible, in the position of the contracting parties, and their intent will be ascertained in the same manner as in the case of any other contract. If, when the Court has placed itself in that position, the intent of the parties is not apparent from the deed, it is to be sought by a resort to the rules of construction which give greater effect to those things about which the law presumes the parties are the least liable to mistake. But arbitrary rules of construction are not to be invoked, if the intention of the parties can be plainly discovered without their aid. At the date of the deed to Whitcomb, the southern line of the rancho of Larkin's children does not appear to have been established, nor was the northern line of the Jimeno Rancho; but the parties in this case assume in argument that the two lines coincided. Neither the Jimeno nor the Colus Rancho had then been surveyed. The Jimeno Rancho seems to have been considered by the parties as a

grant of eleven leagues of land in length, with the average width of one league, bounded by the Sacramento River. The parties did not indicate an accurate measurement of the lines or of the land in any respect, but they simply provided for the conveyance of the undivided half of the lower nine leagues, or of all the rancho except the northern two leagues in length. From the point of beginning, the eastern line extended down and followed the river nine leagues, more or less, to the southern boundary and the tract extended to the west one league, more or less. The river is the only locative call in the conveyance, but the southern boundary, according to the testimony of Green, the surveyor, was a well known slough, called Sycamore Slough, designated on the *diseño* and on the plat attached to the patent of the Jimeno Rancho.

We can see nothing in the deed requiring a strict rule to be applied to the survey of the two leagues that does not as imperatively require the same rule in the survey of the nine leagues. The parties evidently did not contemplate a strict measurement, for after describing the premises conveyed they returned, as if for the purpose of a better description of the land to be conveyed, and say that the premises include all the Jimeno Rancho except a tract of two leagues in length along and with the river, on the upper part of the rancho. The excepted tract could not be two leagues in length, if the meanders of the river were required to be measured to find the length of the tract. Nor, on the other hand, would the tract conveyed, include the half of all the rancho besides the excepted portion, if surveyed as the plaintiff requires the upper two leagues to be measured; for the rancho exceeds eleven leagues in length. The situation of the land, the fact that it had not been surveyed, the absence of abutments except on one side, the uncertain location of an adjoining rancho, the low price of the land, the loose description of the land conveyed and the land excepted, and all the surrounding circumstances, seem to indicate that the parties did not contemplate an accurate measurement of the lines, or a measurement by the meanders of the river. The rule contended for by the plaintiff has

been more frequently enforced in Kentucky, than any other State, and there were peculiar reasons for its application in that State, that do not exist in this, and its application was mostly in cases where persons had made locations of warrants in their own behalf, and had estimated distances by the usual routes of travel. In *Littlepage v. Fowler*, 11 Wheat. 215, the Supreme Court of the United States, while willing to give effect in Kentucky to the authorities of that State, said, in a case where one party contended for the measurement by the meanders of the river and the other for a straight line: "We have examined these cases (the Kentucky cases), and are satisfied that neither party is supported in his doctrine as a universal principle, but that the Courts of Kentucky, with that good sense which uniformly distinguishes their efforts to extricate themselves from the chaos of rights in which political relations and inveterate practice had involved them, have left each case to be governed by its own merits, whenever distance has been resorted to as the means of identifying a locative call; and certainly the sense in which the enterer uses the reference to distance is the only general rule that can govern a Court in construing an entry. That sense may be gathered from the language, or inferred from the habits of men and the state of the country; but as he is responsible for the sufficiency of his entry, it would be unfair to impose an arbitrary and unusual meaning upon the language of unlettered men exploring a country covered with thickets and replete with dangers."

It is apparent that the deed, when viewed by the light of surrounding circumstances, was intended as a conveyance of the undivided half of all the rancho except the upper or northern portion thereof, which was two leagues in length; and this construction leaves the strip of land five eighths of a mile in width, to the north of the plaintiff's northern line.

A further point is raised in respect to the deed of Larkin to Whitcomb, the defendants contending that at its date Larkin did not hold any title in the Jimeno Rancho south of the upper two leagues, and within the Colus Rancho; that Larkin, by his deed of 1861 to Seawell and Hastings, conveyed to them his

interest in the Colus Rancho; and the plaintiff asserting that the title acquired by Larkin, through the deed of Seawell and Hastings to him in 1856, vested in Whitcomb, by virtue of the warranty in Larkin's deed to Whitcomb. Larkin, by his deed, covenants with Whitcomb that he will warrant and defend the premises conveyed from and against all or any incumbrances, claims or demands created, made or suffered by, through or under him, and against none other.

At that time, he had parted with his interest in that portion of the land, which was included within the Colus Rancho. The deed to Whitcomb was simply a conveyance of whatever interest Larkin then held in the land mentioned in the deed, but it did not purport to convey the land, nor any certain interest therein, nor any interest he might thereafter acquire. The warranty in the deed attached itself to the interest conveyed, and not to the land itself, the grantor warranting the title conveyed by him against any incumbrance, claim or demand made or suffered under or through him.

The deed itself would not estop Larkin from setting up an after acquired title, nor will a warranty of the character of the one before us, when annexed to a conveyance merely of the grantor's present interest, cause the after acquired interest of the grantor to "feed the estoppel," and inure to the benefit of his grantee. In *Gee v. Moore*, 14 Cal. 472, a deed of the character of the one before us, and containing a covenant similar to the one in this case, was considered, and the Court held that the warranty was confined to the estate conveyed; and Mr. Chief Justice Field, in speaking of the deed, said: "It purports to pass all the right, title and estate which the grantor possessed in the land, but does not operate upon interests subsequently acquired." (*Blanchard v. Brooks*, 12 Pick. 47; *Comstock v. Smith*, 13 Pick. 116; *Miller v. Ewing*, 6 Cush. 34; *Duchess of Kingston's Case*, 2 Smith's Leading Cases, and Notes.)

It results from the construction we have given to the several conveyances, that the title to no part of the northern two leagues of the Jimeno Rancho passed to plaintiff through those

conveyances; that the deeds to Semple conveyed to him no interest in the southern nine leagues of the rancho; and that the interest in that portion of the rancho lying south of the northern two leagues, which was conveyed by Seawell and Hastings to Larkin—and we do not undertake to ascertain what that interest was—remained in Larkin, so far as the record shows, at the commencement of this action.

The matters of greatest importance involved in this case, and which, perhaps, more than any other, it was desired by the parties should be decided on this appeal, are the questions arising out of the conflict between the boundaries of the two ranchos. Since the trial of this cause in the Court below, it is understood that the Supreme Court of the United States, in the case of *The United States v. Sepulveda*, and in other cases, have more fully and accurately defined the jurisdiction of the District Courts of the United States respecting the surveys of private land claims in this State; and if they have not modified their previous opinions, they have prescribed narrower limits to the power of the District Courts, under the Act of Congress of the 14th of June, 1860, than the bar of the State seem to have understood were fixed by that Act. This case was not presented in view of the law as declared by the more recent decisions of that Court. But be that as it may, the record is not in such form that we can properly pass upon the questions of conflict of boundaries, and settle the rights of the parties depending upon the priority of the segregation of the respective ranchos from the public lands. The plaintiff presented an approved survey and a patent of the Jimeno Rancho, and on the plat the lines of a tract of land, marked "Colus Rancho," are delineated. The defendants introduced a plat and the field notes of a survey of the Colus Rancho, approved by the United States Surveyor-General and the Judge of the District Court. Three other surveys of the Colus Rancho were offered by the plaintiff, without any explanation as to the action taken upon them by the Surveyor-General or the United States District Court. In such a condition of the evidence in respect to the survey of the Colus Rancho, it is

impossible to pass upon these questions satisfactorily to ourselves, and as it will be necessary to order a new trial on other grounds, we think it unnecessary to pass upon those questions at this time, but will leave the parties to present their evidence in the Court below, unrestricted by our opinion rendered upon a very unsatisfactory and meagre statement of facts.

We will proceed to notice further some of the errors assigned by the plaintiff. The deed from Frederick H. Larkin and Rachel Larkin to Jerome Lincoln was improperly admitted as evidence. There was no proof that Larkin made a will as mentioned in the deed, nor that he was dead, except that afforded by the Act of the Legislature, which denominates him "Thomas O. Larkin, deceased," and we doubt the power of the Legislature to determine judicially that Larkin was dead, or that he made a will; or if dead, who were his executors, or any other fact that must be ascertained by the proper Court, in order that proceedings to sell the real estate of any alleged decedent may have any validity.

The Court erred in admitting in evidence that portion of the "Spanish documents" consisting of the grant of the Sal Si Puedes, and other ranchos, which were offered for the purpose of proving that the Mexican Government had granted to Jimeno more than eleven leagues, previous to the grant of the Jimeno Rancho. These matters might perhaps have been properly addressed to the Federal authorities, in the proceedings to confirm the Jimeno Rancho title, but the legality or effect of a patent issued by the United States cannot, in this manner, be called in question. And for the same reason the several conveyances by Jimeno, of those ranchos to Crockett, Davidson and others were inadmissible.

The questions arising upon the admission of certain other deeds offered by the defendants, have been disposed of in considering the effect of the deeds already referred to.

The plaintiff also assigns for error the admission, as evidence, of the confirmation, survey and decree of confirmation thereof of the Colus Rancho, and of oral testimony respecting the quantity of land within the exterior lines of the Jimeno

Rancho; also, the exclusion of evidence offered by him in relation to the different locations claimed by defendant Semple of the Colus Rancho; but it is unnecessary to pass upon those points until the main questions, arising out of the conflict of the boundaries of the two ranchos are presented as above indicated.

Judgment reversed and cause remanded for a new trial.

Mr. Chief Justice SANDERSON expressed no opinion.

By the Court, RHODES, J., on petition for rehearing.

A rehearing was granted upon the petitions of both parties, and with the expectation, on our part, that on a re-argument of this complicated case, much additional light would be shed upon several points that, in the present state of the record, are quite obscure, but the cause has been resubmitted upon the former briefs and the petitions for rehearing. We shall, therefore, not pass upon any of those questions which, in our former opinion, we decline to consider, for reasons there stated; but will notice some of the points made in the petitions for rehearing.

The learned counsel for the appellant requests the Court "to fix with certainty the starting point in the deeds to Coghill and Whitcomb." To do so would be to find a fact, and that is the province of the jury, not of the Court. We have attempted to give a construction to the deeds that will serve as a means—a rule—to the jury, by which, coupled with the evidence, they may find the beginning point of the land described in the Coghill and Whitcomb deeds. We frequently state a portion of the facts in a case, not as finding them from the evidence, but to give application and point to our reasoning. If we mistake the facts or the evidence, it cannot by any possibility benefit or injure either party in a new trial of the action, for in that forum the parties must again produce their evidence and have the facts found, in the same manner as required at the first trial. If we had been of the opinion from

the evidence that the beginning corner was at a certain tree or stake on the river, and had so stated, and if on a new trial it should appear that another tree or stake was the point of beginning, our opinion would not overrule the effect of such evidence. The counsel affords in his petition, a better illustration than the case we just supposed. He claims that we are mistaken in saying that the southeast corner of the rancho of Larkin's children was uncertain or undetermined. We saw no evidence in the record showing that the rancho had been surveyed, or that the corners had been established, and in the absence of such evidence we considered that at the date of the deed to Whitcomb the rancho had no defined corners; but if on a new trial it shall appear that a survey had been made or that a line or corner had been established, the jury or the Court below will so find, without regard to what our opinion — not finding — of the fact may have been.

In regard to fixing the starting point, we have done only that which we are authorized by the power and jurisdiction of the Court to do; that is to say, to construe the deeds and to declare the law arising upon our construction of them, and our decision thus given will govern the Court below and the jury, in ascertaining the bounds of the premises described in the deeds.

We adhere to the construction of the deeds we have given, holding that the two leagues in length should be measured in a straight line from the point where the southern line of the rancho of Larkin's children intersects the Sacramento River. The position of the southern line of the rancho of Larkin's children, like any other fact in the case, must be proven on the new trial, by competent evidence. Our opinion that it was or was not proven at the first trial, will not dispense with proper proof at the new trial. We must have been strangely unfortunate, in the selection and use of language to express our opinion, in construing the deed of Larkin to Whitcomb, if the learned counsel is justified in saying that "it appears from the opinion that it was decided rather from the presumed or supposed intention of the parties to the deed, rather than

from the language itself of the deed," etc. We attempted to read and interpret the words of the deed "in the light of the surrounding circumstances." We ascertain the intention by an examination of the words of the deed, not by a resort to presumption or supposition; and we question the surrounding circumstances to learn the meaning of the terms employed by the parties—to enable us to occupy, as nearly as may be, the position of the parties when executing the instrument.

It will be a sufficient answer to the statement of counsel, made in connection with his remark just cited—that he drew the deed and used the language therein contained, to express the intention he now contends for—to say that he cites no authority, that permits the parties to a deed, to take the witness stand, and explain the meaning of the instrument they have executed.

If the language employed in describing the distance was the same as that used in the description of that portion of the land left out of, and excepted from the conveyance, there would be far more force in the appellant's views of the proper construction. In describing the distance of the point of beginning, from the rancho of Larkin's children, the words are: "Two Spanish leagues in length along the said river;" and in respect to the excepted land the language is: "A tract of land two Spanish leagues in length along and with the said river." A road may be said to run along a river that passes from point to point on the river, without following its meanders; but the boundary of a tract of land extending along and with a river, would coincide with the meanders of the river. Parties intending to describe a course or distance, coinciding with the bank or thread of a river, could very readily, and naturally would use language like that employed by Mr. Green, the surveyor, in giving his testimony—"the meanders of the river"—or words of similar import.


Counsel insist that the tract conveyed was not nine leagues in quantity, and the excepted portion two leagues in quantity—that is, leagues in area of land. We interpret the deeds in this respect as does the counsel for the appellant. The terms

"the upper two leagues" and the "lower nine leagues" were used in the opinion as convenient terms of designation, to avoid a long paraphrase. Our construction of the deeds, gives two leagues as the length of the upper portion of the rancho, not included in the conveyances to Coghill and Whitcomb, without regard to its width; and speaking of the lower nine leagues conveyed to them, we said: "From the point of beginning, the eastern line extended down and followed the river nine leagues, more or less, to the southern boundary, and the tract extended to the west one league, more or less." This sufficiently indicates the sense in which were employed the terms "upper two leagues" and "lower nine leagues," as designating respectively the northern and southern portions of the rancho, as separated by the line drawn westerly from the point of beginning, mentioned in the deeds to Coghill and Whitcomb, without regard to the quantity of land in either tract.

Our attention is again called by the appellant to the deed of the 23d of September, 1851, executed to Seawell and Hastings by Larkin and Missroon — Larkin, professing to act for Missroon under the power of attorney, the execution of which was not proven. The appellant objected to the deed as void for uncertainty, and now holds that if not void, it left in Larkin and Missroon one undivided third of the tract, out of which they professed to convey the undivided two thirds. We were inclined to the opinion that if Larkin had not, in fact, power to execute the conveyance for Missroon, the conveyance purporting to be for the undivided two thirds of the premises, was sufficient to convey the undivided half then held by Larkin, but we did not think the case required an examination and decision of that point, it appearing that whatever interest passed by that conveyance was conveyed to Larkin by Seawell and Hastings in eighteen hundred and fifty-six, subsequent to Larkin's deed of his interest to Whitcomb. Counsel have failed to point out an important discrepancy between the description of the premises in the two deeds. In our previous examination of the record, we had the impression that the description of the premises conveyed by Larkin and Missroon

to Hastings and Seawell, by the deed of September 23, 1851, was identical with that in the deed of Hastings and Seawell to Larkin and Missroon of the same date (except that one was of the undivided two thirds, and the other of the undivided one third of the tract of land), and was also identical with that contained in the deed of March 26, 1856, from Hastings and Seawell to Larkin, which purported to reconvey the lands so described in the deed of September 23, 1851, from Larkin and Missroon to Hastings and Seawell, and which professed to recite the precise description in the deed of September 23, 1851; but upon a further examination of the transcript, it is found that the descriptions materially differ. In the deed of September, 23, 1851, by Larkin and Missroon, a portion of the description is as follows: "Two Spanish leagues (or *dos sitios de ganado mayor*) of land, on the west bank of the Sacramento River, part of the land formerly known as the Colusa tract, including the Town of Colusa," etc.; while in the two other deeds the description is: "Two Spanish leagues (*dos sitios de ganado mayor*) of land, on the west bank of the Sacramento River, part of the land formerly known as the Jimeno grant, now known as the Colusa tract, including the Town of Colusa," etc. Doubtless one of the latter two deeds was before us when considering the appellant's point that the first deed was void for uncertainty. If the deed is correctly copied into the transcript, there would appear to be more force in the appellant's objection, than we formerly gave it. We would be justified in supposing that there was a mistake in one of the copies, and as we might do one of the parties an injury by passing upon a deed incorrectly copied into the record, we decline to pass on any question arising upon either of the three deeds.

The learned counsel for the respondents earnestly urges us to affirm the judgment, for the reason that the evidence shows, as he says, that the defendants' possessions were not included within the lands described in the appellant's deeds. We have remarked that we do not agree with him in holding that those deeds convey nine Spanish leagues in quantity. It is the



duty of the jury—not of the Court—to locate the deeds upon the land, and if the respondents were satisfied that the evidence showed that the deeds, when a proper location of them was made, would not include the land in controversy, they could well have rested their case at that point; but it is their misfortune that they have introduced illegal evidence of such a description that it is impossible for us to determine, whether the jury found for them on the legal or illegal evidence.

If the proof by the witnesses was, as the respondents assert, that they were all, except Roberts, above what they call the dividing line between the upper two and lower nine leagues, it might not necessarily follow that they were entitled to a verdict, for they admit that they were in possession of the “premises in controversy,” which, according to the pleadings, are the premises described in the complaint, and which we understand to extend south of the said dividing line. .

No appeal was taken from the judgment against defendant Amos Roberts, and that judgment is not before us for review.

The judgment entered May 14, 1863, is reversed and the cause remanded.

SAMUEL G. BOYCE v. THE CALIFORNIA STAGE COMPANY.

DAMAGES FOR PERSONAL INJURIES.—In an action against a stage company to recover damages for personal injuries occasioned by the overturn of the coach, it is only necessary for the plaintiff to prove the overturn and the injuries he sustained. The presumption of law is, that the overturn occurred through the negligence of the defendant, and the burden of proving that there has been no negligence is cast on the defendant. In order to rebut the presumption of negligence, the defendant must show that the overturn was the result of inevitable casualty, or of some cause which human care and foresight could not prevent.

INSTRUCTIONS TO A JURY.—Counsel may propose instructions to the Court, but the Court is not compelled to give or refuse them as asked. If in the opinion of the Judge the proposed instructions are defective in form of expression, or erroneous in law, he may modify them in either particular and give them to the jury in their modified form, or he may refuse them altogether.

VARIANCE BETWEEN ALLEGATIONS AND PROOF.—If in the progress of a trial evidence is offered by the plaintiff at variance with the allegations of the complaint, and the counsel for the defense does not object to it at the time.

nor move to strike it out upon the ground of variance, the error is waived, and the Court may instruct the jury in relation to the whole field of inquiry covered by the evidence.

ERROR.—A judgment will not be reversed because an error has intervened in the course of a trial, which does not prejudice the defendant's case.

CHANCE VERDICT.—A verdict which is arrived at by each one of the jurymen marking such sum as he thinks proper, and then adding the several sums together and dividing the total by twelve, and making the quotient the verdict, is not a chance verdict within the meaning of the second subdivision of section one hundred and ninety-three of the Practice Act.

IMPEACHMENT OF VERDICT OF A JURY.—The verdict of a jury cannot be impeached by the affidavits of the jurors, except when the verdict is arrived at by a resort to the determination of chance.

RULE OF DAMAGES.—In all cases where there is no rule of law regulating the assessment of damages, and the amount does not depend on computation, the judgment of the jury, and not the opinion of the Court, is to govern, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice.

APPEAL from the District Court, Tenth Judicial District, Yuba County.

The facts are stated in the opinion of the Court.

Charles E. Filkins, for Appellant.

The Court erred in overruling the motion of defendant for a new trial on the ground of misconduct on the part of the jury, in deciding the case by a resort to gambling. (See Statutes of 1862, p. 38; *Wilson et al. v. Berryman et al.*, 5 Cal. 44; *Harney v. Rickett*, 15 Johnson, 87; *Roberts et al. v. Fallis*, 1 Cowen, 238; *Donner v. Palmer et al.*, 23 Cal.)

W. C. Belcher and *C. E. De Long*, for Respondent.

Appellant claims that the Court *must* give or refuse instructions as they are asked.

It is true that the late Supreme Court seem to have held in *Conrad v. Lindley*, 2 Cal. 173; *Russell v. Amador*, 3 Cal. 400; and *Jamson v. Quivey*, 5 Cal. 490, that instructions must be given substantially as asked for; that the Court might modify the phraseology so as to make it more intelligible to the jury, but could not alter the sense. It is noticeable, however, that there was nothing in either of these cases to call for any such decision or rule; that in each of those cases, the instructions,

as asked, clearly and correctly expressed the law of the case, and as modified and given, did not.

Such a rule was at one time adopted in Alabama, but was discarded, after mature consideration, in *Long v. Rogers*, 19 Ala. 321, and if it can be said to exist here since the decision in *Lawrence v. Fulton*, 19 Cal. 690, California is the only State, so far as we have been able to discover from a pretty careful examination of the reports, in which such a rule obtains.

In *Vaughan v. Porter*, 16 Vt. 268, Mr. Justice Redfield says: "In regard to all written requests, the Court are never bound to regard them in their charge, unless they are couched in such terms as to be *sound to the full extent*. The fact that *some sound law* might be extracted from the requests, or that, in general terms, they may be sound law, with certain qualifications, is not enough. They must be wholly sound law, and without any necessary qualification, or it is not error for the Court to refuse to charge as requested. * * * These written requests are more in the nature of briefs than anything else. * * * But the truth is, these written arguments, in the way of requests, are of but little use. The Court are bound to charge upon every point material to the case upon which there is evidence, and to charge correctly and fully, whether requested or not." And in *Campbell v. Day*, 16 Vt. 560, the same Court say: "It is incumbent on the Court to charge the law correctly, and they may adopt their own language."

In *Lowry v. Beckner*, 5 B. Monroe, 42, the Court of Appeals of Kentucky say: "The Court had the unquestionable right to refuse all the instructions asked on both sides, and give such prepared by himself as might be illustrative of the principles of law involved in the controversy, in any aspect of the proof."

In *Theobald v. Hare*, in the same Court, (8 B. Monroe, 42,) the question of a material modification was directly before the Court, and it was decided that it is proper to modify or add to instructions asked by a party, to meet the Court's opinion of the law of the case.

In *Mask v. The State*, 36 Miss. 7 George, 94, the High Court of Errors and Appeals of Mississippi say: "It is not

only the right, but the duty of the presiding Judge, to modify all instructions so as to make them conformable to his own views of the law. In the exercise of this right, this Court is to presume that the high and dignified tribunals to whose discretion it is previously committed, are always actuated by motives consistent with the delicate, responsible, and important trusts confided to their care.

"While, therefore, we admit the soundness and force of the views of counsel as to the impolicy, as a general rule, of the unnecessary interference of the Court in modifying instructions for the defendant, drawn with legal accuracy and precision, both as to the terms employed and the principles declared, yet this is a matter of discretion and taste for their determination, and not ours, so long as they properly declare the law given in charge."

Was there any misconduct on the part of the jury in adopting the means they did to arrive at their verdict?

The rule is well settled that the affidavits of jurors in exculpation of themselves, and in support of their verdict, are admissible, and that they are not admissible to impeach their verdict, unless rendered so by special statute. This case is not brought within the statute—it was not "a resort to the determination of chance," but simply finding the average of the deliberate judgments of the jurors, formed and expressed under the solemnities of an oath. Until the contrary is shown, we must suppose that each juror expressed his own judgment honestly.

As was said by the Supreme Court of Virginia, in *Thompson's Case*, 8 Grattan, 637: "What more, we would ask, have the jury done in this case than what we know is of every day occurrence in trials of Courts of equity, where, when a question of damage, or value, or compensation, arises before the Master, and when witnesses of equal credibility, or integrity and intelligence, differ in their estimates, the Master adopts as his assessment an average of the estimates of such witnesses; and this practice is sanctioned by a Court of equity, which is a Court of conscience, as it is by law and justice. Indeed, in

some cases, it may be considered a rule of necessity as well as convenience." At least, there is no element of *chance* in such a method. It does not in any respect resemble throwing up cross or pile, as in *Mellish v. Arnold*, 1 Bun. 51, or hustling half pence in a hat, as in *Parr v. Seaver*, Barnes, 438, or drawing lots, as in *Hale v. Cove*, 1 Stra. 642, or flipping coppers, or throwing dice, or any other means resorted to for the determination of any matter, when men are willing to trust to blind chance rather than their own judgments. The whole subject is ably discussed in *Thompson's Case*, 8 Grattan, 637. (See also *Cowperthwaite v. Jones*, 2 Dall. 55; *Chandler v. Baker*, 2 Harrington, 387; *Heath v. Conway*, 1 Bibb, 398; Opinion of Chief Justice Kent in *Smith v. Cheatham*, 3 Caines, 61; *Dana v. Tucker*, 4 Johns. 488.)

C. E. Filkins, for Appellant, on petition for rehearing.

The common law, as well as American authorities, agreeing that such a verdict as the one rendered in this case is vicious and void, and ought not, in morals or in law, be permitted to stand. And a number of cases show that hearsay evidence (the remarks of jurors on the subject, and the testimony of the officer having a jury in charge as to what he saw the jurors do and heard them say in the jury room) has been held good enough evidence to impeach such verdicts. And thus, in the anxiety of the law to detect and punish fraud on the part of jurors, the ordinary rule of evidence has been changed.

To the general rule that the affidavit of a juror is inadmissible to impeach the verdict there is an important exception which those learned authors distinctly enunciate in their text in 3d Graham & Waterman on New Trials, 1,447, under the head of "*As to the mode adopted in their finding*," which is as follows:

"But though jurors after a verdict cannot be permitted to testify as to the reasons and motives of their determination, yet they may show the mode adopted by them in deciding as to the amount of damages." (8 Harrington, 469; 6 Mass. 272; 7 Mass. 110; 6 Pickering, 206.)

It is conceded that under the law as it existed prior to the Act of March 5, 1862, (subject to one exception, which will be hereafter explained,) the reasoning of the Court is right; and, consequently, if that statute does not materially alter it, and the case does not fall within the exception, there is no ground for complaint on the part of the respondent.

The relevant part of the statute is contained in its second section, which reads as follows:

"Misconduct of the jury, and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict, or to a finding on any question, or questions, submitted to them by the Court, by a resort to the determination of chance; such misconduct may be proved by the affidavits of any one or more of the jurors."

The learned Court will agree with me that the law as it existed for twelve years in this State, as to how misconduct on the part of jurors could be proved, was unsatisfactory, and that the legislative department, in the exercise of its undoubted authority, intended, by the law of March 5, 1862, to a greater or less extent to remedy the mischief by holding jurors to a more conscientious discharge of their duties, and removing from them the temptation to careless or dishonest action, which the rules of the common law excited by withholding the only means of detecting it.

A verdict reached by the mode adopted in this case is called a "*chance verdict*," by the Supreme Courts of the States of Massachusetts, New York, Rhode Island, Indiana, Tennessee, and Iowa, and also by the learned authors, Graham and Waterman. (*Dorr v. Fenno*, 12 Pickering, 521; *Dunn v. Hull*, 8 Blackford, 32; *Forbes v. Howard*, 4 R. I. 364; *Harvey v. Pickett*, 15 John. 87; *Mannix v. Meloney*, 8 Iowa, 81; 3 Graham & Waterman, 1,447.)

By the Court, SANDERSON, C. J.

This action was brought to recover damages on account of personal injuries sustained by the plaintiff by reason of the

negligent and careless upsetting of the defendant's stage coach upon which he was a passenger. The damages were laid in the complaint at fifty thousand dollars, and the jury found a verdict in favor of the plaintiff for the sum of sixteen thousand and five hundred dollars. The defendant moved for a new trial, which was denied. The appeal is from the judgment and order.

The facts as gathered from the testimony contained in the record are substantially as follows: On the 19th of October, 1861, the respondent paid the usual fare and took passage in one of defendant's coaches, to be conveyed from Downieville, in Sierra County, to Marysville, in Yuba County. He took a seat on the outside with the driver. The coach started soon after midnight. The moon was near its full, and the night clear and bright. About two o'clock in the morning, the coach was slowly ascending Goodyear's Bar hill, and was about a mile from the summit. At that point the road curves around a very steep, rocky ravine. The roadway was constructed by digging into the bank on the upper or right hand side, and building a rock crib about eleven feet in height on the lower side and filling in with rock and earth. A log about eighteen inches in diameter was placed on the edge of the rock crib or wall, and was a little higher than the road. The road was wide enough for the convenient passage of a coach, mule team or any kind of ordinary vehicle, and the track for the lower wheel was about two feet from the edge of the wall or crib.

As the coach approached this curve, it turned out from the usual track at a small angle, and gradually approached the edge of the wall or crib instead of following around the curve, and tracked along the log nearly its whole length, when, having passed beyond the highest point of its circumference, one of the wheels slipped over the outer side of the log, and the coach, horses and passengers were precipitated down the ravine. The respondent was very severely and dangerously injured, having his lower jaw broken in three places, the upper jaw separated from its bony attachment, his right

shoulder dislocated and the right shoulder-blade broken, the skull fractured, the face, mouth and body bruised, contused and wounded. His injuries were of so serious a character as to render him entirely insensible for many days, and for a considerable time to render his recovery doubtful, and were such as to require the removal of portions of the bone of the lower jaw and to produce great and permanent disfigurement.

Up to the time of the trial of the case, more than a year and a half after the accident, he had not acquired the ordinary use of the lower jaw; the right shoulder and arm were stiff and weak and the hand partially paralyzed, being unable to perform any labor except with the left hand. The plaintiff was a laborer by occupation, and the injuries to the right shoulder and arm were of such a character as to permanently impair his capacity for laborious pursuits.

Previously, and up to the time of the accident, he was a strong, healthy man, and had the perfect use of all the members of his body.

I. The first point made by counsel for appellant is to the effect that the verdict is not sustained by the evidence when taken in connection with and confined to the allegation of carelessness and negligence contained in the complaint. And in support of this proposition it is argued that the only allegation of negligence contained in the complaint relates to the manner of driving and nothing else; that there is no evidence which explains the cause of the accident, and that there is evidence furnished by numerous experts which establishes the character of the driver for care and skill, which evidence rebuts the presumption of carelessness and negligence on his part, arising from the fact that the coach was overturned.

Admitting, for the sake of the argument, that the allegation of negligence is as narrow as counsel for appellant claims it to be, and that the cause of the accident is unexplained by the testimony, and that the general reputation of the driver for care and skill is established beyond question by the evidence, it does not follow that the overturning of the coach is to be charged to the account of unavoidable accident, or to some

1. The first part of the paper is devoted to a discussion of the

2. The second part of the paper is devoted to a discussion of the



terial so far as the point under consideration is concerned. The plaintiff did not undertake to prove where the negligence rested, nor did the law require him to do so; and in our judgment the defendant failed to show that it did not rest where he claims the complaint had placed it. At the point where the overturning occurred the road formed the arc of a circle. Instead of moving on the arc the team took the chord, and went so near the precipice as to allow the wheels to run off. There was no such abrupt turning out of the beaten track as would probably result from a sudden fright; on the contrary, the team seems to have moved in a straight line, or nearly so, instead of following the curve of the road. They were going up hill and moving in a slow walk. One cannot read the evidence in connection with the diagram contained in the record without coming to the conclusion that the overturning which caused nearly fatal injuries to the plaintiff, and death to some of the other passengers, was the result of careless inattention on the part of the coachman in not keeping his team in the road. This could not have happened from his inability to see the road, for it was a clear moonlight night, but it is most probable from the evidence that his inattention was the result of drowsiness, induced by the hour and the use of too much liquor.

II. The defendant, upon the trial, asked the Court, among others, to give the following instructions:

1. "That in order to find for the plaintiff, the jury must find that the stage coach was driven in a "careless, negligent or unskilful manner." The Court, upon its own motion, added after the word manner, "or that there was some fault on the part of the proprietors."

2. "If the jury believe, from the testimony, that the coach was upset by the act of the horses, as in becoming frightened, or from other cause which was not the fault of the driver, then they should find for the defendant." The Court added to this instruction, after the word "driver," the words "or proprietors."

3. "If the jury find from the testimony that the driver

(Miles Nesmith) was a person of competent skill and in every respect qualified, and suitably prepared for the business in which he was engaged, and the accident was occasioned by no fault or want of skill or care on his part, then the defendant is not liable in an action for damages in this case, and the jury should find for the defendant." To this the Court added, after the words "on his part," the words "or the proprietors."

Counsel for the appellant insists that if the foregoing instructions were correct in law, the Court was bound to give them as asked, without any modification which would alter their sense, and in support of that proposition cites *Conrad v. Lindley*, 2 Cal. 173; *Russell v. Amador*, 3 Cal. 400; and *Jamson v. Quirey*, 5 Cal. 490.

To those cases, so far as they may be construed to uphold the doctrine that a party may *of right* insist that an instruction shall be given or refused, *as asked*, and that a modification thereof by the Court, whether right or wrong, is of itself error, we are unable to give our assent. It is the duty and province of the Judge to expound the law, and it is his right and privilege, in doing so, to select and make use of such language and illustration as, in his judgment, is best calculated to explain the same and render it clear to the comprehension of the jury. Upon him the law imposes the duty, and he may determine the manner of its performance. Counsel may propose such instructions as their wisdom may suggest, and submit them to the Judge; but beyond this they have no legal right to dictate to the Judge either the form or substance. If, in the opinion of the Judge, such instructions are defective in form or expression, or erroneous in law, he may, at his election, modify them in either particular, and give them to the jury in their modified form, or he may refuse to give them altogether. If error be assigned upon such instruction, the test question is not, Did the Judge *modify* the instruction? On the contrary, the test is the same as in other cases, and is to be applied to the instruction in its modified form; and if it appear that the instruction as modified correctly states the law, no error has intervened. This Court passes upon instructions, so far as

they are given, in the form in which they were received by the jury; and the fact that they were prepared by counsel, and, before given, modified by the Court, cannot be regarded as error *per se*, or as having any bearing whatever upon the question of error. (*Long v. Rogers*, 19 Ala. 321.)

It is next claimed that the instructions as modified are erroneous, because they are broader than the issue of negligence tendered in the complaint and instruct the jury in effect that they need not confine their deliberations upon the question of negligence, solely to the manner in which the coach was driven, but may go beyond the driver in search of negligence, and inquire from the evidence whether the defendant was in fault in other particulars than the mere manner of driving.

In support of this position it is argued that the allegation of negligence, as contained in the complaint, does not embrace the whole field of the defendant's obligation and duty, but is narrowed, by the language used, to the carelessness and negligence of the coachman in managing and driving his team; that under this allegation the plaintiff could not recover if the overturning was the result of negligence other than careless driving, and that therefore the inquiries of the jury should have been confined by the Court to the manner in which the coachman performed his duty.

The allegation in question is expressed in the following terms: "And this plaintiff further avers that the said defendant then and there received this plaintiff as such passenger in said coach and then and there undertook, and it became its duty to use due and proper care to carry and safely convey in the said stage coach this plaintiff from Downieville to Marysville, via Goodyear's Bar and Forest City; yet the said defendant, regardless of its duties and undertakings, did not use proper care in the transportation of this plaintiff, but suffered and permitted the stage coach to be driven without due care and attention, and in so careless, negligent and unskilful a manner that," etc.

So far as what transpired at the trial can be gathered from the record, both parties and the Court, up to the time the

defendant submitted his instructions, proceeded upon the theory that there was nothing in the complaint restricting the field of inquiry. There was no evidence, however, except in one particular, which tended in the least to fasten blame anywhere except upon the driver. There was some slight testimony as to the character of the nigh wheel-horse and tending to show that he was inclined to shirk the performance of his share of the labor. Being upon the side of the precipice over which the coach and team were precipitated, it is possible that the failure of this horse to perform his duty may have had a slight tendency to swing the team and coach toward the bank, and thus in a measure the unfitness of this horse may be said to have contributed to the overturning of the coach. If the horse was unfit, and his unfitness contributed to the accident, the fault so far did not originate with the driver but with the defendant. But to this evidence counsel for the defendant did not object at the time, nor did he afterwards move the Court to strike it out upon the ground of variance. On the contrary he introduced evidence for the purpose of contradicting it and establishing the fitness of the horse. When the Judge came to instruct the jury upon the application or on behalf of the plaintiff, he did so upon the theory that the whole field of the defendant's obligation and duty was open for investigation by the jury, and that they were not confined to the manner of driving; yet to these instructions counsel took no exception. On the contrary, the first four instructions asked by defendant, and given by the Court, proceed upon the same theory, and the modifications of the Court were only such as were necessary in order to make the defendant's instructions consistent with each other and in harmony with those which had been already given without objection.

Admitting then the narrow construction put upon the complaint by counsel for appellant to be correct, and that a slight portion of the testimony is at variance with the allegation, we think the defendant by his course at the trial waived the objection, or, in other words, failed to take advantage of it at the proper time. But it is not necessary to rest our

decision wholly upon this ground. In our judgment the testimony shows beyond question that the whole fault lay with the coachman, and beyond his misconduct no fault attached to the defendant, and this is made so clear by the circumstances of the case in evidence that it cannot be presumed that the jury based their verdict upon any other ground of negligence than that averred in the complaint. The evidence against the horse was very slight, and the probability that his laziness contributed to the catastrophe still more so. Moreover, the testimony was successfully contradicted by the defendant, and with no show of reason can it be claimed that it had any influence upon the verdict. Such being the case, the instructions in question could not have misled the jury and put them upon a false scent. If there was any error, we are of the opinion that it did not prejudice the defendant's case.

III. It is next claimed that the verdict is a chance verdict, within the meaning of the second subdivision of section one hundred and ninety-three of the Practice Act.

Admitting, as claimed by counsel, that the amount of damages given by the jury was ascertained by each marking a sum which he thought proper, then adding the several sums and dividing by twelve, and that it had been previously agreed that the quotient, whatever it might be, should be their verdict without further consultation, still, as we have decided in *Turner v. The Tuolumne Water and Mining Company*, 25 Cal. 397, such verdict was not a chance verdict within the meaning of that section; and, although vicious, its character in that respect could not be established by the affidavits of the jurors who tried the case. There is no other evidence offered in support of the charge than that which comes from the jury, and it follows that the verdict stands unimpeached.

Nor can we disturb the verdict upon the ground that the damages are excessive. The rule upon this point is well stated by Mr. Justice Wilde in *Worster v. Proprietors of Canal Bridge*, 16 Pick. 547: "In all cases where there is no rule of law regulating the assessment of damages, and the amount

does not depend on computation, the judgment of the jury, and not the opinion of the Court, is to govern, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case. In the present case, the plaintiff was exposed to the imminent peril of his life, to great bodily and mental suffering, and we cannot say that the sum assessed by the jury exceeds a reasonable compensation. We do not consider whether or not we should have assessed the same amount of damages, if the case had been submitted to the Court to decide; for, in a case like the present, men of sound judgment may differ not a little in estimating the compensation which the circumstances of the injury would justify; and it is the judgment of the jury, and not that of the Court, which must govern. To justify the interposition of the Court, the damages must be manifestly exorbitant."

We see nothing in this case to warrant the belief that the verdict is the fruit of passion or prejudice. (*Aldrich v. Palmer*, 24 Cal. 518.)

Judgment affirmed.

By the Court, SANDERSON, C. J., on petition for rehearing.

We are asked to grant a rehearing in this case upon two grounds: First—Because we have erred in holding that at common law the verdict in this case cannot be impeached by the affidavits of the jurors; and Second—Because we have erred in holding that the verdict is not a chance verdict within the meaning of the second subdivision of the one hundred and ninety-third section of the Practice Act. In respect to these points this case was decided upon the authority of *Turner & Platt v. The Tuolumne Water & Mining Company*, 25 Cal. 397. We there held that, although there was some conflict of authority, the better rule was that, at common law, the affidavits of jurors could not be received for the purpose of impeaching their verdict. By so doing we did not establish the rule for

the first time in this State; on the contrary, we merely affirmed a rule which was established as early as the first volume of California Reports and has been strictly adhered to from that time to the present. In the case of *The People v. Baker*, 1 Cal. 405, Mr. Justice Bennett said: "We consider it a settled rule, founded upon considerations of necessary policy, that the testimony of a jurymen cannot be received to defeat his own verdict." In *Amsby v. Dickhouse*, 4 Cal. 103, Mr. Chief Justice Murray said: "It is well settled that a juror cannot be allowed to impeach his own verdict. The reason of this wholesome rule of law is too obvious to require any explanation." The same rule was declared in *Castro v. Gill*, 5 Cal. 42, by Mr. Justice Heydenfeldt. In *Wilson v. Berryman*, 5 Cal. 45, the rule was again reiterated by Mr. Chief Justice Murray. In *The People v. Wyman*, 15 Cal. 75, the verdict was sought to be impeached upon the ground that it was not a fair expression of the opinion of the jury, and the affidavit of one of the jurors was relied on for that purpose. The opinion of the Court was delivered by Mr. Justice Cope, who said: "We have repeatedly decided that this cannot be done." Thus the law of this question had become too firmly established in this State to be disturbed by the judiciary, and in order to effect a change it was found necessary in 1862 to resort to legislative action. This was done, and it was enacted that verdicts found by a "resort to the determination of chance" might be impeached by the affidavits of the jurors. (Stats. 1862, 38.) But it is argued that while such is the general rule at common law, there are exceptions to it. Admitting this to be so, we answer, in the first place, that the Legislature of this State has legislated in regard to those exceptions, and that such legislation has superseded the common law. By declaring in what cases verdicts may be impeached by the affidavits of jurors, the Legislature, upon the maxim, *expressio unius, exclusio alterius est*, has declared that verdicts of a different class shall not be so impeached. And we answer in the second place, if such exceptions exist, this verdict, viewed by the light of the common law as heretofore declared in this State, does not fall within the

exception. In *Wilson v. Berryman*, before cited, the verdict was found by the same process as in the present case. The facts were brought to the notice of the Court by an affidavit which was sworn to by one of the jurors and also by the Sheriff. The Court expressly held that the affidavit, so far as it was the affidavit of the juror, could not be received to impeach the verdict. Thus, however it may have been elsewhere before the decision of the present case, in this State it had been judicially determined that verdicts like the present did not fall within any supposed exception, but were within the general rule of the common law.

As stated in our opinion in *Turner & Platt v. The Tuolumne Water and Mining Company*, the authorities elsewhere are conflicting. We do not attempt to reconcile them; to do so would be impossible. We ground the rule upon the decisions and the legislation of this State, and we declare the law to be in this State, however it may be elsewhere, to the effect that the affidavits of jurors cannot be received in any case to impeach their verdict, except as provided in the second subdivision of the one hundred and ninety-third section of the Practice Act. And in conclusion upon this branch of the case, we may add that a line of judicial decision which struggles to multiply exceptions to a plain and simple rule, founded on considerations of the wisest policy, is not to be favored; on the contrary, the struggle should be to bring every case within the rule, lest the rule itself become shadowy, and in time wholly disappear in a multitude of exceptions.

Upon the point as to whether the verdict in this case is a chance verdict within the meaning of the one hundred and ninety-third section of the Practice Act, as amended in eighteen hundred and sixty-two, our opinion remains unchanged. In addition to what is said upon this point in our opinion in *Turner & Platt v. The Tuolumne Water and Mining Company*, (*ante*, p. 397,) reference may be made to the history of the amendment of eighteen hundred and sixty-two, for the purpose of ascertaining what the evil was which the Legislature had in view, and for which they sought to provide a remedy.

On the 1st of March, 1862, a judgment was rendered, upon the verdict of a jury, in the Twelfth District Court, in the case of *Donner v. Palmer*. (The case is reported in 23d Cal., at page 40.) For the purpose of showing how the verdict in that case was found, we make the following extract from the opinion of the Court delivered by Mr. Justice Crocker: "The affidavit of one of the jurors, Day, after stating generally what occurred in the jury room in the way of discussion and votes, states that after a time a vote unanimous for the plaintiff was taken, but immediately thereafter Hiller and Fortune, who are charged with the misconduct, recanted and said their vote was not according to their convictions; and soon after the affiant saw Fortune approach Hiller, and heard him propose to the latter that he would place a piece of money and the latter should guess heads or tails, and if he guessed right then their verdict should be for the plaintiff; that Hiller assented; that Fortune then placed a piece of money and covered it so that the former could not see it; he guessed, and they announced that he had guessed right, and they thereupon agreed to a verdict for the plaintiff, but both said it was still contrary to their convictions."

Here was a clear case of chance, without any proof of the fact except by the affidavits of the jurors. Under the law as it then stood these affidavits could not be received. The Legislature was in session at San Francisco, where the case was tried. The verdict was rendered on the first of March. On the fifth of the same month the bill amending the one hundred and ninety-third section of the Practice Act so as to allow verdicts to be impeached by the affidavits of jurors, on the ground of chance, was signed by the Governor, and became a part of the law of the land. Thus, aside from the mere wording of the law, the intent of the Legislature is made clear by a legitimate reference to the facts and circumstances which led to the passage of the Act. The Act was made broad enough to cover the case then in the mind of the Legislature and others like it. In our judgment the verdict in this case is not like it. Some cases are cited by counsel where the

Court, in commenting upon verdicts like this, loosely employ the words "chance" and "hazard," but the precise question, to wit: whether such a verdict is a chance verdict, which is here directly presented, was not involved, the question there being whether such a verdict was good or bad. On the contrary the cases cited in our former opinion, and upon which it is based so far as authority is concerned, show that the precise question which we have considered was there considered and passed upon. Counsel has filed an able argument in support of his petition, but we find therein no reason for a change of opinion.

Rehearing denied.

BENJAMIN H. HUTTON v. JOSEPH L. REED, HENRY STEIL, AND CHARLES F. WEHN.

ASSIGNMENT OF ERRORS.—An assignment of errors at common law was in the nature of a pleading, to which there was a demurrer or joinder in error. It did not constitute a part of the transcript, but was founded on it, and was filed in the appellate Court after the transcript had been filed.

SAME.—The term assignment of errors is not used in our Practice Act, nor is it known in our practice in its common law sense.

APPEAL ON JUDGMENT ROLL.—When an appeal is taken on the judgment roll alone, and no statement is made, a specification of grounds of error is not required to be inserted in the transcript. But when the Court comes to examine the case, and no brief or statement of points and authority has been furnished by the appellant, as required by Rule XVII, the judgment will be affirmed without examination.

STATEMENT ON APPEAL.—A general specification in the statement of grounds of error relied on, such as insufficiency of the evidence to justify the verdict, the verdict and judgment are against law, or error in law occurring at the trial, is not sufficient; but the statement should specify the particular grounds of error relied on; and annexed to the statement of the grounds of error relied on by the appellant should be so much of the evidence as may be necessary to explain the points specified, and no more.

STATEMENT NOT SPECIFYING ERRORS RELIED ON.—A specification of the particular grounds of error is the essential element of a statement; the evidence is the mere incident. On appeal from the judgment, if the transcript contains a paper purporting to be a statement, which does not distinctly specify the grounds of error relied on, and objection to its insufficiency in this respect to constitute a statement is made at the proper time, such paper will be disregarded, and only such errors as are disclosed by the judgment roll will be considered.

STATEMENT ON MOTION FOR NEW TRIAL.—When the appeal is from an order

denying a new trial, and the statement does not contain the specific grounds of error relied on, the order will be affirmed, or, on motion, the appeal will be dismissed.

SAME.—If a paper purporting to be a statement on motion for a new trial does not contain a specification of the particular grounds relied on, there is no such statement as is required by section one hundred and ninety-five of the Practice Act, and nothing on which the Court can act.

WHAT STATEMENT SHOULD CONTAIN.—The statement made on appeal, or on motion for new trial to be annexed to the judgment roll, should contain first a clear specification of the particular grounds relied on by the appellant, and then so much of the evidence, rulings of the Court, instructions, etc., as may be necessary to explain the points relied on.

VERDICT OF JURY.—In action to recover possession of land, the jury rendered the following verdict: "We, the jury in this cause, find a verdict in favor of the plaintiff against defendants, for the possession of the premises described in the complaint herein, and the sum of one hundred and sixty-five dollars damages." *Held*, to be substantially a general verdict, covering all the issues, and that it does not limit the finding to any particular fact or single issue.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The following are the pleadings in this action. The complaint and answer were verified:

Benjamin H. Hutton, plaintiff, complains of Joseph L. Reed, Henry Steil, and Charles F. Wehn, defendants; and for cause of action says, that heretofore, to wit: on the first day of January, A. D. 1862, the plaintiff was the owner in fee, entitled to the possession, and in the possession of that certain piece or lot of land, situate, lying, and being in the City and County of San Francisco, State of California, and bounded and described as follows, to wit: Commencing on the southerly line of O'Farrell street at a point distant one hundred and thirty-seven feet six inches westwardly from the westwardly line of Jones street; thence running westerly along said line of O'Farrell street one hundred and thirty-seven feet six inches; thence southerly and parallel with Jones street one hundred and thirty-seven feet six inches; thence easterly and parallel with O'Farrell street one hundred and thirty-seven feet six inches; thence northerly and parallel with Jones street one hundred and thirty-seven feet six inches to the point of beginning, and being fifty vara lot No. 1,115, as designated and numbered upon the official map of the City of San Francisco.

That afterwards, and while plaintiff was so as aforesaid the owner in fee, entitled to the possession, and in possession of said described tract of land, to wit: on the 26th day of February, A. D. 1862, the said defendants wrongfully and unlawfully trespassed into and upon said tract of land and ousted the plaintiff, and from thence hitherto have and still do wrongfully and unlawfully detain the same and the possession thereof from the plaintiff, and to his damage in the sum of five hundred dollars.

Wherefore plaintiff prays judgment against said defendant for restitution of said premises, for five hundred dollars damages, and costs of suit.

PRATT & CLARKE,

Attorneys for Plaintiff.

And now come the said defendants, Joseph L. Reed, Henry Steil, Charles F. Wehn, and for answer to the complaint of the plaintiff in the above entitled action say, that they deny that on the first day of January, A. D. 1862, the said plaintiff was the owner in fee, entitled to the possession, and in the possession of that certain piece or lot of land, situate, lying, and being in the City and County of San Francisco, and particularly described in said plaintiff's complaint by metes and bounds, as fifty vara lot on the official map of the City of San Francisco as number eleven hundred and fifteen (1,115.)

And for further answer to said plaintiff's complaint, the defendants deny that on the 26th day of February, A. D. 1862, that they, the said defendants, or either of them, wrongfully and unlawfully trespassed into and upon said tract of land and ousted the plaintiff therefrom. And defendants deny that from thence hitherto, and that they still do wrongfully and unlawfully detain said piece or lot of land and the possession thereof from said plaintiff. And defendants deny that said plaintiff has sustained damages in the sum of five hundred dollars or in any other sum whatever.

And for further answer the defendants deny all and singular, the facts and allegations in said plaintiff's complaint contained.

Wherefore the said defendants pray that a judgment may be rendered in their favor and against said plaintiff, and for costs of suit in this action.

JOHN MOHENRY,
Attorney, and of Counsel for Defendants.

Plaintiff recovered judgment, and defendants appealed.
The other facts are stated in the opinion of the Court.

James B. Townsend, for Appellants.

If this verdict has any intelligible meaning, it is that the jury find that the plaintiff should have or is entitled to the possession of the premises described, etc.

But whether or not the plaintiff should have or is entitled to said premises, is a conclusion of law merely, to be pronounced by the Court after the facts have been ascertained, and depending upon those facts. It is not the province of the jury to decide what the plaintiff should have or is entitled to. The law, which is pronounced by the Court after the facts are ascertained, settles this.

"Ad questiones juris respondent judices, ad questiones facti juratores."

The verdict in question, unless by implication and argument, decides none of the issues of fact joined between the parties and upon which their respective rights depend.

It does *not* decide whether the plaintiff is, or ever was, owner in fee, or owner of any other estate or interest in the land, unexpired.

It does *not* decide whether the plaintiff was ever in the possession of the land, or ousted therefrom by the defendants.

It does *not* decide whether the defendants have detained said land from the plaintiffs from February 26th, 1862, until the commencement of this action, or during any portion of that time.

These were the material issues of fact to be decided by their verdict.

Upon one or both of the two former depends the plaintiff's

right to recover the *possession* of the land; upon the latter, his right to recover *damages* in the nature of meane profits.

The verdict (at most) finds that the plaintiff has the right to the possession, (which, as before remarked, is a *matter of law* for the *Court* to determine,) entirely *omitting* to find the *facts* upon which that right depends; and it also finds the *amount* of damages to which the jury consider the plaintiff entitled, without finding the *ouster* and *detention* of the premises by the *defendants*, upon which such right depends; in other words, it finds *only conclusions of law*, wholly omitting to find the *facts* upon which those conclusions would arise.

It is well settled that a verdict to authorize any judgment thereon, must find *all the material facts put in issue*. (*Patterson v. United States*, 2 Wheat. 224; *Bemus v. Beekman*, 3 Wend. 667; *Boynnton v. Page*, 13 Wend. 425; 1 Grah. Prac. 3d Ed. 773, 777; Com. Dig. Pleader, Seca. 19, 20; *Kints v. McNeal*, 1 Denio, 436.)

It must find those facts *directly*, not *argumentatively*, or by implication. (Com. Dig. Pleader, Sec. 22.)

It must find *facts*, not legal conclusions. (*King v. Dean of St. Asph*, 3 T. R. 428, note a.)

Clarke & Carpentier, for Respondent.

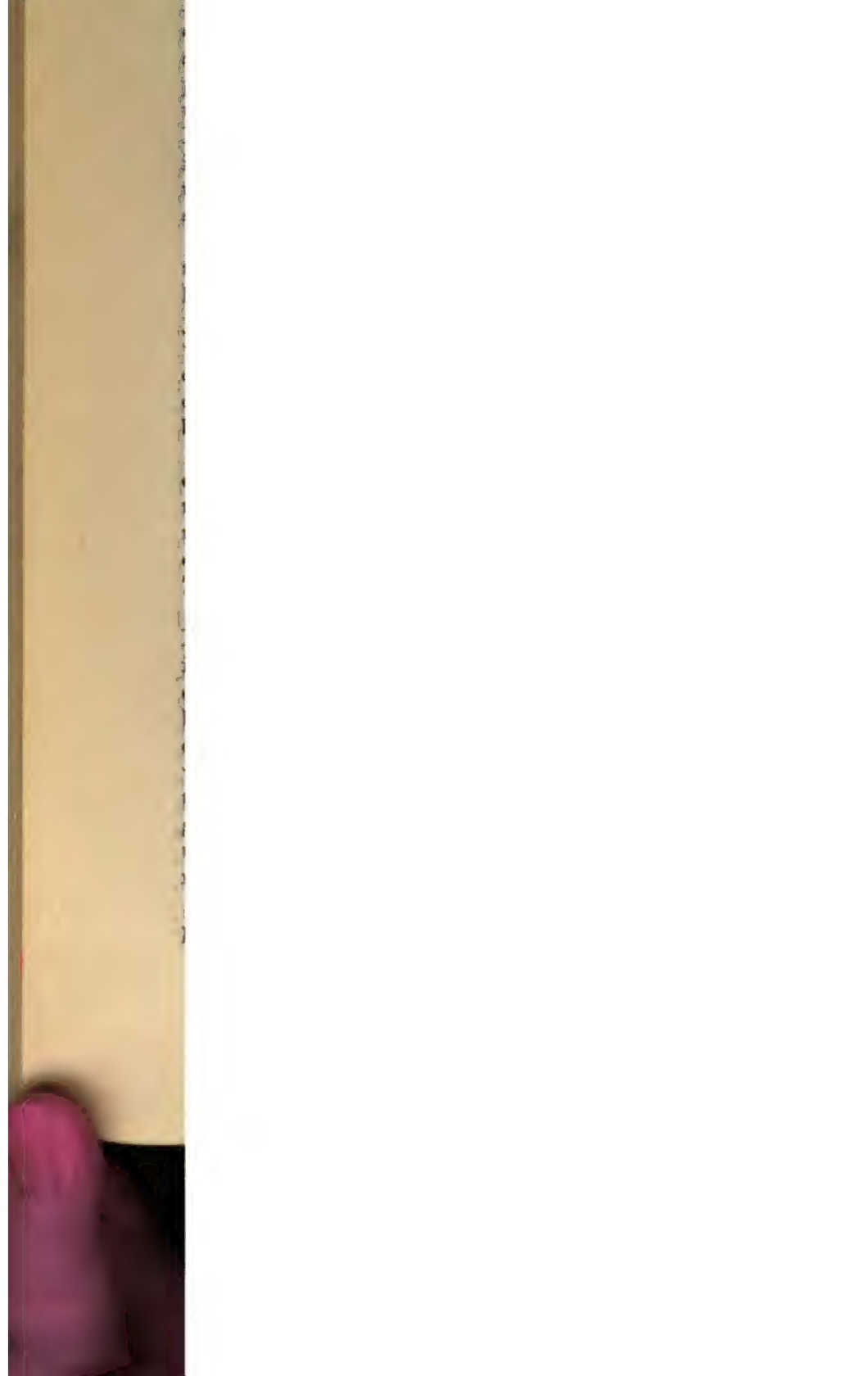
By the Court, SAWYER, J.

The respondent made a preliminary motion to dismiss the appeal, on the ground that the record contains no statement on appeal, and no assignment of errors, or statement of the grounds upon which appellant relies. The motion to dismiss was argued orally, and the case at the same time submitted on its merits on briefs, subject to the motion to dismiss.

We have frequently had motions to dismiss appeals from orders denying new trials, and from judgments, on the general ground that there was no assignment of errors in the record. But the term, "assignment of errors," seems to be used somewhat loosely and vaguely. The real difficulty to be reached —

though frequently the point is not distinctly presented — is, that there is no such statement of the grounds intended to be relied on, on motion for a new trial, or on appeal, as is required by the statute; and this is the point of the objection in this case. Notwithstanding the repeated decisions on the point, there still seems to be a misapprehension as to what is required, under the statute, to constitute a valid statement of the grounds relied on in such cases, and there is more or less discussion upon the subject whenever these motions are made. For this reason, we propose now to examine these questions, and, once for all, lay down the rule which we suppose to be contemplated by the statute, and established by the decisions.

The term assignment of errors is not used in our Practice Act. An assignment of errors, in the strict common law sense of the term, was in the nature of a pleading, to which there was a demurrer or joinder in error. (2 Tidd's Prac. 1,168; 3 Steph. Com. 644; 2 Burr. Prac. 147.) It did not constitute a part of the transcript, but was founded upon it, and was filed in the appellate Court at, or subsequent to the time of filing the transcript. It is hardly necessary to say, that the filing of such an assignment of errors was never required under the system of practice in this State. Yet we find the term often used in our reports in a sense somewhat different from, but analagous to its common law sense. Thus, in *The People v. Goldbury*, 10 Cal. 312; *People v. Comedo*, 11 Cal. 70, and *Sayre v. Smith*, 11 Cal. 129 — generally cited in these discussions — the appeals were dismissed; and in *Squires v. Foorman*, 10 Cal. 298, the judgment was affirmed for want of "an assignment of errors." These cases, except the last, are imperfectly reported, and we have taken the trouble to examine the records with a view of ascertaining, if possible, the precise circumstances under which they were decided; the sense in which the term, "assignment of errors," was used by the Court, and the practice which has heretofore prevailed in such cases. So far as we are able to ascertain the facts from the records, the appeals in these several cases were not dismissed, nor the judgments affirmed on motion of the respondents'



a hearing at any term, the statement of his points and authorities shall be filed five days before the hearing, and unless so filed the appeal shall be dismissed." Probably a similar provision was contained in the rules prior to that time. The records of the Court, so far as we have been able to discover, do not show a dismissal of an appeal for want of an assignment of error in any other sense, or under any other circumstances than those stated, and under the rules of the Court requiring points to be filed.

The case of *Barrett v. Tewksbury*, 15 Cal. 354, presents a different question. The question in that case was, whether the document purporting to be a statement contained a sufficient specification of the grounds on which the appellant relied, to constitute a valid statement, and render it available on appeal. And this is the question which is, or should be presented, when objections are taken to statements on the motions so frequently made in this Court.

Section three hundred and thirty-eight of the Practice Act of eighteen hundred and fifty-one, in force at the time the statement in that case was prepared, provides, that the statement shall "contain the grounds upon which he (the appellant) intends to rely on the appeal, and shall contain so much of the evidence as may be necessary to explain the grounds, and no more."

In deciding the case Mr. Chief Justice Field says: "*The specification of the grounds is the essential element of a statement; the evidence is the mere incident. It is the statement 'of the case,' and not of the evidence, which is to be annexed to the record of the judgment or order appealed from. The case on appeal consists of the questions of law or of fact raised. These must be distinctly set forth and accompanied with only so much of the evidence as may be necessary to explain and show their pertinency and materiality, and no more.*" The specification is necessary, in the preparation of the statement, to enable the adverse party to suggest, intelligently, such amendments as he may deem important to the just determination of the case. Without it neither the adverse party, nor the Judge, can well

know how much of the evidence should be set forth. It often happens that, of numerous points taken in the progress of the trial, the greater number, after mature consideration, are abandoned by counsel, and the appeal made to rest on one or two of them. In such instances a large portion of the testimony actually given becomes entirely immaterial on appeal; but without a specification of the grounds on which the appellant intends to rely, the adverse party will be ignorant of the materiality of that which is inserted or omitted in the statement." (15 Cal. 356-7.)

And again, page 358: "In all future cases, the specifications must be made when the statements are originally prepared. Nor is there any difficulty in pursuing this course; but on the contrary, the labor of the parties, as well as their expenses, will be thereby greatly lessened. It is certainly a very simple matter for the party appealing to allege, either at the commencement or conclusion of his statement, that on appeal he will rely upon certain errors committed by the Court; as, for example, in admitting the testimony of a particular witness, or in excluding certain documents, or in giving or refusing certain instructions, or in making particular rulings upon the contract or subjects in controversy. When the grounds are thus specified it will be an easy matter to state so much of the evidence as may be necessary to explain and point them, and the adverse party will be enabled to suggest readily and intelligently such amendments to the statements as he may deem important to their just determination. There may be cases where equitable relief is sought, as suggested by the learned counsel of the petitioners in which the general ground of appeal will be that the decree is not warranted by the evidence; yet, even then the general ground will be found, in a great majority of instances, subject to more particular specifications—as that the evidence does not establish a contract, or show a tender, or compliance with particular condition precedent, or the like, which will constitute the matters urged upon the Court." (For further illustrations see opinion in the case cited.)

That case was well considered in the first instance, and again on petition for rehearing, and had the concurrence of all the Judges. The requisites of a statement are so fully and precisely laid down that we have quoted at length from the opinion in the case, for the purpose of calling particular attention to the subject; for it seems to us that this case must have been overlooked, or there could not be so frequent occasion for making similar objections to statements in cases appealed to this Court.

The amendment to section three hundred and thirty-eight since the decision in *Barrett v. Tewksbury*, prescribes these essential requisites in still more precise and emphatic language. It now provides that the appellant in his statement "shall state specifically the particular errors or grounds upon which he intends to rely on the appeal." If there ever was room for doubt as to what was necessary to state, there can be none since the amendment of the Act. It is manifest that the Legislature intended by this language something more than a specification of the grounds of appeal in general terms, such as those in the so called assignment of errors in *Squires v. Foorman*, or such as the general language of the statute in enumerating the cases for granting new trials, in section one hundred and ninety-three of the Practice Act. It was intended that the specific error should be distinctly pointed out. It is as easy to do this in the statement as in points or briefs, and such is the requirement of the statute. It is also easy to indicate the ground so distinctly that there can be no room for discussion here as to whether "the errors or grounds upon which the appellant intends to rely" are specifically stated or not. Hereafter, if the grounds are so loosely or defectively stated as to admit of argument as to their sufficiency, it must not be expected that this Court will adopt a liberal construction for the purpose of saving the appellant's case.

It is optional with the appellant, when he appeals from the judgment alone, whether he will make a statement or not. If he makes no statement, it is not necessary that there should be in the transcript, or on file, what has heretofore been denom-

inated "an assignment of errors," or any statement of the grounds upon which he relies, for neither the statutes nor the rules of this Court now require it, and an appeal cannot in such cases be dismissed on motion for want of an assignment of errors in the transcript, or of a statement, or where there is a defective statement; but in such cases, only the errors appearing upon the judgment roll can be considered. But when the Court comes to examine the case, and no brief, or statement of points and authorities is furnished on the part of the appellant to aid in the investigation, as required by Rule XVII, the judgment will be affirmed without any examination of the case, as was done in *Edmondson v. Alameda County*, 24 Cal. 349, and in other cases since.

In this case there is no statement on appeal; but the appellant was not required to make one, and the appeal, so far as it is taken from the judgment, cannot be dismissed. It must, however, rest upon the judgment roll alone. But an appeal is also taken from the order denying the motion for new trial, and the objection to the sufficiency of the statement applies to this branch of the appeal. The statement on motion for new trial was made under section one hundred and ninety-five, as amended in 1861, and the sufficiency of the statement must be determined by a construction of that section as it then stood. It provides that the party intending to move for a new trial shall prepare "a statement of the grounds upon which he intends to rely * * *."

"The grounds of the motion shall be specifically set forth, and the statement shall contain so much of the evidence, or reference thereto, as may be necessary to explain them, and no more." The language here is similar to that of section three hundred and thirty-eight, relating to statements on appeal, since the amendment of that section in 1864, and more specific than the language of that section as it stood at the time of the decision in *Barrett v. Tewksbury*. The same construction must be given to both sections.

In *Wing v. Owen*, 9 Cal. 247, plaintiff recovered. The defendant made what was intended to be a statement on

motion for new trial. It stated the evidence, the various rulings upon the admissibility of evidence, and the exceptions taken by defendants; the instructions given at the request of plaintiff, and those asked by defendant and refused, and the exceptions thereon taken by defendant—in short, the full history of the proceedings; but it did not state the particular errors or grounds upon which the defendants intended to rely on their motion. The District Court granted a new trial, and plaintiff appealed. The document called a statement was held to be *no such statement as the Act required, and therefore no statement at all*; and the order granting a new trial was reversed on that ground. Mr. Justice Field said: “In this case no statement was filed setting forth the grounds upon which defendants intended to rely on their motion for a new trial. The failure to file such statement operates as a waiver of the right to the motion.” (Page 247.) This construction of section one hundred and ninety-five is on the theory, that *the specification of the particular errors, or grounds relied on, is the essential constituent, without which there is no statement*, and the evidence, rulings and exceptions only the incidents which serve to explain and illustrate those essentials—the errors or grounds relied on. The language of section one hundred and ninety-five at that time was more general than after the amendment of 1861, as it did not contain the clause: “The grounds of the motion shall be specifically set forth.” The principle of this case, as we have seen, was affirmed in *Barrett v. Tewksbury* in respect to statements on appeal, in which case, the Court explained more fully, and in terms not liable to be misapprehended, what is intended by the grounds upon which a party intends to rely. This case was approved and followed in *Dobbins v. Dollarhide*, 15 Cal. 375, and recognized in *Valentine v. Stewart*, Id. 396.

If then, “the grounds of the motion,” as thus defined, are not “specifically set forth” in the statement in this case, there is no such statement as is required on motion for new trial, and nothing on which the Court was authorized to act.

The only statement of the grounds is an enumeration of the

causes for new trial specified in the fifth, sixth and seventh clauses of section one hundred and ninety-three, very nearly in the words of the statute, as follows:

First—Insufficiency of the evidence to justify the verdict.

Second—The verdict and judgment are against law.

Third—Excessive damages as given by the jury.

Fourth—Error in law occurring at the trial and excepted to by the defendants; without in the remotest degree indicating wherein the evidence was insufficient, the verdict against law, or the error in law at the trial occurred.

The third specification, as here stated, is not recognized by the statute as a cause for new trial, for there is no averment or pretense that the damages were "given under the influence of passion or prejudice."

We do not think the grounds are "specifically set forth," within the meaning of the statute as before construed. There is nothing here that indicates the specific errors or grounds relied on. The specification affords to the other party no information that is of any service to him in suggesting amendments to the statement. Upon such a specification he could not safely accept a statement that did not contain everything that transpired at the trial; and statements under such a system would be incumbered with hundreds of pages of matter worse than useless—one of the very evils, which the requirements of the statute were intended to obviate. The provision is that the "grounds" shall be "specifically set forth," and "the statement shall contain so much of the evidence * * * as may be necessary to explain them, *and no more.*" If the opposite party knows the precise grounds relied on, he will have no difficulty in determining exactly what evidence is necessary to explain them. But if the grounds are stated in terms so broad as to include everything that transpired at the trial, it is impossible for him to know what is necessary to be included to explain the grounds, or what may safely be omitted. Such a statement affords no information whatever, and so far as any useful purpose is concerned, it might just as well be altogether omitted. We are disposed to carry out these provisions of the

Practice Act according to the letter and spirit; and the construction given them, as we conceive, will accomplish that result. We again call attention to *Barrett v. Tewksbury*, 15 Cal. 358, where the correct practice is distinctly pointed out.

Whenever the statement, on motion for new trial, or on appeal, does not conform to the requirements of the statute as construed in this opinion, and the objection is made at the proper time, it will be disregarded, and such errors only considered as are disclosed by the judgment roll.

When the appeal is from the order denying a motion for new trial, and the motion was not based on such a "statement of the grounds" as is herein approved, or upon affidavits, the practice will be to affirm the order, or, on motion, to dismiss the appeal.

The only point made on the judgment roll in this case is, that the issues of fact are not found by the jury, and the verdict is insufficient to sustain the judgment. The action is for the recovery of the possession of land and damages for detention. The verdict is, "We, the jury in this cause, find a verdict in favor of the plaintiff against defendants for the possession of the premises described in the complaint herein, and the sum of one hundred and sixty-five dollars damages."

We must presume the Court correctly instructed the jury as to what was necessary for them to find to entitle the plaintiff to recover the possession of the premises. We think this is substantially a general verdict covering all the issues. The words "for the possession of the premises described in the complaint herein" do not limit the finding to any particular fact or issue.

We deem it proper to say here that we have come to the conclusion that the statement on motion for a new trial in this case must be disregarded as insufficient with less reluctance, for the reason that we are satisfied upon examination of the record that no injustice will result from the judgment if unreversed. The substantial question on the validity of the grant by Alcalde Geary was determined in *White v. Moses*, 21

Cal. 34. But it
made.
Judgment aff

SILAS LEN
WILLIAM

RENEWAL OF
secured by
would be
of the lie
terms of
note and

SAME.—If the
secured
of the
vestments
until

EXTENSION
If the
still
the
the
from
lie
a

SALE

The accidental circumstance of the reconveyance of the premises to William A. Grover lends no feature favorable to the plaintiff.

The defendants derive title through Lester K. Grover from the original Alcalde grant of the lot of which these premises are a part. That the title came immediately from William A. Grover to them, after the reconveyance to him, does not connect the transaction with his previous ownership of the land, when he executed the mortgage, any more than if he had never owned it. The land and the defendant were separated from each other, and remained so from the 20th of August, 1856, to the 17th of December, 1859, some three years and five months. So far as William A. Grover is concerned, and when, on the latter date, he was re-invested with the title, that act did not again unite the debt and the land.

He then conveys by general warranty, which necessarily operates as a covenant against this mortgage to Charles Morrill, on the 19th of July, 1860, having done no new act in the meantime to operate as a new incumbrance on the land.

The question of notice has nothing to do with this case.

The records are open to the inspection of every one; and when a man finds a recorded mortgage out of date, he has notice of the law that such a mortgage cannot be enforced.

If he inquires, and discovers that part payment of principal and interest has been made upon the mortgage, but in a way rendered valid by law, he is still at liberty to buy, and he will not be bound by such part payment.

S. W. Holladay, for Respondent.

In reply to the objection that the extension agreement could not affect or extend the mortgage, because Grover had already sold the land, we say, that Grover after that conveyance became again the owner of the land, standing in his original position as debtor and mortgagor.

Had he, therefore, been the sole defendant, he would have been estopped from denying his right to extend the mortgage.

His extension agreement, although only executory at the time it was made, when the land was conveyed back to him had been faithfully observed by the plaintiff in his forbearance to sue; it was then fully executed as distinguished from what it was at its date—merely executory. When Grover became again the owner of the land, having had all the benefit of the extension agreement, he could not be heard to question its validity.

He was then estopped. His interest acquired subsequent to the agreement was sufficient to feed the estoppel.

If Grover had the power to extend the time of payment while the debt and the land were both united in him, (as is practically conceded by appellants' counsel,) it seems natural that the same consequence should follow when, by getting back the title, the debt and the land became united in him—the interest acquired by the conveyance feeding the estoppel contained in the extension agreement, as shown in the brief of Mr. Carey.

James C. Carey, also for Respondent.

But are the Morrills and Grover in a position to attack this agreement? It will be remembered that Lester K. Grover reconveyed the fee to Wm. A., December 29th, 1859, and he of course took subject to his own mortgage and extension agreement. He would be estopped to deny that agreement or its effect. He adopted it and continued to pay interest up to July 13th, 1860, when he sold the fee to C. Morrill. While the fee was in Lester K., Morrill could not complain, for he was a stranger to the property, and when he purchased it the agreement bound his grantor, although it may have been invalid when made as to Lester K. Grover. Wm. A. Grover would have been estopped by it, and the Morrills claiming through him, it estops them with or without notice.

“The interest, when it accrues, feeds the estoppel.”

This rule is well illustrated in the *Rawlin Case*, 4 Co. R. 52. A man leased land in which he had nothing, and afterwards

bought the land. The lease was held good against him and all parties to whom the estate might come. He was estopped to deny his lease, and when the interest accrued upon which it was to operate, it fed the estoppel, and the lease was held good. (2 Smith's Leading Cases, p. 500, *et seq.*; Id. 545-551.)

It was held in like manner in *Helps v. Hereford*, 2 Barn. & Adolp. 242, that a fine levied by an heir who had no estate in the land at the time, either contingent or vested, bound the estate by estoppel upon its subsequent descent from his ancestor.

To the same point: *Webb v. Austin*, 7 Manning and Granger, 701; *McKenzie v. Lexington*, 4 Dana, 129; *Sturgeon v. Springfield*, 15 Meeson & W. 224.

It was held in *Somers v. Skinner*, 3 Pick. 52-58, that where a grantor conveyed land with warranty in which he had nothing at the time, he was not only estopped in claiming in opposition to his deed, but that an estate which vested in him subsequently was bound by the estoppel and transferred to the grantee.

In *White v. Patten*, 24 Pick. 324, the Court went still further, and held that where a party who was in actual possession of land, but without title, *mortgaged* it with warranty, and afterwards acquired a good title by conveyance, the warranty took immediate effect on the land thus acquired, and transferred it to the mortgagee not only as against the mortgagor, but as against those claiming under him subsequently to the conveyance.

To the same point: *Clark v. Baker*, 14 Cal. 612, and cases cited by Botts, p. 621; *Mack v. Willard*, 18 N. Hamp. 389; *Baxter v. Brodbury*, 20 Maine, 26; and authorities cited in *Doe v. Oliver*, 2 Smith's Leading Cases, 551.

By the Court, SHAFER, J.

This is an action to foreclose a mortgage. The complaint describes a promissory note, and a mortgage executed to secure its payment; it states the amount due, and asks a

decree of foreclosure and sale of the premises, waiving personal judgment against either of the defendants for any deficiency after applying the proceeds of sale of the land to the satisfaction of the judgment.

William A. Grover, the maker of the note and mortgage, was served with process, but failed to answer, and a default was entered against him. The other three defendants—Charles Morrill, O. F. Morrill and D. W. Chambers—answered separately, and the plaintiff interposed a demurrer to the greater portion of each of the answers, on the ground that the facts therein stated constituted no defense to the action. The Court below sustained the demurrers, and the defendants failing to amend, and the cause coming on regularly for an assessment of damages, a final decree was rendered for the plaintiff, in conformity to the facts and prayer of the complaint. From this final decree the appeal is taken.

The complaint is verified, and its matter may be briefly stated as follows:

1st. That on the 17th of January, 1855, the defendant, Wm. A. Grover, executed his note to Messrs. Newhaus for four thousand five hundred dollars, payable two years thereafter, at one and three quarters per cent per month interest.

2d. At the same time, to secure the payment of the note, Grover executed a mortgage upon the described land, which mortgage was duly acknowledged and recorded on the same day in the county where the land lies.

3d. That on January 13, 1857, the principal sum, four thousand five hundred dollars, and five hundred dollars interest, was due on the note and mortgage, when Messrs. Newhaus, the payees, assigned the same to plaintiff, in consideration of five thousand dollars paid therefor, and the deed of assignment was duly acknowledged and recorded at its date. The deed of assignment also recited said sum of principal and interest as then due.

4th. At the time of said assignment, plaintiff and the defendant Grover, the mortgagor, agreed in writing, signed by them, that the above named sum was due, and that Grover

should pay plaintiff interest on said sum of five thousand dollars, at one and one half per cent per month, and that the time for payment of said note and mortgage should be extended for two years from that date, *i. e.*, two years from February 13, 1857.

5th. Two years thereafter—to wit: February 13, 1859—the accrued interest in arrear, added to the principal, amounted to five thousand nine hundred and twenty dollars, when plaintiff and defendant Grover, by agreement in writing signed by them, stated and agreed that said sum was then due and payable, and that thereafter Grover would pay interest on that whole sum at one and one quarter per cent per month. Grover continued to pay interest up to the month of July, 1860, when he conveyed the mortgaged premises to the defendant, Charles Morrill, with full and actual notice of the note and mortgage, and the extension of time of payment for two years from January 13, 1857, and of the amount due thereon, and the rate of interest which Grover agreed to pay.

6th. That from July 19, 1860, (the date of Grover's conveyance to Morrill) up to and including August 17, 1862, the defendants Charles Morrill and O. F. Morrill paid plaintiff the accruing interest on said note and mortgage at the rate above stated.

7th. Since July 19, 1860, defendant Charles Morrill has repeatedly promised to pay plaintiff the said sum of five thousand nine hundred and twenty dollars, due as aforesaid, but has neglected, etc.

8th. That O. F. Morrill and Chambers claim to have some interest, which is subsequent and subject to the plaintiff's mortgage.

9th. The prayer of the complaint is for a judgment against defendant William A. Grover, for five thousand nine hundred and twenty dollars, accruing interest, and five per cent counsel fees and costs, for a sale of the mortgaged premises, and foreclosure against the defendants, etc.; "but plaintiff does not ask and hereby waives all claim to a personal judgment against either of the defendants for any deficiency after apply-

conveys the mortgaged lands to a third person, and while the note is yet underdue gives an acknowledgment in writing to the holder that the note is a subsisting contract against him, and he thereafter accepts a reconveyance of the lands before time has run on the note as extended, and thereafter, but while the note as extended is yet underdue, conveys the land to a stranger—are the lands in the hands of this last grantee affected by the written acknowledgment of the mortgagor before named?

In *Lord v. Morris*, 18 Cal. 484, the Court held that "a mortgagor, after disposing of the mortgaged premises by deed of bargain and sale, loses all control over them. His personal liability thereby becomes separated from his ownership of the land, and he can by no subsequent act create or revive the charge upon the premises. He is as to the premises henceforth a mere stranger. And if, instead of selling the premises, he execute a second mortgage upon them, he is equally without power to destroy or impair the efficacy of the lien thus created by a subsequent renewal of the first mortgage note."

To the correctness of this decision we fully accede. It is founded upon the principle that the power of incumbering property, and of extending the life of existing incumbrances for a longer period of time than that to which they were limited in the first instance, as well as the power of disposing of property in any and all possible modes, is vested in the person to whom the property belongs. The right of property and the right to dispose of it as the proprietor may choose, are indissoluble.

As we conceive, however, there is one fact disclosed in the record which takes the case at bar out of the operation of *Lord v. Morris*, by withdrawing it from the operation of the principle upon which the judgment in that case was based.

It is true that the mortgagor, W. A. Grover, when he conveyed the land to L. K. Grover, on the 20th of August, 1856, became "a stranger" to the title, and as between himself and his grantee, Grover had no more power to extend the mortgage in time, than he had to increase the rate of interest, enlarge the principal sum due, or make a new mortgage out-

another rule protecting Grover's grantee in the beneficial enjoyment of his estate. But when the temporary hindrance had been removed by the reconveyance to Grover, the mortgage, under the maxim named, at once assimilated itself to the note as renewed and extended.

This result cannot be considered an inequitable one. The rights of third persons were no longer concerned after the *mortgagor* had recovered the title, and we are at a loss to conceive upon what principle it can be held that, as between the original parties to the note and mortgage, the mortgage failed to match itself to the note in the new dimensions imparted to it by the prior written acknowledgment.

It is a matter of no moment that Chambers, when he took his conveyance of the land in 1862, had no knowledge that the note and mortgage had been extended. Lent was not delinquent in any known common law or statute duty or requirement. He was not bound to serve personal notice of the acknowledgment of February, 1859, upon any one, nor to publish the fact in the gazettes; and if he had caused the acknowledgment to be recorded in the Recorder's office it would have been followed by no legal consequences. Chambers, on the other hand, knew, at least, when he bought and paid his money, that the mortgage had not been discharged of record. He further knew, as matter of law, that under the Statute of Limitations a renewal of the note was a possible event. He might, and as a prudent man he ought, before concluding his purchase, to have sought out Lent and inquired of him as to whether the note had been renewed in fact. If on such application Lent had told him that there had been no renewal, and if, thereupon, Chambers, on the faith of the statement, had closed the trade and paid his money for the land, Lent would have been estopped from setting up the mortgage against the man whom his own false suggestions had misled. Not having pursued that course, however, Chambers must be understood to have bought and taken his conveyance subject to all hazards.

II. As to the covenant contained in the deed of Grover to

coin of the United States. The prayer of the complaint was for judgment in the amount due on the note and for the costs of the suit, and for such other and further relief as the nature of the case demanded.

The defendants answered alleging that when the note became due they tendered to the plaintiff the amount due thereon in United States legal tender notes, at their face, and that such tender was made in payment of the sum due by said note, but that plaintiff refused to receive the same in payment thereof; and they also alleged that they had always, since said tender, been and still were ready and willing to pay plaintiff the sum due him, and thereupon they brought the same money and deposited it in Court for the plaintiff.

The cause was tried before the Court without a jury, when the facts pleaded by the parties, respectively, were admitted. Upon this, the Court, after reciting the facts stated in the complaint, found and decided that: "When the day of payment arrived the defendants offered to the plaintiff the principal and interest, in paper of the United States, which was worth about sixty cents for each dollar. The plaintiff refused this paper and claimed gold or silver. This Court, having equity powers, must decide that the tender was ill made, and that the defendants must return the same class of money which they received, or its equivalent, according to the intent of the parties at the time of negotiating the loan."

Judgment was entered upon this decision of the Court to the effect that the plaintiff do have and recover of and from the defendants the sum due, with interest thereon, at the rate specified, until paid, "payable in gold or silver coin of the United States, or in foreign coin, at the value fixed therefor by the Acts of Congress, together with costs and disbursements incurred in the action;" the amount of which is specified.

The defendants have appealed from the judgment, and the only question involved is the constitutionality of the Act of Congress passed February 25, 1862, making the notes issued under that Act lawful money and a legal tender in the payment of private debts. We have decided this question in *Lick*

v. Faulkner, (ante 405,) sustaining the law of Congress, and therefore we hold that the tender pleaded by the defendants and the payment of the same money into Court for the plaintiff was a good and lawful tender, and that the Court erred, first, in giving judgment in a sum exceeding the amount tendered, and directing the kind of money in which the judgment should be paid; second, in giving judgment in favor of plaintiff against defendants for the costs of the action.

The judgment is therefore reversed, and the District Court is directed to render a judgment in favor of the plaintiff for the sum of money due when the tender by the defendants to the plaintiff was made; and a judgment in favor of the defendants against the plaintiff for their costs in this action.

YANKEE JIM'S UNION WATER COMPANY v. MILTON W. CRARY.

ADVERSE POSSESSION OF WATER RIGHT.—The right to the use of a water-course in the public mineral lands, and the right to divert and use the water taken therefrom, may be held, granted, abandoned, or lost, by the same means as a right of the same character issuing out of lands to which a private title exists. The right of the first appropriator may be lost by the adverse possession of another; and when such person has had the continued uninterrupted, and adverse enjoyment of the water, or of some certain portion of it, during the period limited by the Statute of Limitations for entry upon lands, the law will presume a grant of the right so held and enjoyed by him.

EVIDENCE IN ACTIONS FOR DIVERTING WATER.—In an action for the wrongful diversion of water, where the answer sets up more than five years continuous adverse possession in the defendant, if the plaintiff before resting introduces evidence tending to show his possession during the five years, and the defendant then introduces evidence to sustain the answer, the plaintiff, in rebuttal, may introduce evidence to show that defendant's possession has not been continuous, or uninterrupted, or adverse, but he cannot claim as a right to introduce evidence to prove the same facts that were proved in his opening.

ERROR IN ADMITTING TESTIMONY CURED BY INSTRUCTIONS.—If the Court errs in the admission of testimony during the trial, but afterwards instructs the jury to disregard such testimony, the error is not sufficient to entitle the party objecting to the testimony to a new trial.

PRESUMPTION OF GRANT TO WATER.—In an action for the wrongful diversion of water, if the jury are satisfied from the evidence that the defendants have been in the continued, adverse, uninterrupted possession, use, and

enjoyment of the water in dispute for five years preceding the commencement of the action, they are justified in presuming a grant to the defendants.

DIVERSION OF WATER.—If A. is the owner of a ditch, and of the right to divert and use the waters of a stream in the same, and B. diverts the waters of the stream at a point above A.'s ditch and uses them for mining, but turns them back into A.'s ditch at another point before A. has use for them, A. has no cause of action against B.

APPEAL from the District Court, Eleventh Judicial District, Placer County.

The defendant's ditch was excavated on the side of the mountain above plaintiff's ditches, and took the water from the same stream at a point about three fourths of a mile above plaintiff's ditches. The defendant used the water for working his claim, and then allowed it to flow into plaintiff's ditches down another ravine above a mile distant from the one where it was diverted.

Defendant recovered judgment and plaintiff appealed.

The first instruction, given at defendant's request, was as follows:

"If the defendant and his grantors have been in the continued adverse uninterrupted possession, use and enjoyment of the waters in dispute for the period of five years preceding the commencement of this suit, the jury must find for the defendant."

The second instruction given at defendant's request, was as follows:

"If, after defendant's use of the water, it flows back into a cañon, and, without material diminution in quantity or quality, it is again conducted by plaintiff into ditch, and used by them as it would have been used but for the diversion by defendant, the jury must find for defendant."

The other facts are stated in the opinion of the Court.

Tuttle & Hillyer, for Appellant.

The second instruction, given at defendant's request, is erroneous.

Nearly all the ditches in the mining regions pass for miles

along the sides of mountains, and take up the waters of numerous streams. The law, as laid down, will give the right to subsequent appropriators to go above those ditches and divert those streams to any point above the first ditch, so that the water finds its way back at some point, no matter what, into the oldest ditch. If A. excavates a ditch ten miles on the side of a mountain, diverting half a dozen streams, B. may afterwards dig a ditch eighty rods above him, of the same length, and divert the same water, if he finally empties it back into some point of A.'s ditch, even though six miles of A.'s ditch is left dry.

The first of defendant's instructions was also erroneous. It declares that if defendant had been for five years in the adverse uninterrupted possession and enjoyment of the waters in dispute, that defendant must recover.

This instruction ignores entirely the question of possession under claim of right or ownership. It assumes that a trespasser who does not claim to own the property, and knows that he does not own it, by a continuation of his trespasses may acquire a title.

This was an action to abate a nuisance. No length of time could give defendant a right to commit the nuisance. (*Tuolumne Water Co. v. Chapman*, 8 Cal. 397; *Parker v. Kilham*, 8 Cal. 79; *Paddleford v. Paddleford*, 7 Pickering, 152; *Ewing v. Burnett*, 11 Peters, 41.)

Jo Hamilton and P. L. Edwards, for Respondent.

The appellant has no right to require the return of the waters into its ditch at the point where it first diverted them, and must be satisfied if they are returned to it where they were intended to be, and were used.

If there is any error in the instructions given by the Court, it is in favor of the appellant, and not of the respondent.

This was not an action to abate a nuisance, neither in form or substance. Its only legitimate purpose was to determine the conflicting claims of the parties to the water in question.

By the Court, RHODES, J.

The plaintiff is the owner of two water ditches, constructed for mining purposes, which conduct the water from a cañon, and the defendant owns a third ditch which heads in the same cañon, above the plaintiff's ditches. The plaintiff claims the right to the water, on the ground of a prior appropriation and a continuous user down to a time subsequent to May, 1861, when, it is alleged, the defendant diverted the water into his ditch. The object of the action is to recover damages for diverting the water, and to enjoin the defendant from the further diversion of it from the plaintiff's ditches. The defendant had a verdict and judgment, and the plaintiff appeals from the judgment and the order denying the motion for a new trial.

In considering the errors assigned, several points may be passed upon at the same time.

1. The plaintiff was not entitled to a judgment on the pleadings, for the defendant denies the right of the plaintiff, except where the water has receded to four inches, and he sets up title in himself; and we hold that those matters, as set up in the answer, do constitute a defense to the plaintiff's action.

2. After the plaintiff had rested and the defendant had introduced his evidence, the plaintiff "offered to prove by William McClure, one of the former owners of plaintiff's ditches, and James McClure, former agent, that in 1853, 1854, 1857, 1858, 1859 and 1860, plaintiff had possession of and used in its ditches, during all the summer season except when there was a surplus [the] water in controversy," and the testimony was excluded on the objection of the defendant. The plaintiff alleges in its complaint that it now owns two ditches; that the ditches were constructed by its grantor in 1851 and 1852; that by means thereof, the plaintiff's grantors diverted and appropriated the waters of the cañon; that the plaintiff has owned the ditches since August, 1853; and that by means of the ditches, since they were excavated, the plaintiff and its grantors have continuously, up to May, 1861, used

appropriated, diverted and enjoyed the waters flowing down said cañon above the plaintiff's ditches.

The defendant, in his answer, after denying that the plaintiff or his grantors ever had or claimed any right to the water of the cañon above where his ditch heads, except as the owners of his ditch permitted them to use such water, avers that he is the owner of said ditch, and that he and his grantors, ever since the summer of 1853, have been the owners and in the peaceable and quiet possession thereof; that the same was constructed, and ever since has been used for the purpose of conveying the waters of said cañon; that they have had the quiet and peaceable possession of said waters, and have continuously, during nine years past, diverted all of said waters that could be conveyed in their ditch; that they had the right so to do; that by "virtue of such continuous use, enjoyment and appropriation of said water," which use and possession "has been held by them adversely and against all claimants," the defendant is the owner, and entitled to the use, enjoyment and diversion of said water; and "that, by reason of the nine years use and enjoyment and diversion, and the adverse possession of the same, he has acquired the title thereto;" and that the defendant has never disputed the plaintiff's title, until the commencement of the present suit.

The plaintiff thus asserts title founded upon prior appropriation in 1851 and 1852, and the continued appropriation down to the time of the alleged diversion by the defendant in 1861; and the defendant asserts title acquired by prior appropriation in 1853, together with continuous use from that time to the commencement of the action in 1862. He also relies upon title by prescription. The Court below and the plaintiff have treated the answer as setting up the Statute of Limitations in bar of the action. We do not so understand the answer. Although it is not pleaded with great accuracy or technical precision, it contains all the substantial allegations necessary in a case where a party sets up title to an incorporeal hereditament, which has accrued to him by the continued, uninterrupted adverse use and enjoyment — a title by

prescription. The right to the use of a watercourse in the public mineral lands, and the right to divert and use the water taken therefrom, is acquired by appropriation and user, the person first appropriating it being deemed to have the title, as against all the world, except the United States and persons claiming under them, to the extent that he thus appropriated it before the rights of others attached. The rights thus acquired may be held, granted, abandoned or lost by the same means as a right of the same character issuing out of lands to which a private title exists. The right of the first appropriator may be lost, in whole or in some limited portions, by the adverse possession of another. And when such person has had the continued, uninterrupted and adverse enjoyment of the watercourse, or of some certain portion of it, during the period limited by the Statute of Limitations for entry upon lands, the law will presume a grant of the right so held and enjoyed by him. (*Bealy v. Shaw*, 6 East. 208; *Balston v. Bensted*, 1 Campb. 463; *Ricard v. Williams*, 7 Wheat. 59; *Williams v. Nelson*, 23 Pick. 141; *Calvin v. Burnet*, 17 Wend. 564; *Hammond v. Zahner*, 23 Barb. 473.)

The defendant, having proven facts sufficient to warrant the jury in presuming a grant in his favor, the plaintiff, not wishing to rely upon the proof offered by it upon the same points, was at liberty to produce evidence tending to show that the defendant's enjoyment of his asserted right had not been continuous, or uninterrupted, or adverse; but it was not authorized for that purpose, to enter upon its original case, and again prove the same facts that were proved by it in making its *prima facie* case. At least, such evidence would be admissible only in the discretion of the Court below, in furtherance of justice—not in rebuttal, but as a part of the plaintiff's original case.

The other issue between the parties was, as already stated, a contest between them as to which had the better right, founded on prior possession and continued user. The plaintiff had called upon the same witnesses that he then offered, to prove its continuous possession and use, and they had testified concern-

ing those matters, and the offer was in substance to prove the same facts (perhaps more in detail) that those witnesses had testified to in chief for the plaintiff. The examination of those witnesses upon the same point was not permissible, except in the discretion of the Court.

3. The plaintiff further assigns for error, the admission of the testimony of Randolph and the deposition of Beegan, so far as the same related to an arrangement between the defendant's grantors and the plaintiff's agent, on the ground that there was no proof that the agent had authority to make such an arrangement. It is sufficient on this point to say, that the Court, by its instructions, excluded that testimony from the consideration of the jury, the Court instructing them that the agent's acts in that behalf were void, because he had no authority, and there was no proof of the ratification of his acts by the company.

The plaintiff further objects to the testimony of those witnesses, because it was attempted to be proven by them, by parol, that the defendant's grantors had sold and conveyed the ditch to him. It is alleged in the answer, and not denied in the replication, that the persons who constructed the defendant's ditch sold the same to two persons, who afterward sold it to the defendant, and no evidence was needed on that point. Those sales were proven by parol evidence, without objection on the part of the plaintiff, by two other witnesses, and the record contains no objection to the testimony of Randolph on that ground. The admission of the testimony complained of, though improper as it was offered, yet under the circumstances did not amount to an error sufficient to entitle the plaintiff to a new trial.

4. The first instruction given at the request of the defendant was proper, under the pleadings. If objectionable at all, it is on the ground that it does not go far enough, for the Court might have charged the jury that if they found that "the defendant and his grantors have been in the continued, adverse, uninterrupted possession, use and enjoyment of the waters" for five years preceding the commencement of the

action, they would be justified in presuming a grant to the defendant. The charge, as given, had relation to the probative facts upon which title by prescription depended, rather than to the ultimate fact of title. In that view it was not erroneous. (*Hammond v. Zehner*, 23 Barb. 473.) The second instruction was proper, for if the plaintiff had title to the water, and had not been injured by the acts of the defendant, the plaintiff had no cause of action against him.

The instructions concerning the adverse possession and prescription, given at the request of the plaintiff, were very favorable to it, and obviated whatever objection there might be to the defendant's instructions upon the same matter. The remaining points in the assignment of errors do not require a separate consideration.

Judgment affirmed.

SAWYER, J., concurring specially.

I concur in the judgment.

IN THE MATTER OF THE ESTATE OF CHARLES BOYD, DECEASED.

RULE IX OF THE SUPREME COURT.—Rule IX of the Supreme Court is in harmony with the three hundred and forty-sixth section of the Practice Act as amended in 1864.

TRANSCRIPT ON APPEAL.—Matter that does not tend in some degree to illustrate the points made on appeal should be omitted in a transcript.

CERTIFICATE TO TRANSCRIPT.—The object of the rule allowing attorneys to stipulate to the correctness of a transcript was to enable the attorney for the appellant, with the consent of the opposite attorney, to make up the record, and omit all useless and superfluous matter, and thereby save expense and facilitate the examination, and hasten the decision of causes.

SERVICE OF TRANSCRIPT.—The failure of the attorney for appellant to serve a copy of the transcript upon the attorney for the respondent before or at the time of filing, is not a ground for dismissing the appeal, if reasonable diligence is used, but the respondent may object to a hearing at the first term if service is not made in time for him to prepare for argument.

SAME.—When the appellant prints the transcript, service should be made before or at the time of filing, and when sent to the Clerk to be printed, the appellant should direct the Clerk to forward him copies as soon as printed for service.

STATEMENT ON APPEAL FROM PROBATE COURTS.—Section three hundred and

thirty-eight of the Practice Act, prescribing what statements on appeal shall contain, applies to statements made on appeal from the Probate Courts.

STATEMENT ON APPEAL FROM PROBATE COURT.—If a statement on appeal from the Probate Court does not state specifically the particular errors or grounds upon which the appellant intends to rely, and the appeal rests on the statement alone, the appeal will be dismissed on motion of the respondent.

APPEAL from the Probate Court, El Dorado County.

This was an appeal taken by F. A. Hornblower, Public Administrator of El Dorado County, from an order of the Probate Court of that county, appointing J. H. Potter administrator of the estate of James Boyd, deceased. The appeal was dismissed on motion of respondent's attorney. Appellant afterwards, and at the same term, moved the Court to set aside the order dismissing the appeal.

George E. Williams, for Appellant.

James Johnson, for Respondent.

By the Court, SAWYER, J.

This is a motion to set aside the order dismissing the appeal.

The first ground relied on by the respondent in his motion to dismiss the appeal was, that the transcript was certified by the Clerk without having been first submitted to the attorney of the respondent for his certificate. It is claimed that under Rule IX the transcript cannot be certified by the Clerk except in cases "where the parties do not agree." These words in the rule might, perhaps, as well have been omitted, but the restriction contended for was not contemplated; nor is such a limitation necessarily implied by the language of the rule. The rule and section three hundred and forty-six, as amended in 1864, were designed to be in harmony. A transcript is a copy of the record, or portions of the record, in the case, and there is little chance for disagreement between attorneys as to whether the record is correctly copied or not, unless it is wilful. It was thought that the printing of transcripts would greatly facilitate the examination and hasten the decisions of

causes, as well as lessen the liability of the Judges to overlook or misapprehend important facts in the case, and in other respects promote the administration of justice. As each attorney would have a copy, it would enable the counsel to more thoroughly prepare their cases for argument, and facilitate their references to the record. It was also anticipated that the expense would be the only objection that could be urged against printing. By omitting all matter that does not in any way serve to illustrate the points made on the appeal, and by allowing the appellant to make up the record himself, when the respondent is willing to join in the certificate, it was supposed that the expenses of the appeal would be less even than under the former system; thus every objection would be obviated and a great advantage secured. Hence the amendment of the Practice Act and the adoption of the rule. We are satisfied if parties conform in these particulars to the spirit of the amendments, especially by excluding all useless matter from the transcripts, that our highest expectations will be fully realized. We are gratified to find that transcripts are much less voluminous than formerly, but many records still contain much that might be advantageously omitted; for all matter that does not tend in some degree to illustrate the points litigated is an incumbrance and positively injurious. Many pages are often taken up with verifications of papers, acknowledgments of deeds, title of the cause repeated in every paper of the record, etc., when no point is made on them; in which case, where the record is certified by the attorneys, it would answer all purposes if in the place of the verification, acknowledgment, title, etc., the words "duly verified," "duly acknowledged," "title of the cause," etc., and the date of the document or filing were substituted.

We take this first occasion in which we are called upon to construe the rules, to call the attention of the bar and litigants to the reasons which influenced us in their adoption, in the hope that they will co-operate with us in carrying out the reform in the particulars indicated, and that thereby the expense of appeals may be lessened, and the business of this

Court and the correct, as well as speedy decision of causes greatly facilitated.

Another ground relied on by respondent for dismissing the appeal was, that the printed transcript was not served on his attorney till several days after it was filed, instead of before, or at the time of filing, as required by Rule IX. The failure to serve the transcript punctually is not a ground for dismissing the appeal, if reasonable diligence is used. But, if the appellant fails to serve the transcript, he will not be permitted to bring on the hearing at the first term, against the objection of the respondent made on that ground, when he has not had ample time after service of the transcript to prepare for the argument.

When, as in this instance, the transcript is sent from a distant part of the State to the Clerk to be printed, under the provisions of Rule X, it would perhaps not be practicable in all cases to return the copies in time to serve before filing the printed transcript, without unduly delaying the filing. But in such cases, the appellant should direct the Clerk to forward to him for service the necessary copies, as soon as printed. When the appellant himself has the transcript printed, there is no reason why the copies should not be served at or before the time of filing.

The next point relied on was, that the statement on appeal does not allege specifically the particular errors or grounds upon which appellant intends to rely. Section two hundred and ninety-nine of the Probate Act authorizes the appellant to annex a statement to the record, and prescribes the time within which it shall be prepared. But it does not define the term "statement," or prescribe what it shall contain. This term is a new one, and but recently introduced into our legal vocabulary. It is used in the Practice Act, and the requisites of the statement are there prescribed. Under section three hundred of the Probate Act, the provisions of the Practice Act, section three hundred and thirty-eight, prescribing what the statement shall contain, are made applicable to appeals from the Probate Court, as it is one of the sections of Chapter I, Title 9, and is not in conflict with any provision of the Probate Act.

The Probate Act authorizes a statement to be made, but we must look to the Practice Act, section three hundred and thirty-eight, to ascertain what the statement is. In the statement the appellant must "state specifically the particular errors or grounds upon which he intends to rely on the appeal." We have discussed at length, and construed this provision at the present term in the case of *Hutton v. Reed*, 25 Cal. 478, and we need not repeat the discussion here. In this case a statement was necessary to present the point relied on. As no statement was made of the grounds of the appeal, in pursuance of section three hundred and thirty-eight, as construed in *Hutton v. Reed*, and as the appeal rests on the statement (there being no judgment roll), this objection is fatal to the motion. It is unnecessary, therefore, to decide or discuss the other objections made. We have, however, looked into the record, and find that at the time of the appointment of Hornblower, administrator, the amendment to section fifty-two of the Probate Act was not in force, and the creditor was entitled to preference over the Public Administrator.

The motion to vacate the order dismissing the appeal is denied.

**LLOYD TEVIS v. JOHN S. ELLIS, JOHN WADE,
DAVID CALDERWOOD, CHARLES B. HARWOOD,
AND FRANCIS KATTENDORFF.**

WHO SHERIFF MAY NOT DISPOSSESS ON WRIT OF RESTITUTION.—A Sheriff has no authority by virtue of a writ of restitution to remove from the premises described in the writ persons who were not parties to the judgment on which the writ was issued, and did not enter under defendant in the judgment pending the suit.

INJUNCTION TO RESTRAIN SHERIFF.—One who is the owner of land, and in possession of the same, is not entitled to an injunction to restrain a Sheriff from executing a writ of restitution issued on a judgment rendered against third parties, to which judgment the plaintiff is a stranger.

Tomlinson v. Radio, 16 Cal. 202, disapproved of by CURREN, J.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Patterson, Wallace & Stow, for Appellant.

Plaintiff has had two trials, one at law and one in equity, in both of which he established his right against Wade, by establishing it against his grantor, Calderwood, from whom he took a conveyance *pendente lite*—and as we contend from the answer, after both judgments, and if after judgment, the judgment was notice to him. (1 Bailey's Eq. 208; 1 Ohio, 372; 2 Leading Cases in Eq. 155; Adams' Eq. 367.)

Under these circumstances plaintiff was [is] entitled to an injunction, and it should not have been dissolved.

There is an injunction called a perpetual injunction for quieting a man in the *possession* of his *estate*; this is generally upon a plain equitable title, or where one, two, or more verdicts have gone against a man. This injunction is to quiet the plaintiff and his heirs forever, and all claiming by, from, or under him, and it is very often granted and in many instances the justice of the Court calls for it. (*Bushnell v. Harford*, 4 John. Ch. 301.)

In *Dunn v. Vail*, 7 Martin, La. 436, (Vol. 3, N. S. 603,) an injunction was granted to restrain the sale of personal property (a slave) claimed by plaintiff, who was not a party to the execution.

Ford v. Rigby, 10 Cal. 449, was a similar case.

Wm. W. Chipman, for Respondents.

By the Court, SHAFER, J.

The complaint states that on the 20th of August, 1862, the plaintiff was, and is now, the owner in fee simple absolute of certain lots in the City of San Francisco, and that he is in the actual possession of the lots by his tenant.

That on the 20th of August, 1862, the plaintiff recovered

a judgment for the possession of the lots in an action brought by him against Daniel O'Connell.

That notice of *lis pendens* was filed in the Recorder's office, March 13, 1862, the day the action was commenced.

That pending the suit, O'Connell made a deed of the premises to Calderwood, defendant herein, who thereafter defended the suit; and that on the 16th day of April, 1863, by virtue of a writ of restitution issued on the aforesaid judgment, the plaintiff was put in possession of the lots, and Calderwood was ousted therefrom.

That on the 8th of December, 1862, it was adjudged and decreed in another suit, brought by Calderwood against Tevie and others, that he, Tevie, was the owner of the lots, and entitled to the possession thereof.

That the defendant Wade has no title except under Calderwood, acquired after the filing of the notice of *lis pendens* before named.

That the defendants herein, in pursuance of a combination between them "to obtain possession of said lots, and to compel the plaintiff to bring another action to obtain possession thereof, brought an action of ejectment in the Twelfth District Court, in the name of John Wade (one of the defendants herein,) against said Calderwood, C. B. Harwood and F. Kattendorff (also defendants herein,) to recover possession of said lands and premises."

That the complaint in said action was filed March 10, 1863, and judgment was entered therein by default June 5, 1863.

That a writ of restitution has been issued upon said judgment and is now in the hands of Ellis, Sheriff, etc., who threatens to execute said writ, and to remove plaintiff and his tenant from the possession of said premises, and will do so unless restrained by injunction.

That Calderwood, Harwood, and Kattendorff were, or some of them were, in possession of the lots, or some part thereof, at the date of the said judgment in *Wade v. Calderwood*. That the suit was brought by Wade at the instigation of Calderwood, and that all the defendants therein suffered judgment by default, for the fraudulent purpose of enabling Wade to obtain

possession of the premises and then to surrender them to Calderwood.

That Calderwood paid the expenses connected with the suit, and has been active in soliciting and urging Ellis, the Sheriff, to execute the writ of restitution and turn plaintiff and his tenant out of possession.

Wherefore the plaintiff prays judgment that "the defendants Wade and Ellis, and the successors in office of said Ellis, his deputies, and all other persons, be perpetually restrained and enjoined from executing said writ of restitution on said judgment of *Wade v. Calderwood et als.*, and from executing any other writ of restitution founded on said judgment, and that the plaintiff be adjudged to be the owner in fee simple of said lands and premises," etc.

A temporary injunction was granted on the complaint and affidavit, and was subsequently dissolved upon bill and answer, and from that order this appeal is taken.

It is insisted on the part of the appellant that the complaint may be sustained as a bill of peace, or on the ground of the two hundred and fifty-fourth section of the Practice Act, as a bill in equity to quiet the plaintiff's title.

For all the purposes of the present appeal, it is unnecessary to pass upon either of those questions; for, if the appellant's views concerning them should be accepted as correct, it by no means follows that he is entitled to the injunction prayed for in the complaint. A plaintiff must have good cause of action before he can claim an injunction, but he may not be entitled to an injunction though he has a good cause of action. The two things are not necessarily, nor are they even generally connected.

The bill prays that Sheriff Ellis and his successors may be restrained from executing a writ of restitution issued upon a judgment in ejectment, to which judgment neither the plaintiff nor his tenant is party or privy.

The plaintiff and his tenant are not only beyond the reach of the writ, but are unaffected by the judgment as an instrument of evidence, and therefore have nothing to fear from

either. Should the Sheriff interfere with the plaintiff's possession of the lots, the writ would not only fail as a justification, but would be pertinent to convict the Sheriff of an act of official oppression.

The plaintiff, then, having no relations to the writ, and the writ having no relations to him, the writ may be laid out of account; and the question remaining to be considered is whether the defendants' threat and purpose to commit a naked trespass upon the plaintiff's land, is a ground upon which he can claim an injunction to intercept them.

The case is not as strong in its facts as the case of *Tomlinson v. Rubio*, 16 Cal. 202. In that case the complaint alleged that the plaintiff's business would be broken up by the threatened trespass; but in the case at bar there is no such allegation. The two cases, though differing in certain particulars, are alike in this, that so far as the relief of present injunction is concerned, the relief is asked for on the ground of a threatened trespass.

Again, the prayer of the complaint is not that the Sheriff may be restrained from dispossessing the plaintiff of the lots under the writ or under color of the writ, but generally, that the Sheriff may be restrained from "executing the writ." But the complaint charges that the plaintiff is now in possession of the lots by his tenant; and assuming that allegation to be true, then Calderwood, Harwood and Kattendorff, against whom the writ runs, must be out of possession; and if out of possession, then there is no occasion for enjoining the execution of the process as to them, nor for restraining the Sheriff from putting Wade in; for under the writ the Sheriff cannot deliver possession to Wade unless he should find the lots vacant or in the occupation of Calderwood, or perhaps in possession of those claiming under him by titles acquired *pendente lite*.

The decision in *Ford v. Rigby*, 10 Cal. 449, and in *Daubenspeck v. Grear*, 18 Cal. 443, to which we have been referred, went upon the ground of irreparable injury—a ground that entirely fails here. The principal purpose of this action is to obtain a decree quieting the possession of the plaintiff and

suppressing future litigation at law by perpetual injunction. If it appeared by the complaint and affidavit that the defendants were doing or were threatening to do, or were procuring to be done, or were suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, or tending to the great and irreparable injury of the plaintiff, an injunction might go, staying the act in view of its consequences. But the complaint does not present a case of that impression. It charges, as a ground for the injunction, that the defendants intend to disseize the plaintiff of his lands—that and no more; and asks that they may be restrained from carrying their purpose into execution.

Should the defendants succeed in their design, the remedies at law would be speedy, adequate and complete.

The order dissolving the injunction is affirmed.

CURREY, J., concurring specially.

I concur in the affirmance of the order dissolving the injunction in this case, but at the same time, in order to guard against an implication to the contrary, I desire to express my disapproval of the decision made in *Tomlinson v. Rubio*, 16 Cal. 202, as applied to the facts of that case.

Mr. Justice RHODES expressed no opinion.

THE PEOPLE OF THE STATE OF CALIFORNIA v.
JOHN S. LOVE, J. E. GALLOWAY, WM. A. BOLIN-
GER, W. P. WEAKS, W. P. ELLIS, AND F. L. AUD.

SUIT ON COLLECTOR'S BOND.—The District Attorney of a county has the authority, of his own volition, with or without instructions from the Controller of State, County Court, or the Board of Supervisors of a county, to bring an action upon the official bond of the Tax Collector of a county.

SAME.—All the money due on a Tax Collector's bond may be recovered in a

People v. Love et al.

single action in the name of The People of the State, although part of the money thus due may belong to the county and part to the State.

PARTIES DEFENDANT.—It is no misjoinder of parties defendant for the plaintiff to sue one, or any number more than one, of all the persons severally liable upon the same obligation or instrument.

COMPLAINT.—A complaint in an action on the bond given by a Tax Collector as Collector of Taxes of Yuba County, is not ambiguous and uncertain because it does not aver that any of the money sued for was collected by the Tax Collector on account of foreign miners' licenses.

TAX COLLECTOR'S BOND.—An Act of the Legislature which makes the Sheriff of a county its Tax Collector, and also makes the Sheriff and his bondsmen responsible for the payment of all taxes collected by him, has the effect of making the bond of the Sheriff his bond as Tax Collector.

COMPLAINT.—The complaint in an action on a Tax Collector's bond need not aver that the taxes charged on the assessment roll were legally assessed.

TAX COLLECTOR'S BOND.—A Tax Collector's bond, in which the principal and sureties bind themselves in the sum of fifty thousand dollars, "to be paid to the State of California in the following manner and proportion," followed by a specification of the several amounts for which each surety respectively binds himself, the aggregate amounting to the sum of fifty thousand dollars, without any specification of the amount for which the principal is bound, is valid, both against the principal and his sureties.

JOINT AND SEVERAL BOND.—A bond running thus: "for which sums respectively, unto the said State of California, in the manner and in the proportions hereinbefore set forth, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents," is a joint and several bond.

FORM OF JUDGMENT ON OFFICIAL BOND.—A judgment rendered in an action against the sureties on an official bond, who sign for different amounts respectively, may be entered up against each surety for the amount for which he is liable on the bond, and all the costs, with a direction that plaintiff have execution on the judgment, but that no more shall be collected than the sum (mentioning the same) found to be due from the principal.

APPEAL from the District Court, Tenth Judicial District, Yuba County.

The judgment in this case, after reciting the amount found due from the principal, which was thirty-one thousand and forty-eight dollars, reads as follows:

"It is, therefore, by the Court ordered and adjudged, that the plaintiff in this action have judgment against the said J. E. Galloway, and judgment is hereby ordered in favor of the plaintiff, against the said Galloway in this action, for the sum of fifteen thousand dollars, (\$15,000,) and all the plaintiff's costs in this behalf expended, taxed at \$101.45."

Separate judgments, in same form, following each other,

People v. Love et al.

were rendered against each surety for the amount for which he was liable on the bond.

The judgments were followed by the following direction:

"And it is further ordered and adjudged, that the plaintiff have execution on the above judgments, but that no more shall be collected thereon than the aforesaid sum of \$31,048, with accruing interest, and the costs of suit, and accruing costs."

John S. Love was the principal on the bond, but was not served with process. The sureties alone appeared and defended. Bolinger and Ellis alone appealed.

The other facts are stated in the opinion of the Court.

Chas. E. Filkins, for Appellants.

The Court below erred in overruling demurrer of defendants upon the first and second points. (*People v. Lattimore*, 19 Cal. 365; *Wolverton v. Commonwealth*, 7 Sergt. & Rawle, 273; *Montgomery v. Commonwealth*, 1 Monroe, Ky. 197; Practice Act, Secs. 4 and 12.)

The Court erred in overruling the fifth point in the demurrer. (*Whitfield v. Woodbridge*, 28d Miss., 1st Cushman, 183; *Evans v. State*, 2d Blackford, 388.)

The bond sued upon is not a bond required by law; is voluntary and not binding upon the sureties, and the Court erred in overruling the sixth point in the demurrer. (*State v. Bartlett*, 30th Miss., 1st George, 624; Statutes of 1851, page 190; Act of April 20th, 1851; Act of May 1st, 1851, pp. 153 and 158, Sec. 1; Statutes of 1854, p. 110, Sec. 92; Statutes of 1855, p. 164; *Stevens et al. v. Ira Hays et al.*, 6th Cushing, 229; *People v. Cabaness*, 20 Cal. 525.)

The Court erred in entering judgment against the sureties without proceeding to judgment against the principal; there being no obligation on the part of the principal. (*People v. Hartley*, 21 Cal. 585; *Sacramento v. Dunlap*, 14 Cal. 491.)

George Rowe, and J. O. Goodwin, for Respondent.

By the Court, SANDERSON, C. J.

This is an action brought by the District Attorney of Yuba County, in the name of The People of the State of California, upon the official bond of the Tax Collector of that county to recover a certain amount of taxes, part belonging to the State and part to the county, alleged to have been collected by the Tax Collector and not paid over by him to the County Treasurer, as required by law. The defendants demurred to the complaint upon several grounds, which will be noticed in their order.

1. The objection to the effect that this action should have been brought by the Attorney-General instead of the District Attorney, is not well taken. The thirty-sixth section of the Revenue Act of the 17th of May, 1861, (Statutes of 1861, p. 431,) provides that: "If any Tax Collector shall refuse for a period of five days, or wilfully neglect to make the payments and settlements with the Treasurer and Auditor of his county, as in this Act specified, he and his sureties shall be held liable to pay the full amount of taxes charged upon the assessment roll; and the District Attorney, of his own volition, or on being instructed to do so by the Controller of State, or by the County Court or Board of Supervisors of the county, shall cause suit to be brought against such Tax Collector and his sureties for the full amount due on the Auditor's books. And if any such suit is commenced, no credit or allowance whatever shall be made to such refusing or neglecting Tax Collector for the delinquent taxes outstanding." Under this section there can be no question but that the District Attorney had full power and authority to bring this action. The terms of the Act are plain and explicit, leaving no room for construction. Upon the happening of the contingency named at the commencement of the section, it is imperatively made his duty to bring the suit "of his own volition." Whether the money sued for may belong to the State or county, or part to the former and part to the latter, or whether one suit is sufficient, or separate suits are necessary where the money belongs in

part to the State and in part to the county, is of no moment so far as the question of power is concerned, for, in either event, the suit or suits are to be brought by the District Attorney, and he may bring them with or without instructions to that effect.

2. The second and fourth grounds of demurrer are to the effect that the money or taxes sued for, being in part due to the State and in part due to the county, cannot be recovered in a single action, in the name of The People of the State, and that separate suits are necessary — one in behalf of the State and the other in behalf of the county.

In considering this question, counsel for appellants turn aside from the statute, and argue from the principles of the common law, for the purpose of establishing the alleged misjoinder. But, in our judgment, the question finds a ready solution in the provisions of the Revenue Act, and no resort to common law principles is made necessary. The Tax Collector does not report to or account with any State officer for the taxes collected by him. It is his duty, upon receiving the duplicate assessment roll, to collect the taxes therein charged against the taxpayers of his county; and it is his duty, on the first Monday of each month, to pay to the County Treasurer all money in his hands belonging to or collected for the use of the State or county, and take his receipt therefor, and on the same day deliver the same, together with a true and correct account, under oath, of all his transactions since his last settlement to the County Auditor; and on the first Monday in December of each year it is made his duty to attend at the County Auditor's office, with his duplicate assessment roll, and make with the County Auditor a final settlement touching all the taxes charged against him on account of such assessment roll. If he fails to do all this he and his sureties become liable, upon his official bond, to pay the full amount of all taxes charged against him on account of said assessment roll, without any credit for outstanding delinquent taxes — said amount to be recovered by suit upon his bond. Thus the Tax Collector neither accounts to nor pays over any money to any

State officer, nor has he any duty to perform in regard to the apportionment of the money collected by him as between the State and county. His account is kept with the county, and with her he deals and settles. His whole duty is performed when he has collected the money charged in the assessment roll and paid the same to the County Treasurer and made his settlements with the County Auditor. There his duty and liability, and that of his sureties, cease. To whom the money belongs is no concern of his or of his sureties. So far as his duty and liability and that of his sureties are concerned, the money is but one fund, to be collected and paid over to a single individual. Its distribution thereafter is controlled in no way by him or them; nor is he or they in any manner responsible therefor. By their bond he and his sureties have bound themselves to the obligee in the bond to the effect that he will collect and pay over all the money charged in the assessment roll to the County Treasurer, or in default thereof he shall make good the deficit. So far as his duty, and his and their liability is concerned, the money belongs to the obligee named in the bond, and they have no legal right or license to look beyond the bond for the purpose of seeing where the money goes, nor need they be at all anxious whether the right party gets it. That duty the law has not imposed upon them. When they have watched its course until it has reached the hands of the County Treasurer their supervision is no further required. As to them the money constitutes but one fund, to wit: the public revenue, and belongs to but one owner, to wit: the public, and has but one custodian, to wit: the County Treasurer. When there is a defalcation, such defalcation is measured by the difference between the total amount charged against the Collector in the Auditor's books, and the amount paid to the Treasurer by him. For the purpose of a suit upon his bond, such deficit constitutes but one sum, and may be declared for without designating the State's or county's portion. The statute manifestly contemplates but one suit, to be brought by the District Attorney in the name of the obligee named in the bond. It speaks in the

singular number, and provides, without limitation, that the full amount found due on the Auditor's books may be recovered in that suit. Nor does this impose any hardship upon the Tax Collector or his sureties; on the contrary, it enables them to determine in one suit what otherwise would require two. Nor is there any technical difficulty, as we have already seen, in determining the whole controversy in one action. Where this can be done, the policy of the law requires that it should be done. It follows that the record presents no case of misjoinder.

3. The next ground of demurrer is to the effect that there is a misjoinder of parties defendant, because J. G. Eshom, one of the sureties upon the bond, is not made a party.

The bond upon which the suit is brought, as will more fully appear hereafter, is joint and several. The fifteenth section of the Practice Act provides that "persons severally liable upon the same obligation or instrument * * * ~~may~~ all, or any of them, be included in the same action, at the option of the plaintiff." This section changes the common law rule, that one or all, and not any intermediate number, may be sued. Under this section a plaintiff may, at his election, sue one or more, or all the persons severally liable upon the same obligation or instrument.

4. It is next claimed that the complaint is ambiguous and uncertain because it does not designate what portion, if any, of the money sued for was collected by the Tax Collector on account of foreign miners' licenses, for which amount, if any, the sureties upon the bond in suit were not liable.

There is no averment in the complaint showing that any of the money sued for was collected by the Tax Collector on account of foreign miners' licenses, nor is there any averment from which it can be inferred that any money realized from that source constitutes a part of the amount for which judgment is asked. It is true that under the law relating to the Tax Collector of Yuba County (Statutes of 1855, p. 164) he is required to give the same bonds which were theretofore required of the Sheriff in his capacity of *ex officio* Tax Col-

lector. Of the Sheriff (as will hereafter more fully appear) the law required two bonds—one for fifty thousand dollars as Collector of Taxes, and one for fifteen thousand dollars as Collector of Foreign Miners' Licenses. The former bond is the one sued on, and upon that bond neither the Tax Collector nor his sureties could be made liable for any defalcation for money collected on account of foreign miners' licenses. In suing upon this bond the plaintiff alleges in substance that the Tax Collector had collected a certain amount of money belonging to the State and county which he failed and refused to pay over according to law, and that in consequence of such failure he and his sureties have become liable for that amount upon the bond in suit. This was sufficient in our judgment, and it was not necessary to insert a negative allegation to the effect that no part of the money sued for was derived from foreign miners' licenses. The particular source or sources from which the Tax Collector obtained the money was matter of proof rather than allegation. In any event it is clear that there is no such ambiguity in the complaint as would justify us in disturbing the judgment on that ground. No recovery was had on account of money derived from foreign miners' licenses, and we do not think the defendants have been in any manner prejudiced by any real or supposed ambiguity in the complaint.

5. It is next claimed that the complaint does not state facts sufficient to constitute a cause of action; first, because the bond sued on is not a bond required by law, but is a mere voluntary bond, and therefore not binding upon the defendants; second, because there is no averment that the taxes were legally assessed by the proper officers. These positions the learned counsel for appellant has also failed, in our judgment, to maintain.

Prior to the first day of May, 1851, taxes were collected by the County Treasurer. From that time until the office of Tax Collector was created in Yuba County (April 27, 1855) the taxes were collected by the Sheriff. By the Act of the 27th of April, 1851, (Compiled Laws, 711) the Sheriff of Yuba County was required to give a bond in the sum of fifty thou-

sand dollars for the faithful performance of the duties pertaining to his office as Sheriff. By the Act of the 30th of March, 1853, (Compiled Laws, 219) the Sheriff was required to give a bond in the sum of fifteen thousand dollars for the faithful performance of his duties as Collector of the foreign miners' license tax. By the Revenue Act of 1854, section ninety-two (Statutes of 1854, p. 110,) the Sheriff and his bondsmen were made responsible for the payment of all taxes collected by him. By the Act of 1855, (Statutes of 1855, p. 164,) separating the office of Tax Collector from that of Sheriff in Yuba County, the Tax Collector is required to give such bond or bonds as were then required by law to be given by the Sheriff as Tax Collector.

It is claimed by counsel for the appellants that under the statutes above cited the Sheriff was never required to give any bond as Tax Collector, except the bond for fifteen thousand dollars for the performance of his duty as Collector of the foreign miners' license tax, and hence that the Tax Collector is not required by law to give any bond except the bond for fifteen thousand dollars. Such is not the proper construction. By declaring that the Sheriff and his bondsmen should be responsible for all taxes collected by him, the Legislature in effect declared that his bond as Sheriff should be his bond as Tax Collector. The same individual was vested with two offices, but for the sake of convenience he was required to give but one bond. That bond pertained no more to one office than it did to the other, but pertained equally to both. It was his bond as Sheriff and his bond as Tax Collector, and when he gave it he gave it as Tax Collector as well as Sheriff. Such being the case, the law of 1855 requiring the Tax Collector to give the same bonds which had been previously required of the Sheriff made it obligatory upon him to give two bonds—one in the sum of fifty thousand dollars and the other in the sum of fifteen thousand dollars. Pursuant to this requirement of the statute the bond in suit was given, and the same, so far as the question under consideration is concerned, is binding and obligatory upon the principal and his sureties.

Nor do we think it was necessary to aver that the taxes charged upon the assessment roll were legally assessed. The statute provides that, upon the happening of the contingency named, the principal and his sureties shall be liable to pay the full amount of the taxes charged upon the assessment roll. Thus the assessment roll is made the measure of their liability, regardless of the fact as to whether the taxes there charged have been collected. It was the intention of the Legislature to relieve the State from the burden of proving the legality of the assessment, or the collection of the taxes, and make the Auditor's books the measure and the evidence of the liability. This is made more manifest by the clause which forbids any credit or allowance for delinquent taxes outstanding and uncollected. The sufficiency of the complaint is to be determined by a reference to the provisions of the statute under which the suit is brought, and not by a resort to the principles of the common law, to which our attention is invited by the counsel for the appellants. Tested by those provisions, the complaint is not, in our judgment, obnoxious to the objection under consideration.

6. It is next claimed that the principal, by reason of the peculiar phraseology of the bond, is not bound thereby, notwithstanding he has signed it, and that, therefore, his sureties are not.

The principal and his sureties all sign the bond and bind themselves in the sum of fifty thousand dollars, "to be paid to the State of California in the following manner and proportion;" then follows a specification of the several amounts for which each surety respectively binds himself, the aggregate amounting to the sum of fifty thousand dollars, without any specification as to the amount for which the principal is bound, and it is argued by counsel for the appellants that by reason of the absence of any specification as to the principal, he is not bound. By this process of reasoning the learned counsel for the appellant substitutes the exception for the rule. The specifications are limitations upon the general clause which precedes. Strike them from the bond and the principal and

sureties are all bound in the sum of fifty thousand dollars. Insert them and the liability of the sureties is reduced to the amounts respectively specified, but the principal, not being named in the exception, is wholly unaffected thereby and stands as before bound for the full amount of fifty thousand dollars.

7. It is next claimed that the bond in suit is a joint bond only and not joint and several, and upon that hypothesis, several other points are made, which, in view of the conclusion we have arrived at upon the first, it is unnecessary to notice in detail. The language which characterizes the liability of the obligors is as follows: "For which sums respectively, unto the said State of California, in the manner and in the proportion hereinbefore set forth, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents." If, by the use of words, a joint and several liability can be created, it would seem that it has been done in this instance. We certainly know of no words more apt to express that idea than those used. They have been long used for that purpose, and we are not aware that they have lost their force and vigor. In this connection our attention is called to the case of *Sacramento v. Dunlap*, 14 Cal. 421, and the case of *The People v. Hartley*, 21 Cal. 585. The first case, as reported, does not contain a copy of the bond sued on. In the opinion of the Court it is declared to be a joint, and not a joint and several bond; but as a copy of the bond is not given, that case throws no light upon the question under consideration. In *The People v. Hartley*, a copy of the bond was given, and the words "joint and several" were not used. The word "severally" was used, which the Court read as applying only to the various sums for which the sureties bound themselves, and not as giving legal character to their liability. The language used was less explicit than that found in the present case, and the conclusion to which the Court arrived in that case cannot be regarded as establishing a rule for the decision of this, where the language is too clear and precise to afford any room for construction.

People v. Garcia.

The objection to the form of the judgment is not well taken. It is in conformity with the rule of the common law, and we are not aware that that rule has been disturbed by statute.
Judgment affirmed.

THE PEOPLE v. JOSE GARCIA.

COUNTY WHERE INDICTMENT MAY BE FOUND.—Where a hired servant who is intrusted by his employer with property withdraws himself from his employer and goes away with the property with intent to steal the same and defraud his employer thereof, he may be indicted and tried for the offense in any county into which he takes the property and is found.

INDICTMENT.—An indictment against a servant for withdrawing himself from his employer and taking with him his employer's property, intrusted to him, with intent to steal the same and defraud his employer thereof, is sufficient, if it charge the offense in the language of the Act defining it, and set out fully the circumstances under which it was committed.

ADMISSION IN CRIMINAL CASE.—An admission of a fact made by a defendant's counsel for the purposes of the trial in a criminal case, in open Court and in the defendant's presence, and not objected to by him, and recorded by the Court, is presumed to be with the defendant's consent, and may be read in evidence against him on the trial.

CHARGE OF COURT IN CRIMINAL CASE.—If the record does not show that the charge of the Court below was oral, the Supreme Court will not presume that it was oral, but the presumption will be that it was in writing.

ORAL CHARGE TO JURY MAY BE WITHDRAWN.—If a portion of the charge of the Court to the jury was oral, and counsel for the defendant objected to it on that ground, the Court may withdraw the oral charge and direct the jury to disregard it, and reduce it to writing and give it as written.

APPEAL from the County Court, Tuolumne County.

The following is the indictment:

"José Gasseo is accused by the Grand Jury of Tuolumne County by this indictment of the crime of going away with the property of another, with intent to steal," etc., committed as follows: "That the said José Gasseo, at the County of Mariposa, on the 24th day of August, 1863, and previous thereto, was the hired servant, as laborer and farm servant, of Edward C. Bell, his master and employer; and that as such hired servant he was intrusted by his master and employer with one *bayo* coyote horse, of the value of eighty dollars,

and two saddles, of the value of fifteen dollars each; and that the said José Gasseo, being so intrusted with the horse and saddles aforesaid, the same being the property of the said Edward C. Bell, his employer as aforesaid, did withdraw himself from his master and employer aforesaid, and go away with the property aforesaid, with intent to steal the same, and defraud his master and employer, Edward C. Bell, thereof, contrary to the trust and confidence in him reposed by his master and employer aforesaid; and that the said José Gasseo did bring the said property into the County of Tuolumne. All of which is contrary to the form of the statute, and against the peace of the people of the State of California."

Defendant, when arraigned, gave his true name as José Garcia.

Defendant was convicted, and appealed.

The other facts are stated in the opinion of the Court.

James W. Coffroth, for Appellant.

Defendant's counsel had no power to bind by his admissions the defendant. The transcript shows that defendant was addressed through an interpreter. His assent to or knowledge of the admission is not shown by the record. By our statutes defendant's attorney could not plead *guilty* for him; *ergo*, how could the attorney admit a fact establishing defendant's guilt? (Wood's Digest, 293, sec. 301; 4 Cal. 238.)

Our Federal Constitution says that a party charged with crime shall be confronted on the trial with the witnesses against him. (U. S. Const., Art. VI—amendments; Greenleaf on Evidence, Vol. 3, sec. 39.) The only exception to this rule is in cases of *dying declarations*. (*People v. Glenn*, 6 Cal.)

J. G. McCullough, Attorney-General, for Respondent.

The admission would be good for defendant—why not for the State? (*People v. Diaz*, 6 Cal. 248; *People v. Green*, 15 Cal. 512.)

People v. Garcia.

They were competent testimony—were forced on the State—beneficial to defendant—voluntary on his part. They were solemn admissions in open Court; made on the trial, and taken as part of the proofs of the case. The defendant may waive a constitutional privilege, except only in capital cases perhaps. (1 Whar. Crim. Law, sec. 591, e.) But these cases go upon the theory of benefit to the prisoner—that when asked he may fear injury to his cause unless he consent to a waiver, and he will not be permitted to consent his life away. Here, the defendant actually forced the State to accept his admissions. Besides, these cases only go to the waiver of a constitutional privilege, and not to the admission of facts, which the State otherwise would be bound to prove. The defendant or *his counsel* may admit such a fact in open Court at the trial. (8 Greenlf. on Evidence, sec. 39; *Regina v. Thornhill*, 8 Car. & Payne, 575; *People v. Hobson*, 17 Cal. 425–431; *People v. Bruzzo*, 24 Cal. 41.)

By the Court, SAWYER, J..

There was no error in overruling the demurrer to the indictment. The property is alleged to have been brought into Tuolumne County, and the offense was indictable in that county. (Wood's Digest, 277, secs. 87–92.)

The offense is charged in the language of the Act defining it, (Wood's Digest, 339, sec. 70,) and the circumstances under which it was committed are fully set out. This has repeatedly been held to be sufficient under our statute, without using the word "feloniously." (6 Cal. 487; 7 Cal. 403; 10 Cal. 309; 14 Cal. 30; 19 Cal. 601.)

On the 20th of January the District Attorney filed an affidavit, stating that a witness for the prosecution, who had been subpoenaed, was absent, and the facts which he expected to prove by him, and asked a postponement of the trial. The prisoner's counsel opposed the postponement, and offered to admit the facts expected to be proved by the absent witness, and thereupon made, and permitted to be entered upon the

People v. Garcia.

records of the Court, an admission "that the property mentioned in the indictment was intrusted to the defendant by Edward C. Bell, to take to the ranch in Merced County. * * And that the value thereof is as set forth in the indictment." Upon the entry of this admission upon the records, the Court denied the motion to postpone the trial.

On the 21st the case was called for trial. Again the defendant's attorney, in the presence of the defendant in open Court, admitted the same facts, and consented that the admission be again entered on the records of the Court, which was accordingly done.

After examining several witnesses on the part of the prosecution whose testimony tended to prove the same and other facts, the District Attorney, without objection by the defendant, read to the jury from the records of the Court the admissions thus made and entered, and rested.

After the District Attorney had made his opening argument to the jury, and during the argument of defendant's counsel, the counsel for defendant, for the first time, asked the Court to strike from the testimony the admissions read in evidence as before stated, on the ground that the testimony was illegal and incompetent. The Court refused to strike out, but no exception was taken to the ruling.

The defendant's counsel, at the close of the argument, asked the Court, substantially, to charge the jury to disregard the said admissions read in evidence, which the Court refused to do, but no exception was taken to the refusal. The admission of this evidence, and the several subsequent rulings in regard to it, are assigned as error. The admission was a solemn admission of record of a fact at the commencement of the trial, and for the purposes of the trial, by the prisoner's counsel in open Court, in his presence, and we must presume with his consent. And the admission was on the trial read from the record, in pursuance of the purpose for which the admission and record were made, without any objection on the part of the prisoner. An admission of a fact made at the trial in open Court by the prisoner or his counsel may be properly considered by the

Burson v. Cowles.

jury, (3 Greenl. Ev., Sec. 39; *People v. Hobson*, 17 Cal. 425-431,) and such we consider this to be. No exception was taken to the subsequent rulings in regard to it.

We cannot presume that the charge was oral. The presumption is that the action of the Court was in pursuance of the law, and that the charge was in writing. (*People v. Chung Lit*, 17 Cal. 322.) If the Court gave the charge orally, the fact should appear in the record. The strong implication from the record is that the charge of the Court was in writing. For it appears that the Court at first gave a written charge, asked by the District Attorney, with an oral explanation, to which defendant excepted because the explanation was not in writing, whereupon the Court withdrew the instruction and oral explanation, reduced the same to writing, and read them to the jury as written, directing the jury to disregard them as first given. It does not appear that any oral charge was given other than as just stated. If there had been, the Court, after what occurred, would undoubtedly have corrected the error. We think it was competent for the Court to correct the error at the time, in the manner shown by the record.

No other point requires notice.

Judgment affirmed.

JAMES N. BURSON ON HIS OWN BEHALF, AS WELL AS ON BEHALF OF THE PEOPLE OF THE STATE OF CALIFORNIA v. SAMUEL COWLES, COUNTY JUDGE OF THE CITY AND COUNTY OF SAN FRANCISCO.

APPEAL TO COUNTY COURT.—An appeal to the County Court lies from a judgment rendered in a Justice's Court in an action brought to recover the penalty for an overcharge, pursuant to the provisions of the Act of the 14th of April, 1863, concerning street railroads in this State.

CIVIL ACTIONS.—Where the Legislature creates a right of action, and makes no special provisions for its enforcement other than by directing that a civil action may be brought for that purpose, such action may be commenced and prosecuted pursuant to the provisions of the general law regulating proceedings in civil cases, and parties to such actions may take all steps authorized thereby.

Burson v. Cowles.

PETITION to the Supreme Court for a writ of prohibition to the County Judge of the City and County of San Francisco.

Plaintiff recovered judgment in the Justice's Court in San Francisco against the Omnibus Railroad Company for the sum of two hundred dollars, for having charged him six and one quarter cents each for four tickets for passage, and defendant appealed to the County Court. In the County Court plaintiff moved that the appeal be dismissed, which motion was denied. Plaintiff then applied to the Supreme Court for a writ of prohibition commanding the County Judge to desist from all further proceedings in the case.

J. A. Fletcher, for Petitioner.

All proceedings under a special Act must be had by authority of the Act itself. (*Dorsey v. Barry*, 24 Cal. 449; *Cosgrave v. Howland*, 24 Cal. 457.)

Wm. H. L. Barnes, for Defendant.

The amendment of 1854, which is the law now in force, provides that:

"Any party dissatisfied with a judgment rendered in a Justice's Court, may appeal therefrom to the County Court of the county at any time within thirty days after the rendition of the judgment." (Prac. Act, Sec. 624.)

And the Judiciary Act, passed May 19, 1853, at section forty-three, provides:

"The County Court shall have jurisdiction to hear and determine *all civil causes* appealed thereto from a Justice's, Mayor's, or Recorder's Court, in the county."

Certainly no legislation was necessary in the passage of this "Act concerning street railroads," in order to give the right of appeal from a judgment of a Justice's Court in a civil action. It had already been given in the broadest terms in all actions.

By the Court, SANDERSON, C. J.

This is an application for a writ of prohibition to be directed to the Hon. Samuel Cowles, County Judge of the City and County of San Francisco, commanding him to desist from all further proceedings in a certain suit taken to his Court by appeal from a Justice's Court, on the ground that no appeal is given by law in the action in question. The action referred to was brought by Burson to recover of the Omnibus Railroad Company the sum of two hundred dollars for alleged overcharges, pursuant to the provisions of the Act of the 14th of April, 1863, concerning street railroads in this State. (Statutes 1863, p. 296.) The only question involved in the case is as to whether an appeal in such an action is allowed, from the judgment of the Justice's Court to the County Court.

It is claimed on the part of the petitioner that the judgment of the Justice's Court is a final judgment, from which there is no appeal; and in support of this proposition it is argued that the action authorized by the provisions of the Act in question is not an ordinary civil action, in which the method of procedure is found in the Practice Act, but, on the contrary, that it is a proceeding in its character summary and governed solely by the provisions of the statute creating it, and hence, no appeal being given in terms, the right to an appeal does not exist.

The Act in question provides a penalty for overcharging in the sum of two hundred dollars, and that it may be recovered in a civil action in any Justice's Court in the County, or in the city and county, as the case may be, in which the street railroad is situated. Beyond the words "*civil action*" the Act contains no terms descriptive of the nature and character of the proceeding authorized by its provisions. The words "*civil action*" are not restricted or qualified in any manner. No mode of issuing or serving summons is prescribed. No provision for a trial or the other various steps incident to an action is made. On the contrary, the Act is entirely silent upon the mere mode of procedure except in so far as the same is im-

Mitchell v. Hockett et al.

ported by the term "civil action;" and we fail to find in the Act any provision which at all distinguishes the "civil action" therein mentioned from any other civil action. The clause making the plaintiff in the action a competent witness, in his own behalf, in no respect can be said to affect the mode of procedure; but if it did, it would not distinguish it from the mode adopted in other civil actions, for the same provision existed in the Practice Act at the time the Act in question became law. The same is true of the clause which directs the distribution and payment of the judgment when collected. (Section 633 of the Practice Act.)

Thus the Act merely creates a cause of action to be enforced in a "civil action" in a Justice's Court. In this State there is but one form of civil action, and but one mode of procedure therein, which is prescribed by the Practice Act. By the six hundred and twenty-fourth section of that Act, "any party dissatisfied with a judgment rendered in a Justice's Court may appeal therefrom to the County Court of the county at any time within thirty days after the rendition of the judgment."

Where the Legislature creates a right of action and makes no special provisions for its enforcement, other than by directing that a civil action may be brought for that purpose, such action may be commenced and prosecuted pursuant to the provisions of the general law regulating proceedings in civil cases, and parties to such actions may take any and all steps authorized thereby.

The writ is denied.

JAMES MITCHELL v. JOHN B. HOCKETT AND JAMES J. DICKENSON.

EVIDENCE OF SATISFACTION OF EXECUTION.—The return of a Sheriff, indorsed on an execution placed in his hands for collection, that the execution is satisfied by promissory notes received for the amount due on it, is not evidence of the satisfaction of the judgment on which it was issued, nor can it be admitted in evidence as tending to prove a satisfaction of the same.

SATISFACTION OF EXECUTION BY NOTES.—The plaintiff in an execution may

accept of promissory notes by a special agreement, as an absolute payment of the same, but the agreement must be proved by testimony other than the Sheriff's certificate.

SALE OF A JUDGMENT.—In the purchase of a judgment the rule of *coest emptor* applies, so far as third parties are concerned, in the same manner as in the purchase of any other personal property. If the assignor has no title, the purchaser will take none, whether he have notice of a former sale or not.

SEAL.—It is not necessary that the assignment of a judgment should be under seal.

SATISFACTION OF JUDGMENT.—If the defendant in a judgment delivers to the plaintiff therein a promissory note of third parties in satisfaction of the same, which is void because fraudulently obtained by defendant from the payors, it is not necessary for the plaintiff to return the note before enforcing his judgment by execution.

SPECIAL ISSUES WITHDRAWN FROM A JURY.—Where special issues are submitted to a jury, and they announce that they cannot agree upon the special issues, but can agree upon a general verdict, and by consent of counsel on both sides the special issues are withdrawn and a general verdict received by the Court, no error is committed.

APPEAL from the District Court, Thirteenth Judicial District, Stanislaus County.

In 1854, Mitchell, the plaintiff, recovered a judgment against Jacob H. Gardenhire, and on the same day assigned it to Terry & Perley by an assignment in writing, which was deposited with the Clerk of the Court. In 1856 Mitchell took out execution on the judgment, and placed the same in the hands of Kirk, the Sheriff, who levied on property claimed by a son of Gardenhire. Mitchell and four others indemnified the Sheriff, and he sold the property. Gardenhire's son sued the Sheriff and Hockett and Dickenson, appellants here, who were his official bondsman, for taking the property, and recovered judgment. The judgment was collected from Hockett and Dickenson, and to protect them the Sheriff assigned to them the indemnifying bond which he had received from Mitchell and others. H. & D. then sued Mitchell on the indemnifying bond, and recovered judgment for six hundred and seventy dollars and thirty-two cents costs, and issued execution on the same, and the Sheriff levied on Mitchell's property. Mitchell then issued a second execution on his judgment against Gardenhire, and caused a levy to be made on property, when Gardenhire's son and one Martin gave Mitchell their note for the amount

due on the judgment against Gardenhire, and the levy was released. Martin and young Gardenhire claimed that Mitchell agreed to assign them the judgment in consideration of the note. Mitchell assigned the note to Hockett and Dickenson, and the Sheriff released the property levied on, and returned their execution against Mitchell with the indorsement mentioned in the opinion of the Court. Hockett and Dickenson sued young Gardenhire and Martin on the note, and they interposed a defense that Mitchell did not own the judgment for which it was given, and had obtained it by fraud, etc., and defeated H. & D. in the suit. Hockett and Dickenson then caused another execution to be issued on their judgment against Mitchell, and the Sheriff levied on Mitchell's property. Mitchell then commenced the present action to enjoin the sale of his property, and further proceedings on the judgment, on the ground that the judgment had been paid.

The third instruction referred to in the opinion of the Court was as follows:

"That if the jury believe from the evidence that Hockett and Dickenson received the note of Martin and Gardenhire from Mitchell in satisfaction of their judgment against him, then that they had no right again to enforce execution on said judgment until they had returned said note to Mitchell; or, in other words, they must place Mitchell in the same position he was in at the time they received the note."

Plaintiff recovered judgment in the Court below, and defendants appealed.

The other facts are stated in the opinion of the Court.

L. Quint, for Appellants.

The Sheriff had no authority to discharge or satisfy the execution, much less the judgment, by returning it satisfied, unless he proceeded and executed it in due process of law.

The taking of a negotiable promissory note, receiving it as payment, and returning the execution satisfied, would not operate as a discharge of the execution, even though the defendant pay subsequently such note to third parties to whom

it had been assigned. (*Bank of Orange County v. Wakeman*, 7 Cow. 46; *Hart v. Waterhouse*, 1 Mass. 433.)

Taking the promissory note of a third party, or even of the party himself, for a pre-existing debt, does not extinguish the debt, unless it be so expressly stipulated. (*Ramsdell v. Percival*, 12 Pick. 126; *Wilkins v. Hill*, 8 Ib. 522; *Pomeroy v. Rime*, 16 Ib. 22; *Greenwood v. Curtes*, 4 Mass. 93; *Thompson v. Bills*, 4 Ib. 192-194; *Cole v. Sackett*, 1 Hall, 516; *Griffith v. Grogan et al.*, 12 Cal. 317.)

A judgment with reference to its assignable qualities is a *chose inaction*, and may be assigned by an instrument in writing, without being under seal; or even a parol assignment is good. (*Ford v. Stuart*, 19 Johns. 342; *Allen v. Holden*, 9 Mass. 133; *Brown v. The P. D. Co.*, 11 Mass. 152; *Dunn v. Snell et als.*, 15 Mass. 481; *Crandall v. Blen*, 13 Cal. 15.)

S. Heydenfeldt, and *Dwinelle & Shafter*, for Respondent.

The second alleged error is in allowing improper testimony, to wit: "the return of the Sheriff upon the execution marked 'C' to show satisfaction of the same."

Respondent upon this point does not contest the soundness of the principles and authorities cited in appellant's brief, but holds them totally inapplicable to the facts in this case.

The plaintiff in an execution certainly has the moral and legal right to accept satisfaction of the same in any substance and in any manner he may deem proper, and his direction to the Sheriff to satisfy the execution must be controlling and conclusive.

If any doubt can be suggested as to the agency of the Sheriff to make the arrangement for the appellants, then it is insisted that their acts in receiving the note and bringing suit upon it was a ratification of the act; they could not accept of the benefit of a part of the arrangement without submitting to the entire transaction; and having endeavored to avail themselves of what was valuable, they must also submit to what is onerous, especially as the latter was the consideration for the former.

Mitchell v. Hockett et al.

By the Court, SAWYER, J.

Plaintiff introduced in evidence an execution in the case of *Hockett et al v. Mitchell*, and the return of the Sheriff indorsed thereon in the words following: "I return this execution satisfied by two notes of hand—one for ninety-one dollars and seventy-two cents, and the other, six hundred and fifty dollars, making in all seven hundred and forty-one dollars and seventy-two cents—and the above property is released. July 20, 1857."

The object was to prove the satisfaction of the judgment—the main issue in the case. The defendants objected to the introduction of the return, on the ground that it was improper evidence to prove satisfaction of the judgment. The objection was overruled and defendants excepted.

If this return contained any element entitled to be considered, which tended to prove satisfaction of the judgment, it was admissible. But we think it does not. The officer, by virtue of his office, had no authority to accept notes in satisfaction of the judgment, and no authority to certify any other act than one performed in the proper exercise of his powers. The judgment creditor may, undoubtedly, by an express agreement, receive a promissory note in satisfaction of a judgment, or any other antecedent debt. But it must be by an express agreement. "It is a rule well settled * * * that taking a note, either of a debtor or of a third person, for a pre-existing debt, is no payment, unless it be expressly agreed to take the note in payment, and run the risk of its being paid; or unless the creditor parts with the note, or is guilty of *laches* in not presenting it for payment in due time. * * * It only postpones the time of payment of the old debt until a default be made in the payment of the note." (*Toby v. Barlow*, 5 John. 68; *Griffith v. Grogan*, 12 Cal. 322.)

If there was any satisfaction of the judgment and execution, it was by an acceptance of the notes referred to in the return by the plaintiff in the execution, under a special agreement to take the paper as absolute payment; and it was necessary to

prove such acceptance and agreement by testimony other than the Sheriff's certificate. The Sheriff's certificate upon that point was no more entitled to be considered than the certificate of any other person. His return that it was satisfied in the particular manner specified, in effect amounts to nothing more, than a certificate that the plaintiff received the notes under a special agreement to accept them as an absolute payment and extinguishment of the debt, and in satisfaction of the judgment. The certificate being incompetent to prove these facts, it was error to admit it in evidence. As it was admitted, the jury must be presumed to have considered and given it weight in making up their verdict.

The defendants allege, and introduce testimony tending to prove, that the notes referred to in the Sheriff's return (being non-negotiable notes) were obtained by plaintiff by fraud practiced by him upon the makers, Martin and Gardenhire; that the consideration of the notes was the assignment to the makers of a judgment represented by plaintiff to be then held by him against J. H. Gardenhire — the father of one of the makers — when, in fact, the said plaintiff had, before the making of said notes, assigned said judgment to other parties; that at the time of the assignment to Martin and Gardenhire he did not own the judgment; and that there was, therefore, no consideration for the notes, and they were fraudulently obtained. There was testimony, also, tending to show that the first assignment of said judgment was made by a written instrument under seal, and filed among the records of the case on the day of its recovery. But it was claimed by plaintiff, that the testimony was insufficient to show that the instrument had a seal.

With reference to this testimony the Court, at the request of the plaintiff, and under objection and exception on the part of the defendants, gave the following instruction: "That an assignment of a judgment entered in a Court of record, in order to give notice to third parties, must be under seal and filed and entered in the Clerk's office where the judgment was entered. That if they believed from the evidence that no

such assignment was made by plaintiff, then that the plaintiff could enforce the collection of such judgment by execution, and that any settlement which he might make would be a full discharge of the defendants." This instruction, if it contains any principle proper to be stated to the jury, is so ambiguous that it must necessarily have confused and misled them. The first part of the instruction, as to "notice to third parties," seems to refer to the assignees of the judgment under the assignment made in consideration of the notes. Treating them as third parties purchasing the judgment, we are not aware of any rule of law that makes any notice, actual or constructive, necessary in order to prevent them from taking title by an assignment. If they buy a judgment, the rule of *caveat emptor* — so far as any interest acquired as against third parties is concerned — applies to them in the same manner as in the purchase of any other personal property. If the assignor has no title they will take none, whether they have notice or not. The latter part of the instruction referring to "any settlement" which "would be a full discharge of the defendants," must refer to some party different from the "third parties" mentioned in the first part of the instruction. If the judgment debtor should *pay* to his judgment creditor the amount of his judgment before notice of the assignment, he would be discharged. If it was intended to instruct as to any principle of law applicable to these different classes of parties, the instructions should have been presented in distinct propositions, and in such a manner that the jury could clearly comprehend the scope and purpose of the instructions, and be able to apply them intelligently to the testimony.

It is not necessary that an assignment of a judgment should be made under seal. (*Ford v. Stuart*, 19 John. R. 342.)

If the jury attempted to make anything at all out of this instruction, or attempted to apply it to the testimony, they must almost necessarily have been misled, and it was the leading instruction in the case.

The third instruction given at the request of the plaintiff, if correct in other respects, ignores the question of fraud in

Lay v. Neville.

obtaining the note and in inducing defendants to accept it. If the note was a nullity on account of any fraud perpetrated by Mitchell, as there is testimony tending to show, it would not be necessary for defendants to return it before enforcing their judgment by execution. Conceding such necessity when the transaction was made in good faith, still the acceptance of the note under such circumstances as is claimed by the defense to have been shown by the testimony would vitiate the agreement.

As was very proper in this class of cases, the cause was submitted to the jury upon special issues. It is very remarkable, when we consider the question submitted, that they could not agree upon the special issues but did agree upon a general verdict. But counsel, before the verdict was announced upon the statement of the jury that they could not agree upon the special issues, consented to receive the general verdict, and there was no error in this.

There are many other points made which we do not consider it necessary to notice.

We think the judgment should be reversed and a new trial had, and it is so ordered.

Mr. Justice SHAFER, having been of counsel, did not participate in the decision of this case.

JOHN A. LAY v. JOHN M. NEVILLE.

COMPLAINT.—An allegation in the complaint, of the place where the property was taken, in an action to recover possession of personal property, is surplusage.

DENIAL IN ANSWER.—Where the complaint avers that the defendant wrongfully and unlawfully took and carried away personal property, and the answer denies that defendant wrongfully and unlawfully took and carried it away, it is a confession of the taking and carrying away, and a denial merely of its wrongful character.

SHERIFF'S BILL OF SALE.—A Sheriff's bill of sale of personal property sold on execution need not contain all the formalities of a regular certificate.

SHERIFF'S SALE OF PERSONAL PROPERTY.—When a Sheriff sells personal property on an execution, where he has no authority to do so, if the execu-

Lay v. Neville.

tion defendant is present and consents to the sale being made, the purchaser will acquire a good title as against the defendant in the execution.

SALE OF PERSONAL PROPERTY.—The acts required to prevent a sale of personal property from being declared fraudulent for want of an immediate delivery and actual and continued change of possession, depend very much on the character and quantity of the property sold.

PROOF OF BOUNDARY LINE OF A COUNTY.—The boundary line of a county cannot be proved by evidence showing where it is reputed to run among persons living near the line, except where it is an ancient boundary and depends upon prescription, or cannot be proved except by parol.

SAME.—Where a boundary line of a county can be proved by reputation, the proof must be confined to the declarations of persons having knowledge of the matter, and who are since deceased.

APPEAL from the District Court, Seventh Judicial District, Solano County.

On the 24th day of September, 1861, A. Y. Easterby recovered judgment in the District Court for Napa County, against James Glassford, for five thousand seven hundred dollars and ninety-nine cents, and an execution was issued thereon and placed in the hands of J. S. Stark, the Sheriff of Napa County, who levied on, and on the 4th day of October, 1861, sold to plaintiff, Lay, at Glassford's ranch, two thousand and eleven sacks of wheat. There was some doubt as to whether Glassford's ranch was in Napa County, and on the day of sale Glassford consented to the same.

On the 5th day of October, 1861, and before Lay had removed all the wheat from Glassford's ranch, Lewis and Merchant commenced an action against Glassford in the District Court of Solano County, and placed the same in the hands of defendant, Neville, who was Sheriff of Solano County, who, on the same day, at Glassford's ranch, levied on five hundred sacks of the same wheat.

It was to recover this wheat or its value that this action was brought.

Lay claimed title under the sale made by the Sheriff of Napa, and claimed that the ranch was in Napa County, while defendant, Neville, claimed that it was in Solano County.

The following is the certificate of purchase executed to plaintiff by the Sheriff of Napa:

Lay v. Neville.

"District Court, Seventh Judicial District, Napa County.

"A. Y. EASTERBY

v.

"J. GLASSFORD.

"I have sold this day to John Lay, at public sale, on execution in the above cause, two thousand and eleven sacks of wheat, lying at the ranch of Glassford, for and in consideration of the sum of three thousand and sixty-two dollars and five cents, the receipt whereof is hereby acknowledged.

"NAPA, October 4, 1861.

"J. S. STARK, Sheriff Napa County.

"Per J. H. WATERSON, Under Sheriff."

Whitman & Wells, for Appellant.

This is one of the cases that form an exception to the rule respecting hearsay testimony, and, being on a question of public right, is well established — so well established, it has been said, "that Judges, the most fastidious in regard to this kind of evidence, do not pretend to dispute its competency, however widely they may differ on its force and effect." (*Per Lord Ellenborough, C. J.; Weeks v. Sparke*, 1 Maule & Selwyn, 686-7.)

It may, therefore, be taken as settled that when the boundary concerns the extent of a public municipal jurisdiction, as whether lands lie or rights are exercisable within its true limits, either public reputation or the particular declarations of deceased persons, made *ante litem motam*, are receivable." (*Nichols v. Parker*, 14 East. 331, note — cited in 1 Cowen & Hill's Notes, Note 186, p. 241.)

So, in a case cited in the note above quoted, the question being whether a turnpike was within or without the limits of a certain town, evidence was permitted to be given by the party claiming it as within, to show general reputation that the town extended to a piece of land, and that old people, since deceased, said such was the boundary of the town.

And, on trying the validity of a distress for a poor rate, by

Lay v. Neville

magistrates, on land claimed as a part of the parish of B., to determine whether it lay there, descriptions in ancient leases, granted by the ancestors of plaintiff's landlord, and old rates made by the parish officers of B. on the occupiers of the land, and deceased overseers' accounts, crossing out the tax of the occupier, were all received as evidence of reputation on the question of public boundary. (Same Note above cited; *Plaxton v. Dall*, 10 Barn. & Cress. 17.)

"So, in another case, orders of Justices, describing Nottingham Castle as being in the Hundred of B., and evidence that it had long been reputed to be in that hundred was received, to show that it belonged to that hundred, and an extract from Domesday Book was received to repel that presumption."

The authority cited for the last quotation—in the note above referred to—is *Duke of Newcastle v. Broxton*, 6 Barn. & Adolphus, 273.

These, like the case at bar, presented cases where the matter in controversy was of public and general interest, but the principle does not require that the right should be public in a literal sense, but rather that it should be general, and such as concerns a multitude of persons; (1 Phillips on Evidence, 238, 239; 1 Greenleaf on Evidence, Secs. 128, 145; *Boardman v. Reed*, 6 Peters, 328; *Conn et al. v. Penn et al.* 1 Pet. C. C. Rep. 496; *Doe & Taylor v. Roe et al.*, 4 Hawks, 116; *Ralston v. Miller*, 3 Randolph, 44, wherein it is said, as cited in Greenleaf, that ancient reputation and possession were entitled to infinitely more respect in deciding upon the boundaries there in question than any experimental survey.)

P. W. S. Rayle, for Respondent.

The vital mistake, amounting to a fundamental error, appellant falls into, is in urging and presenting his case as if it were a contest between the Counties of Napa and Solano, and as though Napa is estopped from asserting her right to exercise jurisdiction in the disputed territory, when, in fact, the respective counties had no more interest in or connection with the

Lay v. Neville.

subject matter of litigation in this action than the State of New York or Massachusetts.

In order to show the absurdity of allowing general reputation of a county line to be given in evidence we will refer the Court to the fact that the boundary line of Napa County has been twice changed by the Legislature since it was fixed in eighteen hundred and fifty.

By the Court, RHODES, J.

This action was brought to recover the possession of five hundred sacks of wheat, which were attached by the defendant, as the Sheriff of Solano County. The complaint states that the wheat was taken possession of by the defendant, at Glassford Ranch, in Napa County, and the defendant denies that he took possession of it in Napa County. The allegation of the place where the property was taken is mere surplusage, and the issue formed upon it is immaterial. The plaintiff has not alleged directly that he was the owner of the wheat when it was taken by the defendant, or at any other time, but the defendant has not taken an objection to the complaint on that ground, and perhaps it can be held that the averment is argumentatively made; at least the defendant seems to so understand the meaning of the allegations of the complaint, for he denies that the plaintiff is the owner of the wheat. The complaint does not state that the defendant detains the wheat, but alleges that he refuses to deliver it to the plaintiff on his demand. The defendant makes no objection to the complaint for that reason, and both parties have treated the case, as an action to recover the possession of the personal property of the plaintiff that was then wrongfully detained by the defendant, or the value thereof, and we shall consider the case as an action of that character.

The defendant denies that he at any time or place "wrongfully and unlawfully took, became possessed of and conveyed into Solano County the personal property of the plaintiff as in complaint alleged." This is intended as a denial of the plain-

tiff's allegation that the defendant wrongfully and unlawfully took, became possessed of and conveyed into Solano County, the property of the plaintiff, but it strictly amounts to no more than a denial that those acts were wrongfully done; but the plaintiff made no objection to that style of denial, and in view of the extreme liberality with which each party has treated his adversary's pleadings, we would be justified in construing the word *and* to signify *or*, wherever it occurs in that denial of the defendant.

The defendant justifies the seizure of the property under an attachment and an execution, issued at the suits of creditors of Glassford, and alleges that the wheat was Glassford's property, and was then in Solano County.

The jury found that the plaintiff was entitled to the possession of the property in controversy, and found the value thereof; and the defendant appeals from the judgment and the order denying his motion for a new trial.

Three principal questions have been argued by counsel: First, whether the plaintiff was, as between himself and Glassford, the owner of the wheat; Second, whether there had been such an immediate delivery and actual and continued change of possession of the property as would satisfy the requirements of the Statute of Frauds; and Third, whether the property at the time of its seizure was in Napa or in Solano County.

1. A. Y. Easterby had recovered a judgment against Glassford in the District Court for Napa County, upon which an execution issued to the Sheriff of that county, and under the execution, the Sheriff levied upon a large parcel of wheat, as the property of Glassford, on the 25th day of September, 1861, and on the 4th day of October, 1861, sold to the plaintiff two thousand and eleven sacks of said wheat, the same being then on Glassford's ranch. At the time of the sale there was some question about the right to the property, and as to its being in Napa County. The Sheriff asked Glassford if he should proceed with the sale, and he answered in the affirmative, and consented to the sale being made. The wheat was

bid off by the plaintiff, who forthwith paid the purchase money to the Sheriff, and the Sheriff then gave the plaintiff a bill of sale, and directed him to take possession, which he immediately did and placed the same in charge of a person as his agent and keeper. Glassford was present during all these transactions and made no objection to the proceedings, then nor since that time, so far as the record shows. The purchase money was applied toward the satisfaction of the execution in the case of *Easterby v. Glassford*. There is no valid objection to the bill of sale executed to the plaintiff by the Sheriff. It is not in form a certificate of sale, but it contains all the essentials of a certificate, it lacking the mere formal statement, "I do hereby certify," etc. The sale was sufficiently proven without the bill of sale, and its introduction was unnecessary, but not erroneous.

If the Sheriff, in fact, had no authority, as Sheriff, to sell; and if, upon doubt being expressed, the execution defendant directed the Sheriff to sell, or consented to his proceeding with the sale, which was thereupon made, and the price was paid and possession of the property given to the purchaser, as in this case, the execution defendant would be estopped from asserting title to the property; for, relying upon such consent to the sale, the purchaser has parted with his money and the execution defendant has received the benefit of it. If the Sheriff had no authority by law to sell, and for that reason it should be held that his sale as Sheriff, under his execution, was void—and it is not necessary to say that Glassford's consent could vest him with authority, as a Sheriff, to sell—then the sale would be upheld, as any other sale made under the direction of the owner of the property sold, or a sale made by a third person, in the presence of the owner, by his consent, or with his acquiescence.

The Sheriff would be regarded as the agent—the auctioneer—of the owner, and the owner would be bound by his acts done in pursuance of his authority as such agent; and as between the owner and the purchaser, the sale would stand as if made by the owner without the intervention of the Sheriff.

As between Glassford and the plaintiff, the sale was complete and valid. (Story on Agency, Secs. 90-93; Dunlap's Paley's Agency, 171.)

2. At the time of the sale, the wheat was in the field of Glassford, in the possession of the Sheriff's keeper; and the Sheriff, upon receiving the amount of the plaintiff's bid, delivered the grain to the plaintiff, who thereupon put Preston in charge as his keeper, who remained in charge a short time, and on leaving placed the grain in the care of O'Niel, who kept control of that which was left on the ranch, until it was taken by the defendant. The plaintiff without delay procured six to eight teams, and engaged them in hauling the wheat from the ranch of Glassford; and on the fifth of October, when the defendant attached five hundred sacks of the grain, the plaintiff had removed the larger part of the grain, and was then removing the remainder. It is not intended by the fifteenth section of the Statute of Frauds, to make a sale void, as against the creditors and purchasers of the vendor, unless the vendee shall perform in every case, what might in some cases be an impossibility. It was intended that the vendee should immediately take and continuously hold the possession of the goods purchased, in the manner and accompanied with such plain and unmistakable acts of possession, control and ownership, as a prudent *bona fide* purchaser would do, in the exercise of his rights over the property, so that all persons might have notice, that he owned and had possession of the property. The acts that will constitute a delivery, will vary in the different classes of cases, and will depend very much upon the character and quantity of the property sold, as well as the circumstances of each particular case. The same acts are not necessary to make a good delivery of a ponderous article, like a block of granite or a stack of hay, as would be required in case of an article of small bulk, as a parcel of bullion. It might properly be required, that there should be a manual delivery of a single sack of grain at the moment of its sale, but upon the sale of two thousand sacks, this could not be done without incurring great and unnecessary expense, and

Lay v. Neville.

departing from the usual course of business. The same is true of the acts that may be requisite to manifest the actual and continued change of possession required by the statute. Each case must, in a great manner, depend upon its own circumstances. This is well illustrated in the case of *Chaffin v. Doub*, 14 Cal. 384. The property mortgaged consisted of hay lying in swaths, winrows and stacks, over three large fields of the mortgagor, and the possession of it had been given by constructive delivery to the mortgagees, who from thence continued to work on the hay during eight days, when it was attached for the vendor's debts. The Court held that, "if an actual and immediate delivery were construed to mean a removal immediately from the premises, the requirement of the statute in such cases would be impossible of performance," and that time was necessarily required to gather and remove the hay. (See, also, *Pacheco v. Hunsacker*, 14 Cal. 120.) In this case, all the acts were done that could be reasonably required on the part of the vendor, to effect an immediate delivery of the property sold, and the acts of the purchaser in taking and keeping possession, and diligently proceeding and continuing to remove the grain from the premises, were sufficient to satisfy the requirements of the statute.

2. The Act of eighteen hundred and fifty-five, defining the boundaries of Napa County, describes the southern boundary as follows: "Commencing at a point in Guichica Creek where the said creek empties into San Pablo Bay; thence running in a direct line due east to the top of the mountains dividing Napa Valley from Suisun Valley." The initial point in the line is where the middle of the stream of the creek meets the line of San Pablo Bay. A competent surveyor, and perhaps any other person, could find that point; and when that point has been ascertained the line must run thence due east to the "top of the mountains," no question being made that the line thus run will strike the mountains. Previous to the Act of eighteen hundred and fifty-five, the southern boundary of Napa County was further to the north, and that line coincided with the northern boundary of Solano

Lay v. Neville.

County; and it is understood that the southern boundary of Napa County and the northern boundary of Solano County still coincide; for though not expressly so declared in the Act, yet as a portion of Solano was added to Napa, the two counties would be held to be bounded by each other.

The defendant offered to prove the southern boundary of Napa County, by evidence of general reputation among persons living near the line in question and in other parts of the counties. The evidence was excluded, and the defendant having taken his exception, now complains of the ruling of the Court in that respect. Some of the objections to the defendant's being permitted to prove the boundary in that manner may be stated, but the ground has been so fully occupied in the numerous and carefully considered opinions of the Courts, and by the text writers, that it is quite unnecessary to discuss them in detail. This boundary is not in any sense an ancient boundary. It was not proposed to prove an accurate or a defined line on the land—a line indicated by any locative calls or visible landmarks—but simply where the line was *reputed* to be. The only point that could by any possibility serve to determine the position of the line was the initial point, and when that point was ascertained no amount of testimony of any character could make the line from that point vary from true east. It was competent for the defendant as well as the plaintiff to prove by general reputation which of two or more streams in 1855 was known as Guichica Creek, or where was the line of San Pablo Bay, so as to ascertain the initial point as declared by the Legislature; but general reputation was not admissible to show where a line, commencing at the point thus ascertained and running east, was, or would be. This species of evidence is admissible only "from the nature and necessity of the case," as where the bounds depend upon prescription, or cannot be proven to have existed except by parol; but where better evidence exists it must be produced.

The party offering in evidence reputation to prove ancient boundaries, must confine his proof to the declarations of persons having competent knowledge of the matter in contro-

Herron v. Hughes et al.

versy, and who are since deceased. This species of evidence is very properly denominated traditionary evidence. (1 Greenl. Ev., secs. 130, 145, and notes; 1 Phil. Ev., Cowen, Hill & Edward's Notes, 218, and note 87.)

The evidence that persons living in the disputed territory voted, were assessed, and paid taxes in either county, and that officers of either county served process there, might show where they believed the line to be, but it was not competent proof of where the line actually was.

It is not necessary for the purposes of this action to determine whether the survey and map made under the direction of the Surveyor-General are authoritative and conclusive; but the testimony of De Woody, the County Surveyor of Napa County, who assisted in the survey and knew where the initial point was, was competent evidence to show whether the line running east from that point included the Glassford Ranch in Napa County. The testimony of the County Surveyor of Solano County, who knew the initial point but had not run the line, was admitted, and the jury doubtless gave the greater weight to the testimony of De Woody. D'Hemacourt did not know the initial point, and his testimony as to the position of the line, relative to Glassford's ranch, was properly excluded. The testimony of Wells, if it had been admitted, would, at best, have been but secondary evidence.

The instructions are substantially correct.

Judgment affirmed.

C. E. HERRON v. J. HUGHES, W. NICHOLS, AND P. NICHOLS.

AGREEMENT TO CONVERT PROPERTY.—A mere agreement between two or more persons to convert the property of another, without an actual intermeddling with it, does not give the owner a cause of action against the parties to the agreement.

CONSPIRACY WITHOUT DAMAGE NOT ACTIONABLE.—A simple conspiracy, however atrocious, unless it results in actual damage to the party, is not the subject of a civil action; but if the conspiracy be carried into execution and damage ensue, the damage is the ground of the action.

Herron v. Hughes et al.

ACTIONS AGAINST TWO OR MORE PERSONS FOR JOINT WRONGS.—Where two or more persons are sued for a joint wrong done, it may be necessary to prove a previous combination between them in order to secure a joint recovery; but it is not necessary to aver this previous combination in the complaint, and if averred, it is not to be considered as of the gist of the action.

SALE OF GOODS BY AGENT OF OWNER.—Where one is intrusted by another with goods with power to sell the same as the agent or clerk of the owner, a mere intention on his part to appropriate the proceeds to his own use, does not amount to a conversion of the goods; but while his agency continues, his sales, in pursuance of his authority, are valid and bind the owner.

WHEN PURCHASE OF GOODS FROM AGENTS IS A CONVERSION.—If one is intrusted with goods by the owner with power to sell the same at retail for the owner as his agent or clerk, and if he then sells the goods, in payment of his private debt, to one who has full knowledge of the owner's title and the agent's relation to the goods, the purchase made with this knowledge amounts to a conversion of the goods by the purchaser.

LEVY ON GOODS.—A levy made by a constable on goods which he does not see or have in his possession is void.

APPEAL from the District Court, Eleventh Judicial District, Placer County.

The answer was filed by the defendants, Nichols, and they alone appealed. Defendant, Hughes, made no defense.

The other facts are stated in the opinion of the Court.

Tuttle & Fellows, for Appellants.

Hamilton & Arnold, for Respondent, referred to Sedgwick on Measure of Damages, 98, 453, and *Dorsey v. Malone*, 14 Cal. 554.

By the Court, SHAFTER, J.

It is alleged in the complaint in this action:

That on the 1st of July, 1862, the plaintiff was engaged in business at Dutch Flat as a dealer in boots and shoes, etc., and that on that day his stock on hand was of the value of two thousand seven hundred dollars.

That on the 11th of July, 1862, and during a temporary absence of the plaintiff, Hughes commenced an action against him on a pretended and fictitious indebtedness of one thousand two hundred dollars, and caused the whole of plaintiff's said

Herron v. Hughes et als.

stock to be attached in said action by the Sheriff, etc., who placed it in the hands of one Willetts, for safe keeping.

That Hughes went no further with the suit, nor has he made any attempt to prosecute the same to judgment.

That on the 17th of October, 1862, the defendants, W. and P. Nichols, held a pretended and void judgment against the plaintiff for two hundred dollars improperly recovered during the aforesaid absence of the plaintiff.

That they, with full knowledge of the fact that the claim of Hughes was a pretense and fraud, conspired with Hughes to obtain the property attached and then in the hands of Willetts as Sheriff's keeper, and to that intent fraudulently agreed with Hughes that said property should be sold on execution to be issued on said two hundred dollar judgment, and subject, ostensibly, to the prior attachment of Hughes. That said property should be bid off by one Merriman for eight hundred and eighty dollars, and that thereafter said Hughes should dissolve his attachment, when the property was to be divided amongst the conspirators.

That in fulfilment of this fraudulent scheme W. and P. Nichols took out execution upon their judgment and delivered it to the township constable for service, and instructed him to make "a pretended levy thereof upon the aforesaid property, which the said constable then and there did, without taking into his possession, or in any way interfering with, said property; and that, in pursuance of the further direction of said defendants, the constable, on the 23d day of October, 1862 — the goods being still in Willett's possession — sold them in one lot, and boxed up they were, to Merriman, at eight hundred and eighty dollars, as previously arranged."

That both the constable and one of the defendants Nichols, announced at the auction that the property was offered for sale subject to Hughes' attachment for twelve hundred dollars.

That Hughes, pursuant to the corrupt agreement aforesaid, soon after the pretended sale caused his attachment to be released.

That the Sheriff thereupon "ordered Willetts to surrender

Herron v. Hughes et al.

said property to the plaintiff, and the same was, on or about the 25th day of October, 1862 — the same being still the property of plaintiff — by said Willetts so surrendered as directed.”

That “at the same time the property, by virtue of the said pretended sale, was unlawfully taken from the plaintiff by the defendants and converted to their own use.” That since said conversion plaintiff has demanded the property and defendants refused to deliver it.

General damages are claimed to the amount of five thousand dollars.

The answer denies the allegations of the complaint and justifies the sale on the ground that it was made by virtue of an execution issued upon a judgment of a Justice of the Peace in favor of the defendant Nichols and against the plaintiff. That the property was struck off to Merriman October 23d, 1862, and that said defendants thereafter, on the 26th of January, 1863, bought the property of Hughes and Merriman, and received from them the possession of the goods, or rather the remnant thereof.

Trial by jury. Verdict — two thousand five hundred dollars “for value of the goods, and damages one thousand three hundred and thirty dollars.” Motion for new trial denied. Appeal taken from the order and from the judgment.

1. Counsel differ as to what constitutes the *gravamen* of this action.

There are allegations in the complaint suggestive of the idea that the pleader intended to declare for a vexatious suit or malicious attachment, or for both. There are other allegations that suggest a conspiracy to depreciate the value of property to be offered at public sale, as a gist; and others still that look toward a mere conversion of the plaintiff's goods under circumstances of aggravation.

We consider that the only actionable injury disclosed in the complaint is a conversion by the defendants of the plaintiff's goods.

The averments respecting the attachment suit brought against the plaintiff by the defendant Hughes on the 11th of

July, 1862, show no cause of action against him; for it is not averred that the suit is at an end, nor that it was brought without probable cause.

The Nichols are not implicated by the complaint in the bringing of that suit, nor in the attachment. The goods attached had been lying in the hands of Willetts, as Sheriff's keeper, for more than three months before the Nichols are alleged to have had any notice even of the transaction in either one of its branches.

Nor does the corrupt agreement of October 17, 1862, to get a title, or colorable title, to the plaintiff's property, at less than its value, even when coupled with the averments showing that all the devices of that agreement were carried out, disclose an actionable injury. The devices were: 1st. A void judgment. 2d. Execution thereon. 3d. A delivery of the execution to a constable, who was to sell property not only not in his possession at the time, but beyond his official reach. 4th. A falsehood to be suggested, and which was in fact suggested to the bidders, that the sale was to be made subject to Hughes' attachment, when it had in fact been pre-arranged that if Merriman should buy in the property at eight hundred and eighty dollars, the attachment should be dissolved, for the joint benefit of the conspirators.

We have nothing here but a series of mere appearances, commencing with a judgment alleged to be void upon its face and ending with a sale of goods not in the custody of the official who made it, and who neither delivered, nor attempted to deliver, the goods to the purchaser (Drake on Attachment, Sec. 265), and who made no return of the sale on the execution. The whole proceeding was *vox et preterea nihil*. In substance it amounted to nothing more than a verbal agreement between three persons to take and convert the property of another. Such an agreement would not affect the right of property, nor would it amount to an intermeddling with it, nor to an exercise of dominion over it subversive of the dominion of the owner. (2 Mass. 398; 7 John. 254; 10 Shep. 326.) Fraud without damage, or damage without fraud, gives no

cause of action; it is only where both concur that an action lies.

A simple conspiracy, however atrocious, unless it results in actual damage to the party, never was the subject of a civil action; and though such conspiracy be charged, the averment is immaterial and need not be proved. (*Hutchins v. Hutchins*, 7 Hill, 104.)

Where two or more are sued for a wrong done, it may be necessary to prove previous combination in order to secure a joint recovery, but it is never necessary to allege it, and if alleged it is not to be considered as of the gist of the action. That lies in the wrongful and damaging act done. In *Saville v. Roberts*, 1 Ld. Raym. 378, Mr. Chief Justice Holt said: "An action will not lie for the greatest conspiracy imaginable if nothing be put in execution; but if the party be damaged the action will lie. From whence it follows that the damage is the ground of the action, which is as great in the present case as if there had been no conspiracy."

In the case at bar the Nichols and Merriman, prior to the constable's sale, were absolute strangers to the title and to the possession of the plaintiff's goods, and when that farce had been fully enacted they are found standing in that relation still. (*Parker v. Huntington et al.*, 2 Gray, 125.)

2. Assuming, then, that the complaint sets forth no other actionable injury than a conversion by the defendants of the plaintiff's goods, we shall proceed to consider that ground of claim in connection with sundry statements in the complaint and as it stands related to the proceedings at the trial.

The complaint states that Hughes, soon after the constable's sale, released his attachment, and that Willetts, the keeper, in obedience to the Sheriff's order, on the 25th of October surrendered the property to the plaintiff.

As soon as Hughes' attachment was dissolved it doubtless became the duty of the Sheriff to redeliver the property to the plaintiff, and according to the complaint that duty was performed promptly.

The next succeeding averment charges that "at the same

Herron v. Hughes et al.

time [thereupon] the goods were unlawfully taken from the plaintiff by the defendants and converted by them to their own use."

The testimony of the plaintiff at the trial tended to prove that when he left Dutch Flat, in the fore part of July, 1862, he left his goods in the possession of Hughes, as his clerk, with authority to sell them in the course of a retail trade, and that after the release of Hughes' attachment Willetts delivered the goods to Hughes and Merriman.

The original agency of Hughes, under the plaintiff, at the time when he accepted a return of the goods, was still on foot. Hughes had not renounced his agency, the plaintiff had not revoked it, nor had it ended by act and operation of law. If Hughes had perpetrated any fraud upon his principal before the goods were returned to him, or if he meditated any fraud thereafter, that fact would not divest him of the powers with which the plaintiff had clothed him, nor relieve him of his trust obligations. The counsel of the plaintiff seem to have considered that the agency was on foot at the date of the redelivery of the goods to Hughes, for they put in no evidence to prove the averment that the goods were surrendered to the plaintiff, except the redelivery to Hughes. That the Sheriff could, on the ground of that redelivery, have defended an action brought by the plaintiff against him for the goods, or their value, there can be no doubt.

From these views it follows that the act of Hughes in taking the goods in his possession on the dissolution of his attachment, was not in itself considered an act of conversion; and that possession not being tortious, it follows that the Nichols, in facilitating a return of the goods to Hughes by paying the Sheriff's charges, did not make themselves wrongdoers.

It appears further from the plaintiff's evidence that immediately after the goods were delivered to Hughes, or to Hughes and Merriman, they proceeded to sell them in the course of a retail trade conducted in their own names, but under circumstances tending to prove that Hughes intended to appropriate the proceeds to his own use or that of his firm. Still, those

Herron v. Hughes et al.

sales did not, to a legal intent, amount to a conversion of the goods by Hughes. Conversion does not lie in intention, but conduct. Hughes had a subsisting authority to sell, and to sell at retail, as previously stated. The wrong to the plaintiff is not to be found in the acts of sale, but in the failure of Hughes to account for the proceeds; and the liability of Hughes to account therefor, or of Hughes and Merriman, may be now enforced in a proper action. There can be no doubt that the proper parties who in good faith bought the plaintiff's goods at retail of Hughes, or of the firm of which he was a member, acquired a title to them as against the plaintiff. (Sto. Ag. 126, 127.)

The case shows that these sales so made by Hughes, or under his sanction, were continued until the 27th of January, 1863, when Hughes and Merriman transferred the residue of the plaintiff's goods to the Nichols for the purpose, in the first place, of satisfying, and in the happening of a certain contingency, for the purpose of securing a debt which they, Hughes and Merriman, were owing to them. The Nichols took possession of the goods under this contract, and thereafter, on demand made, they refused to deliver them to the plaintiff.

In transferring the balance of the goods to the Nichols for the purpose of paying or securing a private debt, Hughes transcended his powers, and the Nichols, in accepting the transfer, with a full knowledge of the plaintiff's title and of Hughes' true relation to the goods, converted them to their own use; and inasmuch as Hughes participated in the wrong, he is jointly responsible with them. (Sto. Agency, Sec. 437.)

This joint conversion by the defendants of the plaintiff's property, on the 27th of January, 1863, we consider to be the only actionable injury that the plaintiff, on his complaint and proofs, has sustained. The case shows that the defendants intended a fraud; that they adopted certain measures for the purpose of accomplishing it, and that they carried out those measures — but in legal judgment the fraud was without damage. The fraud culminated in the sale to Merriman; but that

was a sale without consequences affecting either the plaintiff's title or possession.

In the language of the plaintiff's counsel: "The levy of the constable was a fiction. The sale was a mockery, and void. The constable made no levy because he had no possession of the property, nor even had sight of it. He made no sale because he could make none. Before he could sell he must have levied; he must have had the right and possession and control of the property levied upon, after which he must have advertised and proceeded according to law to their sale. The purchaser at such void sale could acquire no title, and much less could a purchaser with full knowledge."

The subsequent release of the attachment was not a wrong, but the reverse, assuming that the suit of Hughes was groundless. Nor was the payment of the Sheriff's fees at all prejudicial to the plaintiff. If after the constable's sale any one had taken possession of the goods without authority so to do from the plaintiff, it would have amounted to a conversion; but they went immediately into the hands of Hughes, the plaintiff's agent—that is, into the plaintiff's possession, in legal effect, as averred in the complaint. The subsequent retail sales by Hughes were not unlawful, nor did the Nichols participate either in them or the proceeds.

We do not consider it necessary to review in detail the errors assigned. It is sufficient to say, that in the hurry of the trial the true theory of the plaintiff's case was misapprehended. This is manifested both by the tenor of the rulings and the instructions to the jury. Though the verdict may not be too large on the theory of wrong and damage on which the case was tried, nor too large when regarded as a chastisement for the chicanery that the defendants practiced in fact, and the actionable fraud which they attempted to perpetrate, still, under the narrower views entertained by us as to the true character and scope of the plaintiff's injuries, it cannot be considered otherwise than as excessive.

Judgment reversed and new trial ordered.

Carpentier v. Atherton.

HORACE W. CARPENTIER v. FAXON D. ATHERTON.

LAWFUL MONEY.—By the laws of the United States there are three kinds of money, to wit: gold, silver, and treasury notes, each of which is made a legal tender in payment of debts.

ENFORCEMENT OF A SPECIFIC CONTRACT.—The Act of the Legislature of this State, passed April 27th, 1863, commonly called the "Specific Contract Law," providing for the enforcement in terms of contracts made payable in a specified kind of money or currency, is not in derogation of nor does it conflict with the laws of Congress making United States notes lawful money and a legal tender in payment of debts; and under said Act a judgment may be rendered and enforced, payable in the kind of money specified in the contract or obligation on which it is rendered.

IDEM.—Said Act creates no new right. It only adds one to the cases found in the common law in which it is competent for Courts to enforce the execution of contracts specifically.

DISCHARGE OF MONEY CONTRACTS.—A contract made to pay money generally may be discharged by a tender and payment of either of the three kinds of money made a legal tender by the laws of the United States; but a contract made to pay in one of the three kinds of money cannot be discharged by a tender of either of the two other kinds.

VALUE OF EACH KIND OF MONEY.—A Court cannot say judicially that one kind of money, made a legal tender, is of greater or less value than another; nor can evidence be received that a dollar of one kind is of greater or less value than another.

COSTS AND INTEREST.—Where a contract is made payable in a specific kind of money, the judgment enforcing it may enforce the payment of costs and interest in the kind of money mentioned in the contract.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

W. W. Cope, for Appellant.

Assuming the Act of Congress to be constitutional and valid, it is clear to my mind that the Act of the Legislature is invalid. No debt can be created under the latter to which the former does not apply, and the two Acts are directly repugnant to each other. The one embraces all debts not therein specially exempted, and declares that they may be paid in legal tender notes; the other provides for a class of debts not included in the excepted cases, and declares that payment shall be made in such money as the contract may call for. The effect is to make an exception not made in the original

Act; and if this can be done, the object of the Act may be entirely defeated, and its efficacy as a piece of practical legislation destroyed. A contract payable in money is a debt, and the fact that it mentions a particular kind of money in which payment is to be made, does not alter its legal character. It is still a debt, and by the express letter of the law of Congress may be paid in legal tender notes.

It is said, however, that the Act of the Legislature merely furnishes a remedy where none existed before; that the contracts referred to are legal and valid, and that the remedy given is in strict accordance with the spirit and principles of equity jurisdiction. All this may be admitted without prejudice to the position for which I contend, as it obviously does not make the point. The question is — whether the Act is in conflict with the law of Congress; if so, it is invalid; and its validity must be tested by that law. If there is any conflict in the practical working of the two Acts, the Act of Congress must stand, and the other fall. If the latter derogates in any respect from the force and effect of the former, there is an end of the question. If it takes from its operation any case embraced by its provisions, the conflict is beyond dispute. It is immaterial in what way, or by what means the conflict is brought about. The simple question is, does it exist; and as to that I see no ground for a difference of opinion. The effect of enforcing contracts of this character specifically, is not merely to compel a literal performance of the contracts, but to exempt them from the operation of a law which clearly embraces them in its provisions. The Act of Congress applies to the payment of contracts and not to the making of them, and any attempt to avoid its operation by means of new remedies based on the form of the contract, is a fraud upon the law. In substance and legal effect, a contract payable in gold is the same as a contract payable in money generally; it is simply a debt, and must be so regarded for all purposes. As between the parties, it may be just and equitable to enforce such a contract according to its terms, but under the Act of Congress the Courts have no power to do so. Every contract having the character of a debt may

Carpentier v. Atherton.

be paid in legal tender notes; so says the paramount law of the land.

Clarke & Carpentier, for Respondent.

The statute for enforcing specific contracts simply supplies a remedy wanting at the common law, but entirely within the *spirit* of equity jurisdiction, in decreeing specific performance.

By the common law every contract to transfer a thing is treated as a mere personal obligation, which, if unperformed, is compensable only in damages, thus allowing the party contracting the benefit of the election to perform or pay damages.

Where the damages can be clearly ascertained and exactly computed, the remedy at law is held to be sufficient. But where compensation in damages would fall short of the redress to which a party is entitled, the jurisdiction of equity arises, upon the principles of natural justice, to compel a performance *in specie*. (Story on Eq. Jur. §§ 714-719.)

The specific contract law is not forbidden by or in contravention of the legislation of Congress on the subject of the currency.

The statute of Congress passed July 11, 1862, (Supp. to Brightley's Dig. 1,165,) authorizes the issue of notes by the Secretary of the Treasury "on the credit of the United States, which shall be receivable in payment of all loans made to the United States, and of all taxes, internal duties, excises, debts, and demands of every kind due to the United States, except duties on imports and interest, and of all claims and demands against the United States, except for interest upon bonds, notes, and certificates of debt or deposit; and shall also be lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest as aforesaid."

The power of Congress to pass this law is not disputed.

But, the question arises, whether our specific contract law

is forbidden by or in any way contravenes this Act of Congress. And in determining this question, we must consider the object and intention of Congress, as well as the language employed in the Act.

Congress might have forbidden contracts answerable in coin, and might have forbidden the employment of gold and silver as a currency, and then the only question would be one of power, under the Constitution of the United States, to pass such a law. But such was not the policy of the Government. The object was to give a value to treasury notes, by making them a legal tender in certain cases, in relief of its financial necessities. There is nothing in the law to indicate the design to interfere with the ordinary course of commercial transactions, to shape or control business contracts, or to suppress the circulation of the precious metals wherever the stipulation of parties may except in their favor. By the law there are two kinds of currency recognized and established, but which are confessedly of different values, and which no law can equalize.

The Act of Congress excepts in favor of gold in the payment of certain debts, payable by Government, and of certain others payable to the Government.

By the Court, CURRY, J.

The defendant made and delivered to the plaintiff his contract in writing, bearing date the 2d of April, 1864, by which, for a valuable consideration, he promised to pay to the plaintiff the sum of five hundred dollars on demand, in United States gold coin. Some time afterwards the plaintiff duly demanded payment of the sum of money due on this contract, in the kind of currency specified therein. The defendant refused to pay in gold coin, but subsequently, and before this action was commenced, tendered and offered to pay to the plaintiff certain United States notes, amounting in the aggregate to the sum of the principal and interest due the plaintiff. The United States notes so tendered were issued under and in

pursuance of the Act of the Congress of the United States, entitled "An Act to authorize an additional issue of United States notes, and for other purposes," approved July 11, 1862. By this Act the notes so tendered were made lawful money and a legal tender in the payment of all debts, public and private, within the United States, except as therein otherwise provided.

The defendant, by his answer, pleaded the tender of these United States notes for the payment of the amount due, and brought the same into Court with his answer, ready to be paid to the plaintiff.

The plaintiff demurred to the answer on the ground that it did not state facts sufficient to constitute a defense, specifying as causes of demurrer:

1st. That the United States notes tendered are not money, and the plaintiff was not nor is by law obliged to receive the same in payment of the sum of money due him.

2d. That by the contract on which the action was brought the defendant promised to pay the sum of money due plaintiff in gold coin of the United States, and the defendant does not aver a tender of the amount due in such coin.

The demurrer was sustained, and at the same time leave was granted to the defendant to amend his answer, which he declined to do, whereupon the Court ordered and adjudged that the plaintiff have and recover against the defendant the principal and interest due, and the costs of the action, specifying the amount thereof, payable in gold coin of the United States; and it was further ordered and adjudged that the plaintiff have execution to enforce the collection of such judgment, with the interest which might accrue thereon, and that such execution specify, direct and provide that the judgment and all accruing interest thereon "shall be collectable only in gold coin of the United States."

The defendant has appealed from this judgment, which brings up the case to be considered upon certain alleged errors, that are assigned in a well drawn bill of exceptions, presenting the whole case upon its real merits.

The exceptions taken to the rulings and judgment of the

Court, raise the question as to the validity of the Act of the Legislature of this State passed on the 27th of April, 1863, commonly called the "Specific Contract Law," in so far as its provisions relate to the points involved in this controversy. (Laws of 1863, p. 687.)

The second section of this Act provides that: "In an action on a contract or obligation in writing, for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether the same be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein." The third section of the Act provides that the execution to be issued on such judgment shall state the kind of money or currency in which the judgment is payable, and shall require the Sheriff to satisfy the same in the kind of money or currency in which it is made payable, and that the Sheriff shall refuse payment in any other kind of money or currency; and in case of levy and sale of the property of the judgment debtor, he shall refuse payment from any purchaser at such sale, in any other kind of money or currency than that specified in the execution.

It is a cardinal rule in the construction of statutes that every reasonable intendment is to be made in support of their validity. (*Morris v. The People*, 8 Denio, 381; *Ex parte McCollum*, 1 Cow. 564; *Fletcher v. Peck*, 6 Cranch, 87; *People v. Supervisors of Orange*, 17 N. Y. 241.) But whenever it is clear that the Legislature has transcended its powers, in the passage of an Act which is repugnant to paramount law, it is among the most important duties of the judicial authority to declare the invalidity of the Act so passed. (*Adams v. Howe*, 14 Mass. 345; *Fletcher v. Peck*, 6 Cranch, 87.)

By the laws of the land, the country is furnished with three kinds of money—gold, silver and United States notes—as a medium of exchanges. Money, made by the coinage of gold or silver, is a legal tender as prescribed by law, in the discharge of obligations, which are to be satisfied by the payment of money, in general terms; and we have held in *Lick v.*

Faulkner, (*ante*, 405,) and in other cases, that the notes of the United States, issued by the authority of the laws of the National Legislature, are a lawful and authorized currency, and in that sense lawful money and a legal tender in the payment of private debts; but it does not follow that every kind or any kind of money which by law is a legal tender in the payment of debts may be tendered in satisfaction of every obligation capable of performance by the transfer and delivery of property in satisfaction of it.

In *Lick v. Faulkner* we said, upon good authority, that gold and silver are commodities, the value of which is estimated by the value of other things, in the same manner as that of the latter is estimated by the value of gold and silver. This quality or characteristic of the precious metals is not destroyed by their division into parcels bearing the impress of the mint and possessing a specific value, ascertained and regulated by positive law. If one agrees generally to pay or deliver to another a given number of dollars, he may perform his contract by the payment of the specified sum in any kind of dollars which are recognized as such and made a legal tender for the purpose by the law of the land; for by doing so he fulfils his engagement according to its letter; but if he contracts to pay his debt in a particular kind of money, his obligation cannot be discharged in accordance with his stipulation by payment in a different kind of money; and though by the unaided rules of the common law he could not be compelled to perform specifically that which he had promised, yet, in morals, his obligation to do so is in no degree diminished.

Courts of equity from an early period have exercised jurisdiction, enforcing the specific performance of contracts, for the reason that the Courts of common law, though recognizing the obligation of the parties to a contract to perform their respective parts of it according to its terms, could not afford this remedy to the party injured by the non-performance of the other. At law the party disappointed by the breach of the contract was compelled to be satisfied with money, as a

substitute for the thing for which he had contracted, and to which he was in justice entitled.

The money recovered in such cases, by way of damages, was considered as a substantial equivalent for the injury sustained by the breach of the contract. But upon this subject Judge Story says: "It is against conscience that a party should have a right of election whether he will perform his covenant or only pay damages for the breach of it." (Story on Eq. Jur. 717 a.)

Contracts relating to real property embrace by far the most numerous instances in which the jurisdiction of a Court of equity may be invoked to administer the remedy of specific performance. But this species of remedy has not been limited to the enforcement in terms of agreements relating to lands. It has been in many instances extended to enforcing specifically contracts relating to personal property, and also to the performance of personal acts, though in such cases peculiar circumstances must exist to call forth the remedial agency of the Court. The reason assigned for the universal exercise of this jurisdiction as to contracts respecting lands and not in relation to agreements concerning personal property is not because of any distinction between realty and personalty, but because in the former case damages at law cannot be regarded as a complete and adequate remedy for the breach of the contract, while in the latter a compensation in damages is deemed commensurate with the injury sustained. But whenever a violation of a contract relating to personal property cannot be correctly estimated in damages, or whenever, from the nature of the contract, a specific execution of it is indispensable to justice, a Court of equity will not refuse its aid. (*Duff v. Fisher*, 15 Cal. 381; *Willard's Eq. Jur.* 271, 280; *Fells v. Reed*, 3 Vesey, 70; *Sullivan v. Tuck*, 1 Maryl. Ch. Decisions, 59; *Waters v. Howard*, Id. 112; *Barr v. Lapsley*, 1 Wheat. 152; *Phillips v. Berger*, 2 Barb. 608, and 8 Barb. 528; *Stuyvesant v. The Mayor of New York*, 11 Paige, 414, 427; *Story's Eq. Jur.*, Sections 712 to 720.)

The man who contracts to sell and convey lands is under

Carpentier v. Atherton.

no greater obligation, morally, to perform his agreement than he who agrees for a valuable consideration received, to deliver to the purchaser personal property which he has sold, is to perform his. If there be any distinction between the two cases, let the learned casuist resolve it, for if on this point we are in error we need to be instructed.

The Act of the Legislature by authority of which the judgment in this case was rendered is remedial in its nature, affording to the party who may be justly entitled to the performance of the contract in terms the means of enforcing it. The right to its enforcement is consistent with good faith, and with the dictates of a scrupulous and exact justice. Then, is the Legislature competent to provide for the creditor a remedy to compel his debtor to do what he has solemnly and deliberately bound himself to do? On this point there can be no doubt, unless the Act under consideration is in derogation of the laws of Congress making United States notes lawful money and a legal tender in the payment of debts. Upon the solution of this question our judgment must necessarily depend.

Before a Court, duly appreciating the measure of its duty, will declare an Act of the Legislature invalid, as contravening the laws of Congress, a case must be presented in which there can be no rational doubt (*Ex parte McCollum*, 1 Cow. 564;) for it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered void. (*Fletcher v. Peck*, 6 Cranch, 87.)

It is insisted on the part of the appellant that, as the Acts of Congress making United States notes lawful money and a legal tender in the payment of private debts is the paramount law, therefore such currency is adequate for the discharge of all debts which are to be satisfied by the payment of money. This is so, as we have already observed, in respect to debts that are payable in money generally; but as to the contract, which is the foundation of the judgment in this case, it is more than a contract for the payment of money merely. It goes to the extent of defining by what specific act the contract shall

be performed. By the admitted and settled rules of law, such a contract can be performed, according to the agreement of the parties, only by the payment of the kind of money specified. Is there anything in law or morals opposed to such a contract? If not, what objection can there be to enforcing it in case its voluntary performance is refused? That a creditor may have uses for money of a particular kind, the Acts of Congress making United States notes lawful money and a legal tender in the payment of debts seem to have contemplated. He may have to pay duties on imports and debts beyond the territorial jurisdiction of the United States, and for these uses these Government notes are not a legal tender. Necessities of the kind suggested exist in commercial communities, where United States notes are the usual media of exchanges, as verified by every day's experience. The importer of merchandise must have gold and silver money to pay the duties imposed by law on his importations. With such means only can he discharge his pecuniary obligations to the Government. He must have metallic money for the purchase of such merchandise, because the paper currency of the Government will not answer his purpose abroad. The importation of goods from foreign countries is a lawful trade, which Congress, under the Constitution, may regulate and has from time to time regulated. By what means is the merchant, who is engaged in this species of trade, to provide for his necessities—that is, for the payment of his debts abroad and his duties on imports at home—unless by securing payment from his debtors in the kind of money which he needs and without which he must abandon the business in which he is engaged? Perhaps it will be answered that he must sell his goods for ready money, and not upon a credit, and thus secure a price in gold and silver; and the purchaser from him must in his turn also sell for like ready money in order to be furnished with the means to pay the importer; and the consumer must also provide himself with the same kind of money, let it be derived from what source of industry it may, to pay for the goods he may need for consumption.

If the owner of property may sell the same for metallic money, to be paid concurrently with the sale and delivery of it, we can see no reason why he cannot sell for the same kind of money to be paid at a future day. A sale on credit is, by the customs and laws of trade, recognized as legitimate and is deemed to be consistent with good conscience and sound morals.

It is sometimes argued that the Act of the Legislature under consideration discriminates invidiously, to the discrediting of United States notes. We are unable to perceive wherein. There is certainly nothing in the Act itself that can justify any such interference. If such a charge were made against the Act of Congress making United States notes lawful money and a legal tender in the payment of certain debts, it might be maintained with more seeming plausibility. Congress itself has limited the uses to which the notes can be applied, and has provided expressly that in certain cases gold and silver money only shall be used within the United States for the discharge of pecuniary obligations, and thus, by implication, at least, has recognized an existing necessity for the employment of gold and silver money for the excepted uses. But even in this we cannot perceive that any unjust discrimination is made between the different kinds of money. With the people of some countries trade can be carried on by the use of silver money with greater convenience and advantage than with gold coin; yet it cannot be said that the merchant who furnishes himself with silver money for his purposes thereby discriminates to the prejudice of gold. The argument that the Act in question unjustly distinguishes between metallic and paper money, if valid as an objection to contracts for the direct payment of a particular kind of money, upon a credit given, is equally so as to sales made for the same kind of money, paid concurrently with the sale. It would be illogical to hold that the effect in the one case is more or less detrimental to the credit of United States notes than in the other. Arguments of the character which we have here noticed are too

obviously fallacious to require even the attention which we have devoted to their refutation.

Again. The man of means, actuated by patriotic motives to aid the Government, or for the purpose of legitimate investment, may desire to accumulate United States notes, with the view of exchanging them for bonds of the Government payable within the time and bearing the rate of interest specified and provided in the Act of Congress. Is there, or can there be, any good reason why he may not provide for the desired supply by securing payment from his debtors in the kind of money that would serve his purpose? Is not the end which he seeks lawful, and are not the means employed legitimate to the end?

The Acts of Congress relating to the national currency, comprehending all kinds of money, and the various provisions of those Acts, must be considered and construed *in pari materia*. By this course it will be readily and at once perceived that while United States notes are by the sovereign behest made lawful money and a legal tender in the payment of debts, except in the instances specified, gold and silver money is equally, by force of positive law, a legal tender in the payment of all debts, and is also recognized as an indispensable currency for purposes to which Government notes cannot be applied; and therefore the inference is logical, if not inevitable, that Congress did not design that these Acts should interfere to prevent men from contracting for any particular kind of money they might need.

Whatever, in the estimation of men engaged in monetary transactions, may be the difference in value between gold and silver money and the paper currency of the Government of the same denominations, we cannot say judicially that a gold or silver dollar is of greater or less value than a United States note of the same denomination, and we doubt if a case could be presented to a Court of justice which would authorize evidence of a difference in the value of the two kinds of money. A Court would be placed in an anomalous and absurd predicament in listening and giving heed to evidence designed to

establish as a fact that one dollar is worth more or less than another. (*Woods v. Bullens*, 6 Allen's R. 516.)

By an Act of the Congress of the United States, passed in eighteen hundred and fifty-three, silver money, consisting of half dollars, quarter dollars, dimes and half dimes, issued in accordance with the standard of that Act, was made a legal tender in the payment of debts, in sums not exceeding five dollars. Now, if A. should loan to B. one thousand half dollars, coined under the Act of eighteen hundred and fifty-three, and B. should in consideration thereof contract with A. to pay the debt so created in like silver coin, would not a tender of the same kind of money in payment of the debt be a legal tender? No one, we apprehend, who understands the import of the word *tender*, would answer otherwise than in the affirmative. Then, if the debtor in such case could discharge his obligation by a voluntary performance of his promise, on what just principle could he escape it if he were so determined? The duties of the obligor and obligee in such cases must be reciprocal, and they should be commensurable. In the nature of things, that which it is lawful to tender, under the contract supposed, on the one hand, it is lawful to demand on the other. (8 Barb. 528; 1 Sim. & Stu. 174 and 607; 9 Edw. Ch. R. 531; Story's Eq. Jur. Sec. 723.)

The Act of the Legislature under consideration is purely remedial in its nature. It creates no new right in the abstract. It does no more than add to the cases in which it is competent for the Courts to enforce the execution of contracts specifically, and provides the means by which this can be done. In this, the Act is in harmony with the doctrines of equity jurisprudence relating to kindred subjects, and at the same time it in no just sense contravenes the laws of Congress making United States notes lawful money and a legal tender in the payment of debts.

It is alleged, on the part of the appellant, that the Court erred in determining by judgment that the costs and disbursements of the action must also be paid in gold coin.

The second section of the Act provides that judgment for

the plaintiff may follow the contract or obligation and be made payable in the kind of money or currency specified therein. The plaintiff was entitled to recover his costs, which became a component part of the judgment and payable in the kind of money specified therein.

The judgment is affirmed.

SAWYER, J., concurring.

I entered upon the consideration of the questions involved in this case, not without grave doubts as to the validity of the Specific Contract Act; for, when we held the Act making treasury notes a legal tender in payment of all debts, public and private, to be constitutional, it seemed to follow as a logical consequence, that if an agreement to pay a given sum of money in gold coin is a debt, within the meaning of the law, then, the debtor is entitled to discharge it by paying the amount called for in treasury notes. And this would undoubtedly be true in relation to all debts contracted generally, without any limiting or qualifying term in the contract creating the liability. In such a case, the law has given to the debtor his option to elect which kind of money made by law a legal tender he will adopt in discharging his liability. It is a right or privilege conferred on him of which he cannot be deprived except with his consent. But a right or privilege conferred upon an individual, either by constitutional, or statutory law, may be waived by the party interested unless such waiver would contravene public policy. Such is the case even in criminal law. Natural persons of full age, of sound mind and under no recognized legal disabilities, are endowed with an unlimited capacity to contract with other persons similarly situated, in all things except as to those matters which are against public policy, or prohibited by law. Gambling contracts, contracts for the payment of money in consideration of future cohabitation in a state of concubinage, and the like, are prohibited as being contrary to good morals, and the best interests of society. In some States usurious contracts are con-

Carpentier v. Atherton.

trary to public policy, and are prohibited. But there is nothing in a contract for a sufficient consideration to pay a given sum in gold coin, or any other kind of money, that is immoral, or that in any respect contravenes public policy. It has never been prohibited, either expressly or by implication, and no policy against the making of such contracts has in any manner been indicated on the part of the Government. The Government has created three kinds of money, which, it has provided, shall be legal tender in the payment of debts—gold coin, treasury notes, and silver coin in limited amounts—but it has nowhere intimated, in the remotest degree, a preference for any one of these kinds of money over the others, or any desire that debts should be paid in any one rather than in the other, but has left it to the parties interested to act as their own interests may dictate. Neither, so far as we have been able to discover, has there been any restriction placed upon the capacity or right of parties to contract with reference to these several kinds of currency, other than is hereinafter specified. On the contrary, the law expressly recognizes contracts for the delivery of gold coin.

The Act of March 3, 1863, amending the Act to provide for internal revenue, etc., provides "that all contracts for the purchase or sale of gold or silver coin, or bullion, and all contracts for the loan of money or currency, secured by pledge or deposit, or other disposition of gold or silver coin of the United States, if to be performed after a period exceeding three days, shall be in writing, or printed, and signed by the parties, or their agents or attorneys, and shall have one or more adhesive stamps, as provided in the Act to which this is an amendment," etc. * * * * "And no loan of currency or money on the security of gold or silver coin of the United States, as aforesaid, or of any certificate or other evidence of deposit payable in gold or silver coin, shall be made, exceeding in amount the par value of the coin pledged or deposited as security; and any such loan so made or attempted to be made, shall be utterly void." * * * * "That all contracts, loans or sales of gold and silver coin and bullion,

not made in accordance with this Act, shall be wholly and absolutely void." (12 U. S. Statutes at Large, p. 719, Sec. 4.)

Here is an Act of Congress upon the subject of the purchase and sale of gold coin, which recognizes the validity of such contracts, and regulates the mode of making them. It only prescribes that in all cases where more than three days shall elapse between the time of making the contract and its fulfilment, the contract shall be written or printed, and signed by the parties, and shall have one or more adhesive stamps. Upon well settled rules of construction, all such contracts made in conformity with the provisions of this Act, and also all contracts of sale or purchase not having three days to run, are valid. This is the only limitation or restriction upon the power of parties to contract for the payment, or sale and delivery of coin. When we come to a loan of currency or money on the security of gold or silver coin, or of any certificate or other evidence of deposit payable in gold or silver coin, the law prescribes that the amount of the loan shall not exceed the par value of the coin. But no restriction as to price is imposed upon the sale or purchase of, or any other dealings in coin. Of course, if contracts in regard to coin are permitted by the law, those contracts must be valid, and the law contemplates that the contracts will be fulfilled according to their terms.

So, also, the Act to provide ways and means for the support of the Government, passed March 3, 1863, provides "that the Secretary of the Treasury is hereby authorized to receive deposits of gold coin and bullion with the Treasurer and Assistant Treasurer of the United States, in sums not less than twenty dollars, and issue certificates therefor in denominations of not less than twenty dollars each, corresponding with the denominations of United States notes. The coin and bullion deposited for or representing the certificates of deposit shall be retained in the Treasury for the payment of the same on demand." (Ib. p. 711, Sec. 5.)

For the convenience of the people, the Government consents to become a depository of their coin when desired by the

owner; and upon a deposit of gold coin, the Treasurer is authorized to issue a certificate of deposit to the owner, payable in gold coin. The coin thus deposited is not to be used, but is to be "retained in the Treasury for the payment" of the certificate, on demand. Why not pay it in treasury notes? Simply because it was deposited upon an agreement at the time that it should be returned in coin, and common honesty demands that the contract should be fulfilled. The Government would get no coin deposited in its Treasury upon any other terms; hence, when it undertook to become a depository of coin for its citizens, it was necessary to do as other bankers or persons receiving deposits do—enter into a contract to return the deposit in like funds. These certificates go into circulation in the place of the coin, and become subjects of commercial and financial transactions. The Government in these acts recognizes the propriety of such transactions. And why should not a banker, in the absence of any law prohibiting such transactions, not receive gold coin on deposit, and when he has done so, and issued a certificate showing the fact, and agreeing in consideration thereof to repay the same in gold coin, not be bound by his contract? And why should not a party who has borrowed gold on the faith of his agreement to return the loan in like kind be required to perform his solemn obligation? Good faith and good morals demand it. No law prohibits it, or prohibits making such contracts; the Government has made no discrimination through the law-making power in favor of one kind of money against another. It makes such contracts itself with the citizen, and expressly recognizes contracts between citizens for the purchase and sale of coin. The Government also requires certain portions of its revenues to be paid in coin, and thereby imposes on its citizens a necessity to procure it. No one disputes the right of a party to make all his business transactions upon a coin basis, and to refuse to part with any piece of property, or perform any service without requiring the coin in hand. If, to meet the necessities imposed on him by Government, or his convenience otherwise demand it, he may make a contract for coin, to be

Carpentier v. Atherton.

executed by delivering it at the time the contract is made, why may he not make a similar contract providing for the anticipated emergency, to be executed in the future, when the emergency shall arise? And if he make the contract, why is he not entitled to have it enforced according to its terms? We have seen that the Act of Congress permits a contract to sell and deliver gold coin on a future day. In what respect does an agreement, for a sufficient consideration, to pay on some future day a given amount in gold coin differ in principle from a contract to sell and deliver at a future day a like amount of gold coin? I can perceive none. The transactions in effect are substantially the same. Practically, the party who agrees to sell and deliver coin at a future day does not agree to sell or deliver any specified piece or pieces of coin then in his possession, but he agrees to sell gold coin generally, relying upon his ability to procure it when the time for fulfilment arrives. A contract payable in coin is substantially the same thing. The only difference is in the form of expressing the contract, and not in the substance of it—the thing to be done. Such contracts do not appear to me to be against the policy of the law; for we have seen that the Act of Congress expressly recognizes, and nowhere forbids them. Coin is lawful money. A party may lawfully pay his debts in coin. He may, at his election, waive his right to pay in anything else, either with or without consideration. The only question is, as to when he shall exercise his right to make his election or waive his privilege; and when he has made his election, and inserted it as one of the essential terms and conditions of his contract, for a full and adequate consideration, there seems to be no good reason in morals, or public policy, why he should not be compelled to abide by his election and the express terms of his agreement. Such contracts, then, are valid.

Both a contract to pay a sum of money in gold coin, and a contract to sell and deliver coin at a future day, create a debt in a general sense, and in that respect stand on the same footing. But they do more. The party agreeing to pay or deliver gold coin at a future day, not only creates a debt

Carpentier v. Atherton.

which he agrees to pay, or discharge, but he also waives the privilege which the law would have guaranteed to him had he not voluntarily renounced it, and takes upon himself an obligation to pay it in a specific kind of lawful money, and nothing else. The waiver and obligation are essential conditions, and parts of the consideration of the contract, without which, we must presume the contract would not have been made. The agreement to pay in coin is as much a part of the consideration as the agreement to pay at all, and the presumption is that an ample equivalent has been received for the promise. The parties, then, are competent to contract—the contract is not against public policy—it is not prohibited by law—is payable in a lawful kind of money, and is a lawful contract.

But in case of a breach, independent of the statute, there was no adequate remedy. It was not one of the cases in which Courts of equity were in the habit of granting relief by decree for specific performance, although equity did grant relief upon breach of many, but not all contracts, in which the remedy at law was inadequate. And in a Court of law the only remedy was a suit for damages. But damages could only be estimated in dollars and cents, and in legal contemplation, whatever the fact might be in the commercial world, a dollar in one kind of money was equivalent to a dollar in another. Hence, while in theory there was a remedy, practically it was inadequate. There are many other cases in which parties who suffer from breaches in their contracts are without any adequate remedy. For instance, a merchant has a large amount due him payable upon a given day, upon which he relies to meet his own obligations. His debtor fails to pay at the time. The merchant in consequence fails to meet his own engagements, is attached, his business broken up, and ruin is the result. The measure of damages in such case, in a suit against his debtor, is only the money due and interest, while the actual damages may be three times that amount. But that is the only remedy the law affords. In such cases, and many others, it would be impracticable to afford full relief. Many difficulties inherent in the nature of things exist, which

conspire to prevent the granting of a full measure of relief, and the law affords that measure of relief, only, which experience teaches, on the whole, to be most practicable, and to approximate, as a general rule, most nearly to doing substantial justice to all parties. But in the case of a contract payable in coin, an easy and practicable remedy may be applied to the breach of that branch of the contract requiring payment in a particular kind of money, by a judgment analogous to a decree in equity for specific performance. In these cases our statute affords the remedy, by authorizing, a judgment for the specific kind of money agreed to be paid, and directing the execution to follow the judgment, and the Sheriff to sell property for, and receive in satisfaction of the execution, the kind of money only, which is provided for in the contract and judgment.

I do not see wherein this law, which only affords a more complete remedy for a breach of a contract lawful in itself, is in any respect in conflict with the Act of Congress, making treasury notes a legal tender in payment of debts. A contract payable in money generally, is undoubtedly payable in any kind of money made by law a legal tender, at the option of the debtor at the time of payment. He contracts simply to pay so much money, and creates a debt pure and simple, and by paying what the law says is money his contract is performed. But if he agrees to pay in gold coin it is not an agreement to pay money simply, but to pay or deliver a specific kind of money, and nothing else; and the payment in any other is not a fulfilment of the contract according to its terms, or the intention of the parties.

For these reasons, in addition to those contained in the able opinion of Mr. Justice Currey, I think the law relating to specific contracts valid, and that the judgment should be affirmed.

Mr. Chief Justice SANDERSON expressed no opinion.

Bodley v. Ferguson et al.

THOMAS BODLEY v. ASA FERGUSON, A. J. MYRES,
MATTHEW FELLOW, AND J. H. STEMMERMAN.

APPEAL.—Upon an appeal to the Supreme Court from an order denying a new trial, the appellant must furnish the Supreme Court with a copy of the papers used on the hearing of the motion for new trial in the Court below, and if he fail to do so, the appeal will, on motion, be dismissed.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

The facts are stated in the opinion of the Court.

W. T. Wallace, for Appellant.

D. P. & A. Barstow, and *Edward Tompkins*, for Respondents.

By the Court, SANDERSON, C. J.

This is an appeal from an order granting a new trial. The plaintiff takes the appeal. The case is brought here upon what purports to be a bill of exceptions made up *ex parte* and inserted in the record without the knowledge or consent of the defendant, the statement upon which the motion for a new trial was made in the Court below being omitted. The respondent moves to dismiss the appeal upon the ground that the appellant has not furnished this Court with the necessary papers.

The three hundred and forty-sixth section of the Practice Act provides that "On appeal * * * from an order the appellant shall furnish the Court with a copy of the notice of appeal, the * * * order appealed from, and a copy of the papers used in the hearing of the Court below; such copies to be certified by the Clerk to be correct. * * * If the appellant fail to furnish the requisite papers, the appeal may be dismissed."

Under this provision it is incumbent upon the appellant to furnish this Court with the statement or affidavits, or both, as the case may be, which were used in the Court below upon

Estate of Carr.

the hearing of the motion for a new trial, and the substitution of a different record is wholly unauthorized. The appellant having failed to comply with the law in this respect, the appeal must be dismissed.

Ordered accordingly.

IN THE MATTER OF THE ESTATE OF MICHAEL CARR.

ADMINISTRATORS.—The right of persons entitled to administer on an estate to have, upon their written request, letters of administration granted to persons not entitled to administer, only exists where there is a vacancy in the administration.

SAME.—Where notice in the manner prescribed by law has been given of an application for letters of administration, and upon the hearing no opposition is made, and letters are issued to the applicant, who is not within the degrees of consanguinity mentioned in the sixty-seventh section of the Act to regulate the settlement of the estates of deceased persons, the only parties who can obtain a revocation of the letters as an absolute, unqualified right, are, the wife, child, father, mother, or brother, of the intestate, and they are only authorized to have the letters revoked by presenting a petition praying the revocation, and that letters may be issued to him or her.

APPEAL from the Probate Court, Sacramento County.

The facts are stated in the opinion of the Court.

Robinson & McConnell, and *C. G. W. French*, for Appellants, cited sections fifty-two to sixty-eight of the Act to regulate the settlement of the estates of deceased persons, and *In the Matter of the Estate of Pacheco*, 23 Cal. 476, and *Cooper v. Lowerre*, 1 Barb. Ch. R. 45, and *Harrison v. McMahon*, 1 Bradford, 282.

George R. Moore, for Respondent.

By the Court, SAWYER, J.

Michael Carr died intestate in the County of Sacramento, leaving a sister, Dorothy Bolton, wife of George Bolton, residents of Sacramento County; a brother, Mark Carr, a resident

Estate of Carr.

of Sonoma County, and several married sisters in England, but no other relations in the State of California.

George Bolton, husband of said Dorothy Bolton, and F. McComber, Public Administrator of Sacramento County, each applied for letters of administration. Upon a hearing on the several petitions, it was ordered that letters issue to George Bolton. George Bolton afterwards, as appears by the findings, "came into Court and declared himself unable to procure the requisite sureties, waived his right to administer, and consented that letters of administration should be granted to said McComber." Thereupon letters were issued to McComber, who qualified and entered upon his duties as administrator. Afterwards said Mark Carr, brother of deceased, filed a petition praying that the letters granted to McComber be revoked, and the administration granted to him. Upon the hearing, the prayer of the petitioner was denied on the ground that he was not entitled to letters under the fifty-fifth section of the Act relating to estates of deceased persons, for want of integrity. John Bennett and Stephen Addison then filed a petition praying a revocation of the letters granted to McComber, and the issue of letters to themselves, which petition was accompanied by a written request to the same effect, signed by said Bolton and wife, and Mark Carr. The prayer was denied, and from the order denying the petition this appeal is taken.

There is no question as to the entire fitness of both McComber and the appellants to discharge the duties of the trust. The only question is, as to the absolute, unqualified right of Mark Carr and Bolton and wife, on their written request, to have the letters issued to McComber revoked, and other parties of their selection, not otherwise entitled, appointed. This right is claimed by the appellants under the sixty-sixth and sixty-seventh sections of the Act. We think section sixty-six refers to cases where there is a vacancy in the administration. The Public Administrator is one of the persons entitled to letters. There are others entitled to preference. In this case a petition was filed by Bolton, the husband of the sister of the deceased, in right of his wife, and by McComber at the same

Fox v. Fox.

time. Letters were awarded to Bolton, but being unable to give the necessary bond, letters were issued to McComber with his assent. On the hearing of McComber's application, all parties interested having had notice in the mode prescribed by law, had an opportunity to oppose it. No opposition having been made, the letters were duly issued to him, and were subject to be defeated by the mere will of the parties interested only in the cases specified in section sixty-seven. The only parties who are authorized to obtain the revocation under that section are the wife, child, father, mother or brother of the intestate, and *such* persons are only authorized to have the letters revoked by presenting a petition "praying the revocation and that letters of administration may be issued to *him or her*," and not to parties not entitled to administer otherwise than by the request of such parties praying the revocation. Neither Bolton nor his wife is one of the parties mentioned in section sixty-seven. Mark Carr asks that the letters be revoked, not that he may be appointed himself, but that letters may issue to strangers, who, aside from his request, have no right to administer. We think no such unqualified right to have the letters revoked and appellants appointed, as claimed by appellants, exists. In *Pacheco's Case*, 23 Cal. 476, one of the petitioners was a child of the deceased, and she asked that letters be issued to herself.

In the present case it appears that it had been judiciously determined in a proceeding on a prior application that Mark Carr was himself incompetent.

Judgment affirmed.

JACOB FOX v. MARY FOX.

PLEADINGS IN DIVORCE SUIT.—If the complaint in an action to obtain a divorce avers the marriage of plaintiff and defendant, and the answer does not deny the averment, it is an admission of the fact for the purposes of the trial, and the marriage need not be proved.

FINDING OF FACTS.—Facts averred in the complaint and not denied in the answer, are not required to be found by the Court.

FOX v. FOX.

DECLARATIONS AS EVIDENCE.—If the deposition of a witness has been introduced on behalf of one party, the other may prove his confessions or declarations for the purpose of contradicting his deposition or impeaching his credit.

OBJECTION TO A QUESTION.—An inquiry of a witness, whether he has heard a person, not a party to the suit, say anything about the matter in controversy, is not objectionable. If such question, merely, is objected to, and the witness afterwards states what the conversation was the evidence will be allowed to remain, unless the other party objects to the testimony or moves to strike it out.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

The facts are stated in the opinion of the Court.

Robinson & McConnell, for Appellant.

There is no proof of the marriage of the parties. This is essential. The plaintiff must allege and *prove* his marriage with the defendant. The marriage is the foundation of the whole proceeding. (Bishop on Marriage and Divorce, 3d Ed. §§ 314, 315, and cases there cited.)

Proof of the marriage of the parties is as material as proof of the adultery. (*Abrogart v. Abrogart*, 8 How. Pr. R. 298; *Dobbs v. Dobbs*, 3 Edwards' Ch. R. 377.)

When the defendant does not contest the marriage, the plaintiff must *prove* it in connection with his other allegations. (Bishop on Marriage and Divorce, 3d Ed. § 315, and cases there cited.)

The Court will require *proof* of the marriage even though the party accused makes default of appearance. (*Williams v. Williams*, 3 Greenleaf, 135.)

The necessity of proving the marriage arises not only from the fact that the marriage is an essential ingredient in the offense alleged, since no violation of matrimonial duty can take place where the matrimonial relation does not exist, but, likewise, from the consideration that as divorce is the suspension or dissolution of this relation, if there is no relation subsisting there is nothing for the divorce to act upon. (Bishop on Marriage and Divorce, 3d Ed. § 315, and cases there cited.)

The conclusion that we arrive at from these authorities is, that the plaintiff must not only allege his marriage with the

Fox v. Fox.

defendant, but he must *prove* it, even though the party accused makes default of appearance, or when the defendant does not contest the marriage.

The amount and species of proof necessary to establish a marriage in suits for divorce and separation seems not to be very clearly defined upon authority. (Bishop on Marriage and Divorce, 3d Ed. § 318, and cases there cited.)

But in a suit for divorce on the ground of adultery, like the case at bar, the rule seems to be clearly settled upon both principle and authority that there must be proof of an *actual* marriage in opposition to proof by cohabitation, reputation, and other circumstances from which a marriage may be inferred. (2 Greenleaf on Evidence, § 49, and cases there cited; 1 Phillips on Evidence, Cowen & Hill's, and Edwards' notes, 631, and cases there cited; *Case v. Case*, 17 Cal. 598; Bishop on Marriage and Divorce, 3d Ed. §§ 324, 325.)

Henry Stow, for Respondent.

Here is a serious and solemn admitted fact that the defendant was married to plaintiff, by not denying it in the answer.

The object of the rule requiring proof in corroboration of defendant's confession is to guard against collusion; and when the entire testimony, confession and circumstances repel all suspicion of collusion, and leave no doubt of the truth of the confessions, the Court should act upon them. (*Baker v. Baker*, 13 Cal. 87.)

By the Court, RHODES, J.

This is an action for a divorce *a vinculo matrimonii*, on the alleged ground of adultery. The Court found for the plaintiff, and decreed a divorce. The defendant's motion for a new trial was denied, and she appeals from the order and the judgment.

The appellant assigns for error the failure of the plaintiff to prove the marriage. The plaintiff alleges that he was married to the defendant in 1852, in the City of Chicago, and that ever since that time they have lived together as husband and wife.

The defendant failed to deny this allegation, and it thereby stands admitted as fully as if she had expressly alleged it to be true, and in any civil action, except an action for a divorce, her admission thus made upon the record, of the fact of the marriage, would be conclusive upon her, and no evidence on the point would be required. The Act concerning divorces (section eight) provides that "no divorce shall be granted in any action by default of the defendant, nor on the admission or statement of either party; but in all cases the Court shall require proof of the facts alleged as the grounds for divorce."

What are the grounds for a divorce referred to in the statute? They are those causes enumerated in section four of said Act—natural impotence, adultery, extreme cruelty, willful desertion, and the other grounds mentioned in that section. The marriage is in no sense a ground for the divorce. The marriage must have been solemnized before an action can be maintained for its dissolution, but the existence of that fact being found, then the legal causes for its dissolution constitute the grounds mentioned in the statute, of which proof is required. The statute was framed to prevent collusion between the parties, having for its object the dissolution of the marriage relation, not its creation. The fact of the marriage is fully established by the defendant's failure to deny it in her answer, and that is equivalent to the most direct proof.

The appellant makes the point that the finding is insufficient to authorize the decree, because there was no finding of the fact of the marriage. The fact was not in issue between the parties, and therefore was not required to be found by the Court.

There was no error in admitting in evidence the confessions of David Fox, the alleged *particeps criminis*, for his deposition had been taken in behalf of the defendant, and his confessions previously made were admissible and competent to contradict him or impeach his credit. While a witness for the plaintiff, who lived in the same house with the defendant and the child of the parties, aged about six years, was testifying on behalf of the plaintiff, he asked the witness this question: "Did you

Kierski v. Mathews.

ever hear the child say anything about her mother sleeping with Uncle David?" The defendant objected to the question as "leading, incompetent; that the child would not be a competent witness on account of its age." The Court overruled the objection. The question was not leading, and if it had been it was admissible in that form, in the discretion of the Court. The objection on the ground of the tender age of the child is not worthy of any consideration, for if the declarations of any person in respect to the subject of the inquiry were admissible those of the child would be. The objection cannot be maintained on the ground that the testimony was incompetent. The inquiry was not what the child had said, but was preliminary to questions relating to that subject. The only proper answer to the question asked was simply "Yes" or "No;" and if answered in the affirmative it might be proper, after showing that the mother was present, to ask what the child said, for the purpose of proving what was her mother's language, conduct, or demeanor when the child made the declaration.

The witness, instead of answering the question, went on to state what the child said, and what another person thereupon said, without objection on the part of the defendant. If the defendant had objected to such testimony, or if after it had been given, without showing the presence of the defendant, she had moved for its exclusion, it would have been error for the Court to have overruled the objection or motion. But no such objection was made. It was confined to the preliminary inquiry, whether the witness had heard the child say anything about the matter referred to in the question.

Judgment affirmed.

M. KIERSKI v. H. O. MATHEWS.

TREASURY NOTES — LEGAL TENDER.—The Act of Congress passed February 25th, 1862, making the notes issued thereunder a legal tender in payment of private debts, is constitutional.

Kieraki v. Mathews.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

The facts are stated in the opinion of the Court.

H. O. Beatty, for Appellant.

A. M. Heslep, for Respondent.

By the Court, CUNNEY, J.

This is an action for the recovery of the amount due from the defendant to the plaintiff on two promissory notes, both of which were made and delivered on the 17th day of May, 1862, and both of which are for the payment of money without specifying of what quality or kind. The defendant, by his answer, admitted the making and delivery of the notes, and then further answered, pleading a tender of the sum due on the same in "United States legal tender notes, commonly denominated greenbacks," except ten dollars, which was tendered in gold and silver; and also pleaded facts showing that he had kept his tender good; and with his answer he brought and paid the money into Court for the plaintiff.

To the affirmative matter so pleaded, the plaintiff demurred, alleging the same to be insufficient in law, and as constituting no defense.

"1st. Because the facts stated do not constitute a tender.

"2d. Because legal tender notes or greenbacks are not money."

The Court sustained the demurrer, and the defendant excepted. The plaintiff then applied for judgment upon the complaint and answer as they then stood, whereupon judgment was rendered and entered in favor of the plaintiff against the defendant for the amount due by said notes, and also for the costs of the action. From this judgment the defendant has appealed, and the only question now to be determined is, as to the sufficiency of the tender pleaded by the defendant, and this rests entirely upon the validity and binding obligation

 Clarke v. Huber.

of the Act of Congress passed February 25, 1862, by authority of which said legal tender notes were made lawful money and a legal tender in the payment of private debts. In the case of *Lick v. Faulkner*, (*ante*, 405,) we considered this subject at length, and upon the reasoning and authority of that case we hold that the tender made was sufficient, and the Court erred in sustaining the demurrer and in rendering judgment against the defendant for a sum exceeding the amount tendered and for the costs of the action. Upon the case as disclosed by the record, the plaintiff was entitled to judgment against the defendant for the sum tendered, and the defendant was entitled to judgment against the plaintiff for his costs in the action.

The judgment is reversed and the cause remanded, with directions to the Court below to render judgment in accordance with this opinion.

JEREMIAH CLARKE v. WILLIAM HUBER.

STATUTE OF LIMITATIONS.—The period of limitation in this State, to bar a right of entry upon real estate, commences to run from the 22d of April, 1855.

ESTOPPEL AT COMMON LAW.—At common law a purely equitable estoppel, or purely equitable title, could not be entertained, even if it were represented upon the record.

ESTOPPELS IN PALS MUST BE PLEADED.—Under our system of practice equitable estoppels and defenses can be entertained in actions at law, but they must be specially stated in the answer.

EVIDENCE OF ESTOPPEL.—If an equitable estoppel, relied on in an action of ejectment, is not specially set up in the answer, evidence to sustain it should be rejected.

ARGUMENT IN SUPREME COURT.—The respondent on an appeal to the Supreme Court is at liberty to suggest any ground that he may choose, to show that the ruling of the Court below was right, whether the grounds suggested were advanced in the discussion before the Court below or not, while the appellant is confined to the objections urged in the Court below.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

Plaintiff recovered judgment, and defendant appealed.
The facts are stated in the opinion of the Court.

Clarke v. Huber.

Patterson, Wallace & Stow, for Appellant.

No ground is given on which the objection to evidence of an equitable estoppel is based. It cannot, therefore, be said it was because the estoppel was not pleaded. If that had been the ground, the objection might have been *obviated* by an amendment of the answer.

The proof of the pointing out and location by Robles, the taking possession and the claim of ownership under the Koch deed, should have been received, and were sufficient to control the erroneous description in the deed, independent of the Statute of Limitations. (*Livingston v. TenBroeck*, 16 Johns. 482; *Jackson v. Vedder*, 2 Caines, 210; *Stanley v. Green*, 12 Cal. 162, 163.)

J. Clarke, for Respondent.

By the Court, SHAFER, J.

This was an action of ejectment brought to recover the possession of a portion of the Rancho Santa Rita, situated in the County of Santa Clara.

In addition to the usual allegations in ejectment, it is averred in the complaint that "the plaintiff claims the premises and the possession thereof, under title derived from the Mexican Government, and that said title was, viz: on the first Monday in December, eighteen hundred and fifty-nine, finally confirmed by the legally constituted authorities of the United States, viz: the Supreme Court thereof."

The answer contains a general denial; a special plea of title in Henry A. Huber, containing an averment that the defendant is in possession of the premises by leave and license of the said Henry A. Huber; and a further plea of the Statute of Limitations. In this last plea the defendant impliedly admits that a Mexican grant embracing the property was confirmed by the Court, and at the date named in the complaint, but denies the allegation that the plaintiff claims the premises, or any part thereof, by virtue of such grant.

Clarke v. Huber.

1. As to the title of Henry A. Huber, which the defendant justifies.

It was admitted at the trial that the lands described in the complaint were part of the Rancho Santa Rita, granted by the Mexican nation to José Pena; that the said grant had been finally confirmed by the Supreme Court of the United States in December, eighteen hundred and fifty-seven, to José Teodoro Robles and Secundino Robles, grantees of said José Pena.

It further appeared that José Teodoro Robles, one of the tenants in common, on the 2d of April, 1858, conveyed an undivided moiety of said rancho to Antonio Larrain, who conveyed the same to Vallejo, who conveyed to the plaintiff on the 25th of March, 1859. It was admitted that the plaintiff and defendant both claimed under the aforesaid grant.

It appeared from evidence introduced by defendant that José Teodoro Robles, having first procured from Secundino Robles a conveyance of all his interest in the said rancho, conveyed (as we shall for the purposes of the present investigation assume) three hundred and twenty acres of the rancho to Louis and Wilhelmina Koch, on the 8th day of February, 1853, and that the said grantees conveyed the same to the said Henry A. Huber on the 23d day of September, 1853. It further appeared that the defendant was in possession of the lands described in the complaint by the license alleged in the answer.

The defendant, for the purpose of proving that the lands described in the complaint were included in the deed under which Huber claimed from Robles, produced a plat of survey, and called the surveyor by whom it was made as a witness. The witness testified in chief that the survey was correct, and that the deeds of Huber included the land in controversy; but on cross examination he admitted that he had made a mistake in his survey, and that no part of the premises demanded were in fact included in the title deeds of Huber. These deeds called for a parallelogram, one thousand varas north and south by fourteen hundred varas east and west,

Clarke v. Huber.

but the survey and plat had been made on the false supposal that the true north was north thirty-three degrees east, and the true south south thirty-three degrees west. This was all the testimony introduced upon the question of the location of the lands called for by the deeds relied upon by the defendant, and it was decisive to show that the premises described in the complaint were not included within them.

2. As to the defense of the Statute of Limitations.

It appeared in evidence that the defendant, under the license before named, entered upon the premises in eighteen hundred and fifty-four, and inclosed them with a fence, and that he had possessed them ever since. This action was commenced on the 17th of April, 1860.

In *Billings v. Harvey*, 6 Cal. 383, the Act of eighteen hundred and fifty-five, passed on the twenty-second of April of that year, was held to be the only Statute of Limitations applicable to actions for the recovery of real property, and that the time fixed therein runs only from the passage of that Act. This decision was reaffirmed in *Billings v. Hall*, 7 Cal. 3, and it is now too late to question the correctness of the rule established by those cases. This action was commenced five days before the expiration of the five years.

8. It appears from the record that the defendant, in the course of the trial below, offered to prove "that when Henry A. Huber was about to purchase of the Kochs the tract of land described in the deed to said Henry A. Huber, already given in evidence, and before he paid the purchase money, the plaintiff's grantor, Robles, went with said Koch and said Huber on the land now in possession of defendant, and pointed out to said Huber the lands now in the possession of defendant as the land embraced in the deed of Robles to Koch, said Robles then knowing that said Huber was about to purchase the same; and that, after so pointing out the same, said Huber immediately purchased the same, and paid said Koch three thousand dollars therefor; and immediately thereafter the defendant, as the agent and servant of said purchaser, took

Clark v. Huber.

possession of the premises so pointed out, and has ever since continuously occupied the same."

The introduction of this evidence was objected to by the plaintiff, and the objection was sustained by the Court. To this ruling the defendant duly excepted.

For all the purposes of this hearing the respondent concedes that the facts embraced in the defendant's offer would amount to an estoppel, but he justifies the ruling excluding the evidence on the ground that the estoppel was not specially set up in the answer.

The appellant, in reply to this objection, insists that by the rule of the common law it was not necessary that estoppels *in pais* should be specially pleaded, and authorities are cited in support of this position.

It may be admitted that at common law estoppels of that character might be proved under the general issue; still it is to be borne in mind that a purely equitable estoppel, or purely equitable title, could not be entertained at common law even if it were represented upon the record, for the reason that the common law Courts have no jurisdiction over such titles considered as a subject matter. Under our system, however, the jurisdictional difficulty has been overcome; but still the decisions of this and of the late Supreme Court require that in actions at common law all equitable defenses should be specially stated in the answer. If they are not so stated they are waived for all the purposes of the action. (*Arguello v. Edinger*, 10 Cal. 150; *Lestrade v. Barth*, 19 Cal. 660; *Downer v. Smith*, 24 Cal. 114; *Blum v. Robertson*, 24 Cal. 127.)

The defense which the appellant offered to prove was not only an equitable defense, but was one over which the jurisdiction in equity was exclusive. The rejected evidence was not offered for the purpose of proving a boundary agreed upon, by parol, between conterminous proprietors, followed by possession conforming to the agreed line; nor was it offered for the purpose of fixing the position of a monument called for by a deed, as in *Stanley v. Green*, 12 Cal. 162. It stands confessed that Huber had no deed applicable to the premises in

Hagar v. Mead.

controversy. Assuming the facts embraced in the offer, Huber has a right, perhaps, as against Clarke, to have his deed reformed, or a right to compel Clarke to give a new deed to him embracing the demanded premises. But this right is not only an equitable right in view of its origin and subject matter, but for the further reason that under the old system it would be cognizable in equity only. From these views it follows that the evidence offered to prove the right at the trial was properly excluded.

It is further insisted for the appellant that inasmuch as the objection taken by the respondent to the introduction of the evidence was a general one, he ought not now to be permitted to justify the ruling on the ground that the equitable right was not specially pleaded.

The reasoning, pushed to its consequences, would preclude the respondent from submitting any argument in favor of the ruling. It is unnecessary, however, to consider the question upon principle, for it is well settled that the burden of showing error is upon the party who alleges it. The error alleged here is the exclusion of the defendant's testimony. The respondent is at liberty to suggest any ground that he may choose, to show that the ruling was right, whether advanced in the discussions below or not. If the testimony had been admitted, and Clarke had appealed, he would have been required to confine himself to objections specifically taken at the trial and stated in the record. The distinction is between the case of a party seeking to reverse a judgment and that of a party resisting the attempt.

Judgment affirmed.

GEORGE HAGAR *v.* A. MEAD.

DISMISSAL OF APPEAL.—Where an appeal has been dismissed by reason of the failure of the appellant to file the transcript of the record in the Supreme Court within the time required by the rules, the order of dismissal will not be vacated and the appeal restored unless the appellant shall make it appear, not only that there has been no want of diligence on his part, but also, shall

Hagar v. Mead.

show that, at least in the opinion of his counsel, the appeal has been taken in good faith, and that there are substantial errors in the record which ought to be corrected by the Supreme Court.

APPEAL from the District Court, Tenth Judicial District, Colusa County.

The plaintiff recovered judgment in the Court below, and defendant appealed.

The other facts are stated in the opinion of the Court.

C. D. Semple, for Appellant.

By the Court, SANDERSON, C. J.

The appeal in this case was dismissed during the first week of the term upon motion of the respondent, made pursuant to the third and fourth rules of this Court. Subsequently, and before the adjournment of the term, the appellant, upon notice to the respondent, moved to vacate the order of dismissal and to restore the appeal. Upon this motion both parties presented affidavits, from which we find the following facts: On the 26th of January, 1864, the statement on appeal as settled by the Judge was filed in the Clerk's office. The appeal was perfected by service of notice and filing undertaking on the first day of February following. Within a short time thereafter the attorney for appellant requested the Clerk to make up the transcript for this Court, but, on being asked when he wanted it, he replied, "You can make it up now, or next Fall, or some other time." The title papers, etc., of plaintiff and defendant, used in evidence on the trial, were made a part of the statement, and the transcript could not be made out by the Clerk without the original or agreed copies. Neither has ever been furnished by the appellant.

The only reason alleged by appellant for not furnishing the documents in question is that they were and still are on file in the District Courts of Yuba or Sacramento County, or in this Court, in other suits there pending. No reason is given why they could not have been withdrawn by stipulation or otherwise, or agreed copies obtained for the purpose of making out

the transcript; on the contrary, it affirmatively appears that no effort was made by appellant to obtain them in any manner, and there is no pretense that an effort to that end would have proved abortive; on the contrary, it is clear that they could have been readily obtained; for it appears that, about the middle of May last, the respondent by stipulation withdrew his title papers from said Courts, and has had them in his possession ever since, with the full knowledge of appellant's attorney and by virtue of his express stipulation; and it further appears that the respondent has been at all times ready and willing to furnish the appellant with his title papers, but has never been called upon by appellant for that purpose.

The second and third rules of this Court are to the following effect: "In all cases where an appeal has been perfected and the statement filed (if there be one) thirty days before the commencement of the next succeeding term, the transcript of the record shall be filed on or before the first day of such term."

"If the transcript of the record be not filed within the time prescribed, the appeal may be dismissed, on motion, during the first week of the term, without notice. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party; and unless so restored the dismissal shall be final and a bar to any other appeal in the same case."

The facts in this case wholly fail to show any "good cause" within the meaning and intent of the rule; on the contrary, they show a want of the most ordinary diligence on the part of the appellant in prosecuting his appeal. Moreover, on motions of this character the affidavits should show that the appeal has been taken in good faith, and that, in the opinion of counsel at least, there are substantial errors in the record which ought to be corrected by this Court. Upon these points the affidavits of the appellant are entirely silent. To hold that, under this showing, an order dismissing an appeal should be vacated and the appeal restored, would be a practical nullification of the rules of this Court, which, for purposes of

People v. Eastman.

equal and exact justice and promoting a uniform and established practice, should be regarded and held to be as binding and obligatory upon litigants as any other rule of civil conduct.

THE PEOPLE v. CYRUS A. EASTMAN.

TAXATION — JUDGMENT WHERE AND HOW ASSESSED.—A judgment for a debt and foreclosing a mortgage given to secure it, is only subject to taxation in the county where the owner of the judgment resides, and then the money due on the judgment alone is taxable.

ASSESSMENT OF MORTGAGE.—A mortgage, as such, is not liable to be assessed for taxes, but the assessment should be made of the debt which the mortgage was given to secure, and the debt, where the creditor resides in the State, has no *situs* for the purposes of taxation apart from the residence of the owner.

APPEAL from the District Court, Thirteenth Judicial District, Mariposa County.

The facts are stated in the opinion of the Court.

J. G. McCullough, Attorney-General, for Appellant.

The property was taxable in the County of Mariposa; the land on which the mortgage and judgment of foreclosure is a lien, is situate in that county; the judgment *debt* has its existence there; it is an acknowledged, unsatisfied, solvent debt; it ripened into a judgment in that county, and *there* is a debt of record. And now shall it, the property, pay tax, where it exists, or where its owner lives?

What county property shall be taxed in, is within the province and power of the Legislature to say.

By section thirteen of said Act, page 423 of Stat. of 1861, the Assessor must ascertain "*all* property, real or *personal*, subject to taxation," and assess it in that county to the owner or possessor, whether present or absent—known, or if unknown, say so—but assess it he must. (See Secs. 10 and 19.)

By section fourteen the Assessor is to obtain a list of all property which a party may own in another county, which list shall "specify the kind and nature of all other personal

People v. Eastman.

property in such other county belonging to the party;" and by section fifteen the Assessor must send copies of such lists to the Assessor of the proper county who is to assess the property, if not already assessed by him, "as other property therein."

These three sections show that where the property is, *there* it is to pay tax; and the *only* exception to this rule is, that a party, under section fourteen, may pay taxes on deposits of money or gold dust (not silver dust, or any other species of deposit even (where he lives, and not in the county where are the deposits.

This particular *exception* only illustrates in a clearer light the *rule* intended to be laid down by the Legislature. And under these sections the Assessor can only make an assessment from the list given him on the property in his county, with above exception; and further, if the party refuse to furnish the statement, the Assessor, under section thirteen, can *only* arbitrarily assess him for his property in *that* county which the "statement required by *this* section," (not sec. 14,) if furnished, would have shown.

Thus far there seems no foundation for the distinction between tangible and intangible property made in the case of *People v. Park*, 23 Cal. 138.

The case of *People v. Park*, 23 Cal., is not a precedent nor authority in this case.

1st. It was decided under the law of 1860, and not the Revenue Act of 1861, under which this case arises.

2d. As a matter of fact, the Act of 1860 had been repealed long before the assessment was made, and in that case considered.

3d. The assessment was made under the Act of 1861.

4th. The debt did exist at and long before the commencement of the year 1861, for which year it was assessed.

5th. It is not law; and I submit it is not authority for any purpose in this case.

Clarke & Carpentier, for Respondent.

By the Court, SAWYER, J.

This is an action to recover a tax levied in the County of Mariposa, under the Revenue Act of 1861, for the fiscal year 1863-4. At the time the tax was levied, the defendant was, and he ever since has been, a resident of the City and County of San Francisco. The property taxed was a judgment of record in Mariposa County, foreclosing a mortgage held by defendant on lands situate in said county. The defendant had judgment and plaintiff appeals.

The question is, as to whether the judgment is properly taxable in Mariposa County. We think not. In the case of *The People v. Park*, 23 Cal. 138, the property assessed was a mortgage upon lands in Mariposa County, held by a resident of San Francisco. In that case the tax was assessed under the Act of 1860; but the provisions of that Act, in all respects affecting the question under consideration, are substantially the same as in the Act of 1861. It was held—and we think correctly—that the property was not assessable in Mariposa County. The property to be assessed in such cases is money at interest, or debts. The money at interest, debt or obligation, is the principal thing, and the mortgage is only a security—a mere incident to the debt or obligation. The mortgage has no existence independent of the thing secured by it; a payment of the debt discharges the mortgage. The thing secured is intangible, and has no *situs* distinct and apart from the residence of the holder. It pertains to and follows the person. The same debt may, at the same time, be secured by a mortgage upon land in every county in the State; and if the mere fact that the mortgage exists in a particular county gives the property in the mortgage a *situs* subjecting it to taxation in that county, a party, without further legislation, might be called upon to pay the tax several times—for the lien for taxes attaches at the same time in every county in the State, and the mortgage in one county may be a different one from that in another, although the debt secured is the same. The fact that the mortgage has been foreclosed, and the lien

Greely v. Townsend et al.

carried into a judgment does not, in our opinion, change the character of the property with reference to the question under discussion. The principal thing is still a debt, secured by a judgment lien instead of a mere mortgage lien. The twenty-third section does not affect the question. Those provisions operate in cases where the creditor resides in the county in which the mortgaged premises are situated. The Act of 1860 contained the same provision. (See also *Faulkner v. Hunt*, 16 Cal. 171.)

Judgment affirmed.

Mr. Justice RHODES expressed no opinion.

GEORGE G. GREELY v. JAMES B. TOWNSEND AND JOHN B. POWELSON.

WRIT OF ERROR TO THE SUPREME COURT OF THE UNITED STATES.—When a final judgment in a suit has been rendered in the highest Court of law or equity of a State in which a decision in the suit could be had, and a writ of error has been issued by the Clerk of the Circuit Court of the United States, directed to the Judges of the Court in which the judgment was rendered, commanding that the record be sent before the Supreme Court of the United States to be there reviewed, the presiding Judge of the Court in which the judgment was rendered is not compelled, as a matter of right, to award a citation to the respondent to appear before the Supreme Court of the United States to maintain the validity of his judgment, but he may look into the record for the purpose of determining whether in his opinion the judgment is one from which a writ of error lies, and if he determines that it is not, he may refuse the citation.

SAME.—The granting of a citation is not a mere ministerial act, but one of judicial discretion.

POWER OF STATE LEGISLATURE.—It is not within the constitutional power of a State Legislature to confer jurisdiction upon Federal Courts, or prescribe the means or mode of its exercise.

WRIT OF ERROR FROM JUDGMENT CONCERNING PUEBLO LANDS.—A writ of error does not lie to the Supreme Court of the United States from a judgment rendered by the Supreme Court of this State, by which it is decided that the City of San Francisco was, at the date of the conquest and cession of California, and long prior thereto, a pueblo, and that as such pueblo she had a title to the lands within her general limits, and that such lands were held by the city in trust for public uses, and were not, either under the old Government or the new, the subject of seizure and sale under execution issued on a judgment against the city.

WHEN WRIT OF ERROR LIES.—The true test as to whether a writ of error lies to the Supreme Court of the United States from the final judgment of a

Greely v. Townsend et al.

State Court is to be arrived at, not from mere averment in the pleadings, but from the matter decided, as developed in the whole record.

STAY OF EXECUTION.—The presiding Judge of the highest Court in a State has no power to grant a stay of proceedings on a judgment rendered in that Court until an application can be made to some Justice of the Supreme Court of the United States to issue a citation on a writ of error.

APPLICATION for a citation to the respondent, on a writ from the United States Circuit Court for California to this court.

The case of *Greely v. Townsend and Powelson* has not been reported, as it did not involve any point of law not already passed on. It was an action of ejectment brought to recover possession of the western half of Fifty-vara Lot Number One Thousand One Hundred and Eighty-eight, in the City and County of San Francisco. The defendants, on the trial, offered to deraign a title from an execution sale on a judgment against the city, and offered to show by a decree of confirmation by the United States Land Commission of the city's title, that the title was in the city.

The evidence was excluded by the Court.

Plaintiff recovered judgment in the District Court, Twelfth Judicial District, City and County of San Francisco, and defendants appealed to the Supreme Court. After the affirmance of the judgment by the Supreme Court, appellants obtained a writ of error from the Clerk of the Circuit Court of the United States, directed to the Judges of the Supreme Court of the State of California, and then applied to the Chief Justice of said Court to award a citation to the respondent to appear before the Supreme Court of the United States and maintain the validity of his judgment. This application was made on the 14th day of June, 1864. The Chief Justice fixed the time for hearing the application for the 11th day of July, 1864, and in the meantime stayed all proceedings in the cause.

Vanarman & Townsend, for the motion.

A writ of error from the United States Supreme Court to the Supreme Court of a State is a *writ of right*, and issues *as*

debito justitiæ, and not as a matter of *discretion*, and does not depend upon the *amount* involved in the controversy, nor is any allowance thereof required beyond what takes place by the issue of the writ from the United States Supreme or Circuit Court, and the right to maintain it ought not to be passed upon by a Judge at Chambers. (Conklin's Treat. 3d Ed. pp. 681, 683; *Buel v. Van Ness*, 8 Wheat. 321, 323.)

Such writ is a *supersedeas*, and stays execution in cases under the twenty-fifth section of the Judiciary Act as well as when prosecuted from Circuit Courts, when the writ is served by lodging a copy thereof for the adverse party in the Clerk's office where the record remains within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of. (1 U. S. Stats, at Large, p. 85, §§ 23, 25; Conklin's Treat. 3d Ed. pp. 679, 680, 683, 684; *Siocton v. Bishop*, 2 How. U. S. 74.)

Unless the writ of error had been regarded and treated generally in the other States of the Union as a writ of right, and the question of jurisdiction under the twenty-fifth section of the Judiciary Act as properly belonging to the United States Supreme Court to determine, it can hardly be imagined how such cases as the following could ever have been taken to that Court under said twenty-fifth section: *Houston v. Moore*, 3 Wheat. 433; *Evans v. Phillips*, 4 Wheat. 73; *Gibbons v. Ogden*, 6 Wheat. 448; *Verden v. Coleman*, 18 How. 86; *Withers v. Buckley*, 20 How. 84; *White v. Wright*, 22 How. 19.

Even if, upon the present application, and notwithstanding the issuance and service of the writ of error, the Chief Justice of this Court were required to look into the record and be satisfied that the plaintiffs in error will, or at least, *may*, be able in the United States Supreme Court to maintain their writ, still, it is clear that the writ is in this case properly issued and the record is *examinable* in the United States Supreme Court. (*Smith v. State of Maryland*, 6 Cranch, 304, 305; *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 621, 622, 626; *Martin v. Hunter's Lessee*, 1 Wheat. 355, 361; *Miller v. Nicholls*, 4 Wheat. 311; *Ross v. Doe ex dem. Borland*,

Greely v. Townsend et al.

1 Pet. 663; *Satterlee v. Mathewson*, 2 Pet. 409; *Craig v. State of Missouri*, 4 Pet. 425, 429.)

W. W. Crane, Jr., against granting the motion.

Upon question of signing citation cited Conklin's Treatise, page 683; *Ferris v. Coover*, 11 Cal. 179; *Hart v. Burnett*, 20 Cal. 169.

As to whether this is a case within the twenty-fifth section of the Judiciary Act of seventeen hundred and eighty-nine, also cited Statutes at Large, Vol. I, p. 85; *Owings v. Norwood's Lessee*, 5 Oranch, 344; *Williams v. Norris*, 12 Wheat. 117; *Mathews v. Zane*, 4 Oranch, 382; *Mathews v. Zane*, 7 Wheat. 164.

SANDERSON, C. J.

At the last term of this Court a judgment was rendered in this case affirming the judgment of the Court below. The defendant, against whom the judgment was rendered, now presents a writ of error, addressed to the Justices of this Court, issued by the Clerk of the Circuit Court of the United States for the Northern District of California, and applies to me as Chief Justice of the Court for a citation to the defendant in error. The application is made under the provisions of the twenty-fifth section of an Act of Congress, passed on the 24th of September, 1789, entitled "An Act to establish the Judicial Courts of the United States." (1 U. S. Statutes at Large, 85.) That section declares:

"A final judgment or decree in any suit in the highest Court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State on the ground of their being repugnant to the Constitution, treaties or laws of the United States,

Greely v. Townsend et al.

and the decision is in favor of such validity; or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, the citation being signed by the Chief Justice, or Judge or Chancellor of the Court rendering or passing the judgment or decree complained of, or by a Justice of the Supreme Court of the United States." * * *

In support of the application it is first argued that the writ provided for in the foregoing section is a writ of right, and issues *ex debito justitiæ* and not as a matter of discretion; and that I cannot look into the record or proceedings for the purpose of determining whether the case falls within either class described in the section above quoted; and that no alternative is allowed, and I have no choice, but must issue the citation upon the presentation of the writ and a sufficient bond, notwithstanding I may be fully satisfied in my own judgment that the case in which the application is made does not come within the purview of the section in question.

To this doctrine I am unable to assent. It finds no color in the Federal Judiciary Act, and the industrious research of counsel has been unable to cite a single case in which the doctrine for which he contends is announced. Conklin's Treatise (pages 81 and 83,) the case of *Buel v. Van Ness*, 8 Wheaton, 321, and an Act of the Legislature of this State entitled "An Act to provide for certifying and removing certain cases from the Courts of this State to the United States Circuit Courts, and to remove, by writ of error, certain cases from the Supreme Court of this State to the Supreme Court of the United States," passed April 9, 1855; (Statutes of 1855, p. 80,) only are cited by counsel in support of his proposition. Conklin's Treatise and the case of *Buel v. Van Ness* wholly fail, in my judgment, to sustain the doctrine. On the contrary, so far as they afford

any guide to a correct solution of the question, they seem to militate against it.

Mr. Conklin, in his Treatise, (page 683,) says: "When the writ of error is to a State Court, the citation may be signed by the presiding Judge of the Court to which it is directed, or by any Justice of the Supreme Court of the United States. It is usual, in imitation of the English practice, also to have the writ of error *allowed* by the Judge. But the Act does not in terms require it, nor is there any rule in the Supreme Court requiring it, and no formal allowance beyond what is implied by the approval of the security offered, and the signing of the citation is necessary in any case unless it is made so by rule or established usage in the particular Circuit Court to which it is returnable." This language, although not very satisfactory, certainly favors the idea that there must be an *allowance* of the writ by the Judge either expressly or by implication. To allow implies an exercise of judgment and will on the part of him by whom the act is done, coupled with the power, in his discretion, to refuse. In *Buel v. Van Ness* it was objected that the writ of error in that case did not, upon its face, purport to be issued upon a final judgment of the highest Court in the State. In reply to this objection Mr. Justice Johnson, who delivered the opinion of the Court, said: "We see no reason why it should be so expressed. The writ of error is the act of the Court; its object is to cite the parties to this Court, and to bring up the record. How else is this Court to ascertain whether the judgment be final? Nor can there be any danger of its being hastily or erroneously used, since it *must be allowed* either by the presiding Judge of the State Court or a Judge of the Supreme Court of the United States." Further on, he said: "It is a writ of common right in the cases to which the jurisdiction of an appellate Court extends, and the abuse of it is sufficiently guarded against, as suggested to the first exception," referring to what he had previously said, which was that which I have above quoted. What is the guard against the hasty and erroneous use of the writ to which he refers in the first instance, or its abuse in the

second, unless it be the judgment and discretion of the Judge by whom the writ is allowed and the citation issued? The reason assigned by him why it was not material that the judgment need not appear upon the face of the writ to have been a final judgment is, in effect, because the Judge by whom the writ was allowed and the citation signed had the power to determine in advance, and preliminary to his signing the citation, whether the judgment was final, and if not to refuse to sign it. Whether the judgment is final or not is one of the tests of the jurisdiction of the appellate Court, and if I may, as the case of *Buel v. Van Ness* clearly implies, ascertain the presence or absence of that test, with a view of determining whether I will sign or refuse to sign the citation, then, by parity of reason, I may look into the case for the purpose of ascertaining whether it embraces the other conditions upon which the jurisdiction of the appellate Court is grounded, and may be governed in my final action by the conclusion to which my judgment may come.

This is not the first time that the question under consideration has arisen in this State. The same point was made in *Ferris v. Coover*, 11 Cal. 179, and in *Hart v. Burnett*, 20 Cal. 169. In the former case Mr. Justice Baldwin said: "The appellate power of the Supreme Court of the United States is strictly limited to the cases given in the Act. Like any other special power, it is to be strictly pursued, and the record must show upon its face the facts which give the power. In the cases falling within the provisions of the section quoted, we acknowledge the right of appeal. We deny it in all other cases. By the provisions of this section, in such cases the Chief Justice of this Court is authorized to issue the citation. That duty or that power is cast upon him alone. The Associate Justices have nothing to do in the premises. The act is his as a chamber proceeding. But still the power is in its nature in some degree judicial. He must see, when he is required to act or authorized to proceed under the Federal law, that he is within the law. If there is much doubt or question as to the jurisdiction, he might, in his discretion (and

perhaps it would be advisable), issue the citation, leaving the fact of jurisdiction to be determined by the Supreme Court of the United States." This language of Mr. Justice Baldwin, and more of like import, was approvingly quoted by Mr. Chief Justice Field in *Hart v. Burnett*, and that learned Judge who now occupies a seat upon the bench of the Supreme Court of the United States, continued in these words: "In accordance with the views here expressed, I must, when applied to for a citation, judge, in the first instance, whether the case is covered by the Act of Congress." He came to the conclusion that it was not, and denied the application for a citation.

To me it seems clear that Congress foresaw that the provisions of the twenty-fifth section might lead to great abuse unless some check was interposed to the hasty and unauthorized use of the remedy thereby granted in certain cases; and to that end the allowance of the writ, or what is equivalent thereto, the issuing of the citation, was designedly placed in the sound discretion of the presiding Judges of the State Courts and the several Justices of the Supreme Court of the United States. Why place the power in the hands of judicial officers if its exercise is not a judicial act? If the signing of the citation is purely a ministerial act, unaccompanied by the exercise of judicial discretion, the power might, with equal convenience, and with much greater congruity, have been lodged with the Clerk of the State Court, or with the Clerk of the United States Circuit Court, by whom the writ is issued. If it be said that there is danger of defeating the object of the law in placing the power in the discretion of the State Judges, by reason of any supposed jealousy on their part toward the encroachments of Federal jurisdiction, the answer is that against this danger, also, Congress has wisely guarded by providing that a party shall not be ousted of his appeal by the adverse decision of a State Judge, by allowing the application to be made to a Federal Judge without any restriction upon the number of applications. So, as the Courts are at present organized, there are eleven Judges, to either

Greely v. Townsend et al.

and all of whom the application can be made. Thus, it may be safely affirmed that the abuse of the writ is designedly and amply guarded against upon the one hand, and its rightful use fully secured upon the other.

As a general rule, upon a question of construction, effects and consequences ought not to be consulted. But to this general rule, cases of doubt, where the opposing reasons are nicely balanced and the scales refuse to turn, the light weights of effect and consequence may be superadded. Admitting then, for the sake of argument, that the present is such a case, it is proper to refer to the effects and consequences of the doctrine contended for on behalf of this application; and upon this point I cannot do better than by quoting from the opinion of Mr. Justice Baldwin in *Ferris v. Coover*. Such a "doctrine would be fraught with enormous and intolerable evils. If an appeal with stay of execution be matter of absolute right, then every case, civil or criminal, decided by the highest Court having jurisdiction in the State, could be taken up to the Federal Capital, and all proceedings suspended until its return. In every criminal case the pretext would be that the law was *ex post facto*. It would be no answer to say that the record showed plainly the contrary; the reply to this would be, 'The Supreme Court is to decide that question.' And every civil case might be carried thither upon the ground of a supposed asserted repugnance to some provision of the Federal Constitution or law, or of some treaty. That damages might be given for frivolous appeals would be no adequate protection against them, and in criminal cases no protection at all. The Supreme Court of the United States holds but one term in each year, and from the embarrassments and delays attending the taking of cases from this Court to that, especially in criminal cases, the recognition of this principle would produce the worst possible results. If the Chief Justice of this Court should err in deciding the case not to be appealable, the jurisdiction of the Supreme Court of the United States would not thereby be ousted. That Court could, on the

Greely v. Townsend et al.

inspection of the record, grant the writ or issue the citation, and proceed to hear and determine the case."

As a last resort, counsel appeals to the statute of this State in aid of the doctrine for which he contends. The origin and history of the Act of the 9th of April, 1855, (Statutes of 1855, p. 80,) are well known. Five months prior to its passage the then Supreme Court of this State, in the case of *Johnson v. Gordon*, 4 Cal. 368, had decided that the twenty-fifth section of the Federal Judiciary Act of 1789 was unconstitutional, and declared that no case could be taken from a State to a Federal Court by writ of error or otherwise. The decision was made upon the authority of the Court of Appeals of Virginia in the case of *Martin v. Hunter's Lessee* and in harmony with the ultra State rights doctrine of Calhoun and his political followers, the soundness of which is now undergoing its last test upon the bloody battlefields of the republic. Startled by the judicial enunciation of a doctrine which they had previously contemplated only in its political and partisan aspect, and which, in their eyes, may have acquired additional importance by reason of the immediate sanction of the highest Court of the State, the Legislature sought to provide a remedy against its supposed evils by interposing a barrier to its further judicial progress, apparently without pausing to consider whether a remedy was within the constitutional reach of State legislation. The motive was a good one; but, as all must admit the power was wanting. It is not within the constitutional power of a State Legislature to confer jurisdiction upon Federal Courts or prescribe the means or mode of its exercise. That subject belongs exclusively to the Federal Government, and must be regulated solely by the Federal Constitution and the laws of Congress. While, therefore, I appreciate the motive of the Legislature in passing the Act in question, I am compelled to deny its power, and must hold that, so far as the Act attempts to prescribe a rule for judicial conduct in cases like the present, it is wholly inoperative. If constitutional, the occasion for such legislation no longer exists; for the case of *Johnson v. Gordon* has been long since

Greely v. Townsend et al.

overthrown and a contrary doctrine firmly established in this State. (*Ferris v. Coover*, 11 Cal. 175; *Hart v. Burnett*, 20 Cal. 169.)

It only remains for me to determine whether the facts of this case are covered by the twenty-fifth section of the Act of Congress. The action was brought to recover possession of a certain lot in the City of San Francisco, and the ultimate facts relied on to bring the case within the Act are stated in the defendant's answer as follows: "And for a further and separate answer to said complaint, said defendant, according to his information and belief, says that by virtue and effect of the treaty of peace, friendship, limits and settlements, between the United States and the Mexican Republic, dated at Guadalupe Hidalgo, February 2d, 1848, the ownership and title in fee simple to said lot of ground described in said complaint, passed to and became vested in the said United States, and that the said United States, afterward, by force and effect of the Act of the Congress thereof passed March 3d, 1851, entitled 'an Act to ascertain and settle the private land claims in the State of California,' and by force and effect of the final decision and decree of the Board of Commissioners of said United States, appointed and acting thereunder (upon the petition and claim of the City of San Francisco presented to and filed before said Board), in favor of said city, the said ownership and title in fee so acquired and held by the United States passed to and vested in the said City of San Francisco, and that by divers mesne conveyances, since duly executed and delivered, and by force and effect of divers ordinances of said City of San Francisco, and an Act or Acts of the Legislature of California, duly passed the said ownership and title in fee in and to said lot of ground and premises had, prior to the 28th day of March, 1862, became and then was vested in and held by one James E. Mumford," defendant's lessor, etc. In support of this defense the defendant upon the trial offered evidence of a judgment against the City of San Francisco, execution thereon, and a Sheriff's sale and deed of the lot in suit. This evidence was objected to by the other side, and excluded by the Court upon

the authority of *Hart v. Burnett*, 15 Cal. 530, where it was held that the City of San Francisco was at the date of the conquest and cession of California, and long prior thereto, a pueblo, and that as such pueblo she had a certain right or title to the lands within her general limits, and that such lands were held by the city in trust for public uses, and were not, either under the old Government or the new, the subject of seizure and sale under execution. To this ruling the defendant duly excepted, and on appeal to this Court the judgment of the Court below was affirmed. In rendering this judgment was the validity of the treaty of Guadalupe Hidalgo, or of the Act of Congress of the 3d of March, 1851, or the authority of the Board of Land Commissioners drawn in question; and if so, is the judgment against the validity of either? Or, was the construction of any clause of the Federal Constitution, or of the treaty of Guadalupe Hidalgo, or of the Act of Congress of the 3d of March, 1851, or of the Land Commission, drawn in question; and if so, is the judgment against any title, right, privilege or exemption specially set up or claimed by the defendant in good faith? I say in good faith, because such, in my judgment, is the true intent and meaning of the Act.

The first question presented is whether the validity or construction of the treaty, or of the Act of Congress, or the Land Commission, any or all, was directly or necessarily involved in our decision to the effect that the lot in question was not subject to execution sale. The question is narrowed to these three, because (which is worthy of note) it is not pretended that we have violated any clause of the Federal Constitution.

It is first claimed that these several matters were directly and necessarily involved, because they are expressly alleged in the answer, and therefore the title of the defendant thereunder is "set up and claimed" within the meaning of the Act. Counsel admits that the construction of the Federal Constitution is not involved. Suppose, then, that the pleader, instead of commencing with the treaty of Guadalupe Hidalgo, had gone back to seventeen hundred and eighty-nine, and led

Greely v. Townsend et al.

off by averring "that, by reason of the force and effect of the Federal Constitution," etc., would the construction of that instrument thereby have become involved in the decision of the case? I hardly think the learned counsel will answer in the affirmative. Matter of averment cannot be regarded, merely because it is averred, as furnishing a certain test. Whether the facts relied on as conferring appellate jurisdiction appear as matter of averment in the pleadings, or are developed by the evidence during the progress of the trial, is wholly immaterial, and the mere fact that they are stated in the pleadings can have no possible effect upon the result. The test is to be found in the facts themselves, and not in the mode or manner of their presentation. The test question in the present case is this: "Is the defendant's title, or rather the title of the City of San Francisco, derived by or through the treaty, or the Act of Congress, or the Land Commission, or is it in any manner dependent upon either for its validity?"

The argument is that the lot in question originally belonged in fee to the Mexican nation, and was ceded in fee to the United States by the treaty of Guadalupe Hidalgo, and was granted by the latter to the City of San Francisco, by the Act of March 3d, 1851, and confirmed to her by the judgment and decree of the Land Commission; and hence became subject to sale on execution against the city. This Court, on the contrary, has decided, upon the authority of *Hart v. Burnett*, that the City of San Francisco was a pueblo, or town, under the Mexican Government, long prior to the treaty; and that as such pueblo she held, under the laws of Mexico, the land in question in trust for public uses, also long prior to the treaty, and that under the laws of Mexico such land so held was not subject to forced sale under execution; and that by reason of the character of the city's title the same is true under the laws of this State. Thus the real point of difference between the argument and decision of this Court (and the point upon which the whole case turned) antedates the treaty. The error of the argument lies in the fact that it assumes

(what this Court has decided is not true) that the title to the land was in the Mexican Government at the date of the treaty, and by its force and effect passed to the United States. Having decided that the title to the land was in the Pueblo of San Francisco prior to the date of the treaty, and that it was held in trust, the final judgment which was rendered by this Court followed as a matter of course. The determination of the date and character of the city's title imparted to every subsequent question involved in the decision of the case a like legal complexion, and became conclusive upon the ultimate question of final judgment. It is clear, therefore, that the determination of the leading and controlling question did not involve the validity or construction of the treaty or the Act of Congress, or the authority of the Land Commission, because its solution necessarily depended entirely upon the laws of Mexico as they existed prior to the date of the treaty.

The only further question presented by the case was whether a trust estate was subject to forced sale under execution against the trustee, which, I presume, counsel will admit could hardly depend upon the treaty or Act of Congress, or the decree of the Land Commission. Thus only two legal propositions were involved in the decision of the case, neither of which was founded upon the treaty or Act of Congress, or the decree of the Land Commission, or bore any legal relation whatever to either; but on the contrary the first had its origin in and depended for its solution wholly upon the Mexican law and the latter upon the laws of this State. If the questions upon which this Court necessarily passed in arriving at a final judgment adverse to the alleged title of the defendant bear directly or indirectly any legal relation whatever to the treaty of Guadalupe Hidalgo, or the Act of Congress of the 3d of March, 1851, or the decrees of the United States Land Commission, I certainly am unable to perceive it. That this Court indirectly decided that San Francisco did not obtain her title from the United States is true, and the same result would have followed had the pleader averred that she obtained her title from the King of the Sandwich Islands, or interposed, under pretense

Greely v. Townsend et al.

that it was a defense to the action, any other matter wholly foreign to the merits of the controversy. As I have already stated, mere averment cannot make that material which is immaterial, or raise a mere pretext to the level of a controlling fact. A question so made and presented does not draw into the decision of the case the validity or construction of a treaty, or Act of Congress, or of a Commission, within the meaning of the Federal Judiciary Act. To hold that it does would enable the pleader to determine the question of Federal jurisdiction, and there has not been and never will be an action of ejectment tried in this State where such a result could not be readily attained. It would only be necessary to allege Mexican title, and the validity and construction of treaties, Acts of Congress and Commissions are all brought in. In vain the Court may say they have nothing to do with the case. The reply is, "My title, my right, privilege or exemption" (as the case may be,) "depends upon them, and if you decide against me the Federal Judiciary Act takes the case to Washington." The logic is false, and does not rise to the dignity of forensic discussion. It perverts law and ignores good faith, which every rule of civil conduct exacts. It converts form into substance, and accords to pretense the dignity of truth.

In conclusion, I have only to add that in my judgment, after a careful examination of the record, this case does not fall within the Judiciary Act of 1789; and that the facts relied on for that purpose do not immediately or remotely affect any question directly involved in the final judgment. I may be in error, but if I am the defendant is not without remedy. He can make a like application to each and all of the Justices of the Supreme Court of the United States.

While the power and the responsibility of passing upon this question is vested, so far as the action of this Court is concerned, solely in me, by the Act of Congress, I have not failed to take counsel with my associates, and I am authorized to say that they fully concur in the conclusion which I have reached.

I am also asked to grant a stay of proceedings for the purpose of an application to some Justice of the Supreme Court

Sneed v. Osborn.

of the United States. This individually I have no power to do. No such power is conferred upon me by the Act of Congress. The Act of the Legislature of this State confers the power in terms, but I have already decided that Act to be inoperative.

The application must be denied, and it is so ordered.

WILEY SNEED v. J. W. OSBORN.

BOUNDARY LINES OF LAND SOLD.—If the description in a deed is uncertain, the grantor and grantee may agree upon and establish the boundary line between the land granted and the remaining lands of the grantor, and such agreement will be binding upon the parties; but to be effectual, it must be done while the parties own the lands on both sides of the lines they thus locate.

DIVISION LINES BETWEEN ADJOINING TRACTS OF LAND.—When the owners of adjoining lands have acquiesced for a length of time, equal at least to the length of time prescribed by the Statute of Limitations to bar a right of entry in the location of a division line between their lands, although it may not be the true line according to the calls of their deeds, they are thereafter precluded from saying it is not the true line.

LEGAL TITLE TO LAND.—A party holding land dependent on a division line established between contiguous owners by their acquiescence for the time prescribed by the Statute of Limitations as a bar to an action for the recovery of real property, holds it by a legal and not an equitable title.

OBJECTION TO EVIDENCE.—Where the objection made to testimony is that it is incompetent and illegal, without a specification of the point of incompetency or illegality, it is the duty of the Court to overrule it if it is admissible for any purpose.

EVIDENCE TO PROVE BOUNDARY LINES.—The declarations of the owner of a tract of land are not admissible in evidence for the purpose of proving its boundary lines, if made when he is not in possession.

APPEAL from the District Court, Seventh Judicial District, Napa County.

The facts are stated in the opinion of the Court.

Williams & Thornton, for Appellant.

The agreed location must control, and should prevail.

The authorities on this point are clear and conclusive. The first case to which we call the attention of the Court is *Adams v. Rockwell*, 16 Wendell, 285-302, decided by the

Sneed v. Osborn.

Court of Errors of the State of New York. In that case Chancellor Walworth thus states the rule, in case there could be no real doubt as to how the land should be located according to the limits described in the deed. He says:

“Where there can be no real doubt as to how the premises should be located, according to certain and known boundaries described in the deed, to establish a practical location different therefrom, which shall deprive the party claiming under the deed of his legal rights, there must be either a location which has been acquiesced in for a sufficient length of time to bar a right of entry under the Statute of Limitations in relation to real estate, *or the erroneous line must have been agreed upon between the parties claiming the land on both sides thereof*, or the party whose right is to be thus barred must have silently looked on and seen the other party doing acts, or subjecting himself to expenses in relation to the land on the opposite side of the line, which would be an injury to him, and which he would not have done if the line had not been so located; in which case, perhaps, a grant might be presumed within the twenty years.”

The rule we refer to we have given in the above extract, in *italics*.

In the case of *McCormick v. Barnum*, 10 Wendell, 104, the Court say:

“Cases of this description” (referring to cases of location) “have been frequently before the Court. The principle upon which they have all been decided is, that where parties agree upon a division line, either expressly, or by long acquiescence, such line shall not be disturbed; buildings and permanent improvements may be made upon the faith of the location of the line; transfers may be made, and to permit such lines to be altered might be productive of incalculable injury.”

In *Jackson v. Corlear*, 11 Johns. 123, the Court say: “After the parties have *deliberately settled* a boundary line between them, it would give too much encouragement to the spirit of litigation to look beyond such settlement, and break up the line *so established between them*.”

Sneed v. Osborn.

In *Perkins v. Gay*, 3 Serg. & Rawle, 132, the defendant had given evidence of an agreed line of boundary, styled by the Court "a consentable line." The Court, by Gibson, J., thus expressed itself with reference to this line:

"The establishment of this kind of boundary is always a matter of compromise, in which each party supposes he gives up for the sake of peace something to which, in strict justice, he is entitled. There is an express mutual abandonment of their former rights, upon an agreement that whether they be good or whether they be bad, neither is to recur to them on any pretense whatever, or claim anything that he does not derive from the terms of the agreement. Each takes his chance of obtaining an equivalent for everything he relinquishes, and if the event turn out contrary to his expectations, so much the worse for him. If there be no intention of fraud, no unfair dealing, and neither party has more knowledge of the fact misconceived than the other had, the contract will bind."

The ruling is the same in *Hagey v. Detweiler*, 35 Penn. 412, 413; see, also, 1st Hening and Munford, 177; 4 Id. 125.

But it is said that Harrison was no party to this agreement as to the boundary line, and therefore it is not binding.

In reply to this we say: By reference to the deed of Harrison, it will be seen that its *northern* boundary is the *southern* boundary of the Boggs tract. The language used is this: "one square mile, or six hundred and forty acres, bounded on the north by a certain tract of one square mile, which the said Vallejo sold to L. W. Boggs, by deed bearing date the 19th day of March, A. D. 1847." The location of the Harrison tract is then dependent on that of the Boggs tract. The former cannot be ascertained until the location of the latter is ascertained and determined. Until the Boggs tract is located, the Harrison tract cannot be. The title, then, of the Harrison tract remains in the grantor, Vallejo, and does not pass out of him until the location of the Boggs tract. The evidence further shows that Vallejo owned the land surrounding both the Boggs and Harrison tracts. Vallejo is the grantee of the "*Rancho de Napa*," of which these two tracts formed a part,

Sneed v. Osborn.

and D'Hemecourt's map of the said rancho shows that it surrounded the tracts above mentioned. Vallejo was then an adjoining owner with Boggs, and was competent to enter into an agreement fixing the boundary line.

The declarations deposed to are those of an interested party, not in possession; the witness testifies that he was himself in possession.

The authorities go to this extent only, that the declaration of a party in possession as to the character of his possession, whether in his own right, or for another, are admissible as part of the *res gestæ*. But such declarations cannot be admitted, until a possession has been established of the party whose declarations are offered in evidence.

In this case the declarant was not in possession, the tract was entirely uninclosed, and its virgin soil had never been disturbed by a single furrow.

The following authorities are referred to:

McBride v. Thompson, 8 Ala. 652; *Abney v. Kingsland*, 10 Id. 358, 359; *West v. Price's Heirs*, 2 J. J. Marshall, 380, 383; *Jackson v. Vredenburg*, 1 Johns. 158; *West Cambridge v. Lexington*, 2 Pick. 536; 3 Phil. Ev. C. & H.'s Notes, 217, 218, 219.

Whitman & Wells, for Respondent.

It will be remembered that the survey of the Boggs tract was made after the execution and delivery of the Harrison deed. By the delivery of that deed Harrison acquired rights which could not be varied or annulled by any agreement between Boggs and Vallejo. His deed called for the Boggs tract as his northern boundary. What Boggs tract? The tract described in the deed; not any other tract which might be agreed upon by way of compromise between Boggs and Vallejo. It will be remarked that Harrison was not present at the survey, nor is it pretended that he ever agreed to or knew of the arrangement between Boggs and Vallejo.

Harrison was entitled to have the survey made according to the calls of the Boggs deed, for thus it became a feasible thing.

Sneed v. Osborn.

We contend in the first place, that the survey was thus practically made on the ground. Second, if not so made, that the starting point being ascertained, the survey therefrom extended shows that the defendant has twenty-four acres of that land in possession; and even admitting that a variety of surveys may be made legitimately from the ascertained starting point, still, where there may be a difference of construction or application, we have the right to the election. (*Jackson v. Hudson*, 3 J. R. 374; *Saun v. Blodgett*, 16 J. R. 172; see, also, to the prior points suggested: *Luce v. Carley*, 24 Wend. 451; *Jackson v. Wendell*, 5 Wend. 142; *Bates v. Tymason*, 13 Wend. 300.)

By the Court, RHODES, J.

On the 19th of March, 1847, Salvador Vallejo conveyed to L. W. Boggs one square mile of land in Napa Valley, bounded as follows: "Beginning at a point near the base of the mountain on the west side of Napa Valley, one half a mile in a southerly direction from where a small branch or brook enters the valley from the mountains, usually known as the Old Rhodare; thence running from the said point of beginning along a line parallel with the base of the mountains, in a northerly direction one mile; thence forming a right angle and running in an easterly direction one mile; thence making a right angle and running in a southerly direction one mile; thence making a right angle and running in a westerly direction one mile to the point of beginning."

Vallejo conveyed to Harrison, on the 5th of April, 1847, one square mile of land, the only description of the boundaries being as follows: "Bounded on the north by a certain tract of one square mile, which said Vallejo sold to L. W. Boggs, by deed bearing date the 19th day of March, A. D. 1847." Subsequent to the deed, and about the last of April of the same year, Vallejo and Boggs went on the land, and caused a survey of the same to be made by Surveyor Ida, who set stakes at the southeast, the northeast and northwest corners,

and directed the parties where to set the stake at the southwest corner, at a certain distance north of where he had set the stake for the first station; and the southern, eastern and northern lines were marked. The position of the initial point is uncertain. Probably no two men would take the deed, and going on the land separately, fix upon the same place for the initial point, for the place where the creek enters the valley—the line where the hills terminate and the valley begins—is difficult of ascertainment, there being a gradual slope of the hills to the valley; and the “Old Rhodare,” which the parties understood to mean rodeo grounds, is a tract which may include from a few acres to five hundred acres. In view of this uncertainty, the parties went on the land for the purpose of establishing the lines, and in the first place agreed upon a certain tree on the bank of the creek, as the initial point; but on the surveyor measuring thence south half a mile and setting the first station and running from thence the southern line, the parties, after some controversy as to the land to be included, agreed that the first station should be set to the north such a distance, that the southern line should not cross Dry Creek; and the lines were run and marked and corner stakes were set accordingly, the western line not being actually run or marked, but directions being given for setting the stake at its southern extremity, so as to accord with the southern line as run.

At the time of the sale to Boggs, Vallejo owned the land adjoining the Boggs tract and the land adjoining the Harrison tract, and there can be no doubt, upon principle or authority, that under such circumstances, and considering the uncertain description of the deed, it was competent for the parties to locate the land, and establish the boundary lines between the tract conveyed and the remaining lands of the grantor. This could be done by them while the grantor owned the adjoining land, and the lines thus fixed would be regarded as division lines established by the agreement of coterminal proprietors. To be effectual for any purpose, it must be done while the parties own the lands on both sides of the line they thus locate. If the square mile sold to Boggs had contained all the lands

that Vallejo owned in that place, Vallejo, after the sale of it, would have had no greater control over the location of the land than a stranger to the title.

Harrison did not participate in the Ide survey, and there is no evidence in the record, showing that he assented to or acquiesced in it in any manner. He owned the land south of the Boggs tract at the time of the survey, and was unaffected by any agreement respecting the lines of the Boggs tract, to which he was not a party.

In 1852, the northwest quarter of the Harrison tract was conveyed to the respondent, and in 1853, there was conveyed to the appellant all of the southwest quarter of the Harrison tract, except ten acres in the northeast corner of the southwest quarter, which had been conveyed in 1852 to McNeil, who conveyed the same to the respondent in 1857. The respondent is in possession of the northwest quarter and the ten acre tract, and the appellant is in possession of the southwest quarter less the ten acre tract, measuring the land from the southern line of the Ide survey as the base.

The respondent now claims that the Ide survey was incorrect; that the southern line was run about six chains too far to the north; that upon the Harrison tract being surveyed and subdivided according to the true southern line of the Boggs tract, the northwest quarter and the ten acre tract will include two parcels of land within the northern part of the southwest quarter, as claimed and occupied by the appellant, of the width of six chains, and both together extending across the southwest quarter, and containing twenty-four acres. He sued to recover the possession of the northwest quarter and the ten acre tract, and the Court found for him, and gave judgment for the possession of the premises sued for.

What we have already said indicates that we agree with the appellant in his first and second propositions, but that his third proposition, viz: that "the agreed location must control, and should prevail," cannot be maintained, because there is no evidence that Harrison or the plaintiff or those through whom he claims, joined in running the line in controversy,

Sneed v. Osborn.

or at the time it was run, directly assented to it, as established by the Ide survey.

There is another consideration applicable to a part, at least, of the case, that counsel have not particularly urged, but which is of too much importance to be passed over without notice. In eighteen hundred and fifty-four, while McNiel was the owner of the ten acre tract, and the appellant owned the residue of what he claims as the southwest quarter, the appellant directed a survey to be made of the ten acre tract, so that he might know where to build his fences, and the survey was accordingly made. It does not appear whether or not McNiel was present, but he soon after the survey built his fences on the land as surveyed, and thereafter occupied the land until he sold it to the respondent, who since that time has held it as fenced by McNiel, and the appellant has since the survey held the land adjoining it on the south and west. The record contains no evidence of any objection being made by McNiel or the respondent, to the lines of the ten acre tract as surveyed and fenced, from the time of the survey to the commencement of this action in eighteen hundred and sixty.

The acts of the parties might not amount to an agreement between them, to locate the tract as then surveyed, and it is unnecessary to consider them in that view; but do they not show an acquiescence by the parties in those lines as the division lines between the two tracts of land? If they do show such acquiescence it will make no difference in the result that they acted in ignorance or under a mistake, as to the true northern line of the southwest quarter of the Harrison tract. The authorities are abundant to the point that when the owners of adjoining lands have acquiesced for a considerable time in the location of a division line between their lands, although it may not be the true line according to the calls of their deeds, they are thereafter precluded from saying it is not the true line. The better opinion is that the considerable time mentioned in the cases must at least equal the length of time prescribed by the Statute of Limitations to bar a right of entry. (*Jackson v. Ogden*, 7 Johns. 238; *Jackson v. Freer*,

17 Johns. 29; *McCormick v. Barnum*, 10 Wend. 104; *Dibble v. Rogers*, 13 Wend. 536; *Adams v. Rockwell*, 16 Wend. 285; *Van Wyck v. Wright*, 18 Wend. 157; *Boyd's Lessees v. Graves*, 4 Wheat. 513.) There was sufficient evidence in the case to have justified the Court in finding that the parties and the respondent's grantor had acquiesced in the practical location of the lines of the ten acre tract in such a manner and for such a time that they cannot now deny that those lines are the true division lines between their respective lands; and there being no conflicting evidence upon this point, the Court should have found for the appellant as to the ten acre tract.

The evidence bearing upon this point, so far as it relates to that portion of the division line extending westerly from the ten acre tract, is very slight and unsatisfactory, arising probably from the reason that the case was not presented in the Court below in view of the proposition that we have been considering. And for the same reason, we do not undertake to say that the respondent has presented all his evidence, or fully made his case on this question, in regard to the ten acre tract.

The appellant makes a further point that the Court erred in admitting the testimony of H. C. Boggs, concerning the declaration of Governor Boggs as to the boundaries of the Boggs tract, and we think it well taken. The objection was general — the ground being that it was incompetent and illegal testimony — and it would be the duty of the Court to overrule an objection thus taken, if the evidence was admissible for any purpose. The party objecting should lay his finger on the point of objection. (*Martin v. Travers*, 12 Cal. 243, and cases cited.) But here the witness stated that Governor Boggs was not then in possession of any of the land, and for that reason his declarations were not competent as evidence. (1 Phil. Ev. C. H. and E.'s Notes, 194, note 81.)

The respondent contends that the admission of that evidence did not amount to an error, because the Court, in passing on the motion for a new trial, disregarded the evidence as immaterial. Such in fact was the case; but it was done by the

Sined F. Osborn.

Court, on the theory that Vallejo and Boggs still adhered to the tree at the creek, as the initial point, and on which the location was made to depend, notwithstanding that on their running the southern line they agreed that the first station, as set for the southwestern corner, should be moved several chains north of where it was set, on measuring southerly the half mile from the tree; and that all the lines were run and marked and the corners established in view of the fact, that the first station had thus been moved to the north. The evidence of the declarations of Governor Boggs might very properly be disregarded as immaterial, if it could be held that the initial point had been permanently fixed as contended for; but the whole survey contradicts the idea that the parties still regarded that as the initial point—and, in fact, the Ide survey could not have been made as it was, by beginning at the marked tree at the creek as the initial point. We cannot say that the Judge who tried the case disregarded this evidence because it was immaterial, or if so, that it was done for the same reason that the Judge who refused the new trial disregarded it; but if the cause was determined at the trial upon the theory announced, in deciding the motion for a new trial, the finding cannot be sustained, for the theory amounted in substance to the doctrine that Harrison, while holding his deed from Vallejo, was bound by the acts of Vallejo and Boggs in assuming and fixing upon the initial point—and a point, too, that was immediately abandoned by them, in running and making the lines and locating the corners.

Judgment reversed, and the cause remanded for a new trial.

By the Court, RHODES, J., on petition for rehearing.

The respondent, in his petition for a rehearing, suggests that we have mistaken the evidence in several points, but we have carefully examined the record, and we think we correctly understand the facts of the case. Facts are stated, in the opinion of the Court, solely that the course of reasoning adopted by the Court, and the principles enunciated, may be

the better understood. The Court does not assume to find the facts in a case, for it has no authority to do so, except in case where an ultimate fact results, as a conclusion of law, from the proof of certain prior facts. If this Court states the evidence in a cause, whether correctly or incorrectly, the statement in no manner controls the Court below, and cannot prejudice the parties, where a new trial is had. It is upon questions of law, that the decision of the appellate Court becomes the law of the case, and not upon questions of fact.

We are of the opinion, from the evidence in the record, that the act of Vallejo and Governor Boggs, in the absence of Harrison, in fixing upon the initial point, did not and could not affect the location of the Harrison tract, and we are further of the opinion that, as a fact in the case, the Ide survey, as made and marked on the land, was inconsistent with the first intention of the parties, in taking the tree as the initial point, and, in effect, removed the initial point to a position north of the tree.

But it is immaterial where they fixed the initial point, for the northern line of the Harrison tract coincided with the southern line of the Boggs tract, as it must be ascertained and run, according to the deed, without regard to how Boggs and Vallejo may have run it. After the initial point is established, a line one half mile in length must be run therefrom, south, to find the southwest corner of the Boggs tract, and the southern line must run from that corner, at right angles with the western line, as described in Boggs' deed from Vallejo. If the parties owning the land on both sides of the true line, have established another line, by a valid agreement, or by an acquiescence, such as we have before indicated, that line will govern the parties and their vendees.

The respondent objects that the facts relating to the acquiescence in the lines of the ten acre tract cannot be considered in this case, because those acts, if amounting to anything, create an equitable estoppel, and the appellant has failed to plead the estoppel.

The objection would be well taken, if it is a correct princi-

Sneed v. Osborn.

ple of law, that the parcel of land, cut off from the lands of the coterminous proprietor, by the division line established by long acquiescence of the two parties, is held by an equitable title. The Courts often say that it would be inequitable for the parties, after such long acquiescence in a partition line, to set up another, as the true line, according to the calls of their respective deeds — that they are estopped from making such proof; but it is not meant thereby that either party holds by an equitable title, or that title accrued to him by estoppel. It is said in other cases that after a long acquiescence in a division line, varying from the true line, the Court is authorized to presume a grant of the excess, (see *Adams v. Rockwell*, 16 Wend. 285,) but it is unnecessary to presume anything more than an agreement upon the division line, for the one party does not purport or attempt to sell or convey to the other any land; nor does the other set up any right under a purchase or conveyance of the legal or equitable title, made at the establishment of the division line. The division line when thus established, attaches itself to the deeds of the respective parties, and simply defines, not adds to, the lands described in each deed, in accordance with the understanding of the parties, who are presumed to know best their lands; and if by a mistake of the parties, one deed is in that manner made to include more than the calls of the deed would actually require, the grantee of the deed holds the excess by the same tenure that he holds the main body of his lands. This principle is well expressed by Judge Ryland in *Blair v. Smith*, 16 Mo. 273. He says: "We consider this case thus: Two owners of contiguous lots or tracts of land, each having his deed for his lot or tract, agree with the other: We fix this mark on the earth's surface as the line called for in my deed; this mark as the line called for in your deed; here is the line between us. My land mentioned in my deed comes up to this mark, or this fence, or this wall, on this side, and your land comes to the same on that side. * * Such boundary thus agreed upon shall be considered the true one, and each one considered as the owner of the land mentioned in his deed, thus

Athearn v. Poppe, and Bours v. Walsh.

marked out to that boundary between them." In *Jackson v. Ogden*, 4 Johns. 142, Mr. Justice Spencer, in speaking of the acts of one of the lessors of the plaintiff, says: "It is not, however, to be controverted that parties whose rights to real property may be perfect, and the boundaries of which may be susceptible of certain and precise ascertainment, may by their acts conclude themselves by establishing other and different boundaries."

The same doctrine is announced in several of the cases cited in the opinion delivered in this case. In *Boyd's Lessee v. Graves*, 4 Wheat. 413, it is said, in commenting upon the fact that a dividing line had been run by a surveyor, by agreement of the parties, more than twenty years previous to the commencement of the action, that the agreement was not a contract for the sale or conveyance of lands and had no ingredient of such a contract. In the Courts of Pennsylvania it is held that "adjoining owners who adjust their partition line by parol, do not create or convey any estate whatever between themselves; no such thought or intention influences their conduct; after their boundary is fixed by consent, they hold up to it by virtue of their title deeds, and not by virtue of a parol transfer." (*Hagey v. Detweiler*, 35 Penn. 409; *Perkins v. Gay*, 3 Serg. and Rawle, 381.)

The party holding land, dependent on a division line established between contiguous owners, by their acquiescence for a space of time equal to the time prescribed by the Statute of Limitations, as a bar to an action for the recovery of the possession of real property, holds it by legal title.

Mr. Justice SAWYER expressed no opinion.

ATHEARN v. POPPE, AND BOURS v. WALSH.

WRIT OF ERROR TO THE SUPREME COURT OF THE UNITED STATES.—A writ of error does not lie to the Supreme Court of the United States from the judgment of the Supreme Court of this State, by which judgment it is decided that where a State School land warrant is located upon lands pre-

Athearn v. Poppe, and Boura v. Walsh.

viously occupied and settled upon by another, and pre-empted by him, under the laws of the United States, the patent issued by the State under the location is void, and the patentee cannot maintain an action against the pre-emptioner to recover possession of the same.

SAME.—The construction of an Act of Congress was not necessary in rendering such judgment, but the State law under which the warrant was located afforded a rule for the complete determination of the rights of the party who made the location.

APPLICATION for citation to the appellants on a writ of error from the Supreme Court of the United States issued by the Clerk of the Circuit Court for California to the Judges of the Supreme Court.

Judgments were rendered in the District Court, Fifth Judicial District, San Joaquin County, in favor of the plaintiffs. The defendants appealed, and the judgments were reversed by the Supreme Court at the April Term, eighteen hundred and sixty-four. The cases are not reported, the judgments having been reversed on the authority of *Terry v. Megerle*, 24 Cal. 609. The facts in these cases were similar to those of *Terry v. Megerle*.

George Cadwalader, for the citation.

George W. Tyler, against granting citation.

SANDERSON, C. J.

These are actions of ejectment. In the Court below the plaintiffs recovered judgment. The defendants appealed to this Court, and the judgments were reversed and the Court below directed to enter judgments in favor of the defendants. The plaintiffs now present writs of error directed to the Justices of this Court, issued by the Clerk of the Circuit Court of the United States for the Northern District of California, and ask that citations to the defendants in error may be issued. The plaintiffs claim title by virtue of the location of School land warrants and a patent issued by and under the laws of this State. The defendants claim title under the pre-emption laws of the United States. The defendants had occupied and

settled upon the lands in controversy as pre-emptioners under the laws of the United States prior to the location by plaintiffs of their School warrants under the laws of this State.

No opinions were delivered by the Court in these cases, but they were decided in general terms upon the authority of *Terry v. Megerle*, 24 Cal. 609, decided at the same term, the controlling questions in all three being similar in the judgment of the Court. Hence, the precise grounds upon which the decision of these cases was based does not appear, nor has it been specifically determined what questions were necessarily involved therein.

It is claimed that these cases fall within the third class mentioned in the twenty-fifth section of the Federal Judiciary Act of seventeen hundred and eighty-nine, which is described thus: "Or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission;" and it is argued that we have construed the eighth section of the Act of Congress of the 4th of September, 1841, entitled an Act "to appropriate the proceeds of the sales of the public lands and to grant pre-emption rights;" and also the sixth section of the Act of March 3d, 1853, providing for the survey of public lands in California and the granting of pre-emption rights therein, and other purposes; and that we have decided against the title of the plaintiffs "specially set up or claimed" under those statutes. If this has been done and the same was necessary to a complete determination of these cases, the plaintiffs are undoubtedly respectively entitled to their citations.

In my judgment the construction of those statutes was not directly and necessarily involved in the final determination of these cases, for it may be conceded that the State's title to the land in question, under the Act of September 4th, 1841, was perfect and complete at the time the State land warrants of

Athearn v. Poppe, and Bours v. Walsh.

the plaintiffs were located, and yet their title must fail under the very terms of the State Act by which their location was authorized. The third section of that Act reads as follows: "The parties purchasing such warrants, and their assigns, are hereby authorized, in behalf of this State, to locate the same upon any *vacant and unappropriated* lands belonging to the United States, within the State of California," etc. * * * By this section the plaintiffs were made the agents of the State for the purpose of locating their warrants, but they were expressly restricted to vacant and unappropriated lands. Hence, by the terms of the Act under which they claim to have obtained the State's title, their title fails, for the land in controversy was not at the time of their location vacant and unappropriated, but on the contrary was settled upon and occupied by the defendants with the right to pre-empt the same under the laws of the United States. The policy of the State, as indicated by the third section of the Act in question, was not to interfere with the rights of actual settlers upon public lands under the pre-emption laws of the United States; but had such been her policy the Act would have been so far inoperative on the ground of repugnancy to the laws of Congress, which, upon all questions touching the public lands of the United States, are paramount. It being conceded that the defendants were in the occupation of the land at the time the plaintiffs' location was made, the State law afforded a rule for the complete determination of their rights in the premises and no resort to Federal laws was necessary.

Citations denied.

People v. Coon et al.

**THE PEOPLE OF THE STATE OF CALIFORNIA ON
THE RELATION OF THE CENTRAL PACIFIC RAIL-
ROAD Co. OF CALIFORNIA v. HENRY P. COON,
MAYOR, HENRY H. HALE, AUDITOR, AND JOSEPH S.
PAXON, TREASURER OF THE CITY AND COUNTY OF SAN
FRANCISCO.**

**COMPROMISE OF CENTRAL PACIFIC RAILROAD COMPANY WITH SAN FRAN-
CISCO.**—The Act of the Legislature, passed April 4th, 1864, authorising the
Board of Supervisors of the City and County of San Francisco to compromise
and settle all claims upon the part of the Western Pacific Railroad Company
and the Central Pacific Railroad Company, for bonds claimed by said com-
panies, of said city and county, under the Act of April 22d, 1863, fully
empowered said Board of Supervisors to make a settlement with said Central
Pacific Railroad Company, by the terms of which the company released its
claim for the six hundred thousand dollars of bonds claimed under the Act
of 1863, and accepted in place thereof bonds of said city and county to the
amount of four hundred thousand dollars, and the city and county released
its right to stock in the company, and withdrew its subscription to the capi-
tal stock of the same. Said Act also fully empowered and authorized the
said city and county to compromise with the Central Pacific Railroad Com-
pany, without compromising with the Western Pacific Railroad Company
also.

INDIVIDUAL CORPORATORS OF MUNICIPAL CORPORATION.—The individual cor-
porators of the City and County of San Francisco did not acquire such
right in the capital stock of the Central Pacific Railroad Company, separate
and distinct from the municipal corporation, as to disable the Legislature
from conferring on the Board of Supervisors the authority to settle the
claim of said company for six hundred thousand dollars of the bonds of said
city and county, by withdrawing the subscription of the city and county to
the capital stock of said company, and releasing its right to stock, and ex-
ecuting a less amount of bonds in lieu thereof.

MUNICIPAL CORPORATION.—A municipal corporation is an entity, possessing
for many purposes the attributes of individuality, and in the exercise of its
legitimate powers can only act by and through its agents appointed in the
mode prescribed by the law of its creation. The rights of the individual
corporators of a municipal corporation can only be enjoyed by and through
the agents appointed by law to exercise the corporate powers.

JUDGMENT IN FRENCH v. TESCHEMAKER, 24 CAL. 518.—The judgment of the
Supreme Court in the case of *French v. Teschemaker*, was, in a qualified sense,
a final judgment, compelling the Board of Supervisors of the City and County
of San Francisco to execute and deliver to the Central Pacific Railroad Com-
pany the six hundred thousand dollars in the bonds of said city and county,
as specified in the Act of April 22, 1863.

PRACTICE IN CASES ORIGINALLY COMMENCED IN THE SUPREME COURT.—Where
a judgment is rendered in the Supreme Court, as a court of original juris-
diction, on an application for a writ of mandate, an application for a re-
hearing will not be entertained unless a motion for a new trial is made in
the manner prescribed by the Practice Act in cases arising in the District
Court.

APPLICATION to the Supreme Court for writ of mandata.

The facts are stated in the opinion of the Court.

Shafter, Gould & Dwinelle, for Relator.

The law of 1863, (Stats. p. 380,) authorizing the Board of Supervisors to make subscriptions to the capital stock of the Pacific Railroad was constitutional. (*French v. Teschemaker*, 24 Cal. 518.)

The vote of approval by the electors of San Francisco was not necessary to the validity of the law, but only a condition precedent to the exercise of the new franchise granted to the Board of Supervisors. (*Bank of Rome v. Village of Rome*, 18 N. Y., 4 Smith, 38; *Clarke v. City of Rochester*, 24 Barb. 446; *Corning v. Green*, 23 Barb. 33.)

The Legislature had the power to direct the Supervisors of San Francisco to levy six hundred thousand dollars by taxation, and pay it to the Central Pacific Railroad without any vote of the people of that city and county. They might have done so after the people had been authorized to vote upon the question, and on such vote had refused to levy the tax. They might have imposed the tax without any subscription being made, or any stock or other consideration received, except the incidental benefit from the construction of the road, and of the nature and extent of that benefit the Legislature is the exclusive judge.

"The Legislature is not confined in its appropriation of the public moneys, or of the sums to be raised by taxation in favor of individuals, to cases in which a legal demand exists against the State. It can thus recognize claims founded in equity and justice in the largest sense of these terms, or in gratitude or charity. Independently of express constitutional restrictions, it can make appropriations of money whenever the public well being requires or will be promoted by it; and it is the judge of what is for the public good. It can, moreover, under the power to levy taxes, apportion the public burdens among all the tax paying citizens of the State, or among those of a particular section or political division. It is well settled that the authority to raise money by the exercise of the taxing power

is not in conflict with the constitutional provisions protecting private property from seizure. The two principles co-exist in the Constitution, and it is not difficult to distinguish between them." (*Town of Guilford v. Supervisors of Chenango*, 3 Kernan, 13 Smith, 143; *Brewster v. City of Syracuse*, 19 N. Y., 5 Smith, 116; *The People v. Mayor of Brooklyn*, 4 N. Y., 4 Const. 419; *Providence Bank v. Billings*, 4 Peters, 514, 561-563; *McCulloch v. Maryland*, 4 Wheat. 428; *Blanding v. Burr*, 13 Cal. 356.)

An eminent instance of a large debt founded upon a merely valuable or meritorious consideration and forced upon a municipal corporation by Act of the Legislature, will be found in Laws 1858, page 183, section 2.

All the corporate franchises of the City and County of San Francisco are repealable by the Legislature, and it can therefore have no vested right under the grant of a franchise which the Legislature cannot divest. (Const. of California, Art. IV, Sec. 31; *McLaren v. Pennington*, 1 Paige, 102.)

And this power to alter and repeal is not restricted by any legislative limitations existing in the Constitution at the time when the original law is passed, but may be exercised under the fullest power of legislation contained in the Constitution as subsequently amended and existing at the time when the alteration or repeal is made. When the charter of a railroad corporation contained a clause authorizing the Legislature to repeal or alter it, the alteration of the charter, by the Legislature, made on the application of the directors, without consulting the stock subscribers, does not absolve the latter from their subscription. (10 Barb. 261.)

The franchise granted to the Board of Supervisors, authorizing them to hold railroad stock, was an extraordinary franchise; so extraordinary, that it was at first held under our Constitution to be unconstitutional. (*Low v. Marysville*, 5 Cal. 214.) But, like all corporate franchises, the power of repeal is expressly reserved in the Constitution. (Const. Cal. Art. IV, § 31.)

This franchise could, therefore, be repealed at any time by

the Legislature; that is to say—The Legislature might withdraw the power to hold railroad stock, and prescribe the mode in which the city should dispose of it. (Angel & Ames on Corporations, Ch. XXII, § 2, p. 733; *McLaren v. Pennington*, 1 Paige Ch. R. 102.)

The Legislature could not grant an irrevocable franchise to a municipal corporation. This would be allowing one Legislature to trammel the constitutional powers of all its successors. If a Legislature authorizes a municipal corporation to issue bonds under a limitation that they shall be paid by a tax which is unconstitutional, the result is, not that the bonds are invalid, but that they shall be provided for by a tax which is not subject to any constitutional objection. (*Gilman v. City of Sheboygan*, 2 Black U. S. R. 510.)

The power to subscribe for stock, or to compromise, includes the power to pay money, or to issue bonds or other securities, and in the form prescribed in the ordinance. (2 Kent Comm. 278, etc. text and notes; *Berry v. Merchants' Exchange Company*, 1 Sandf. Ch. R. 280, 288; *Reinboth v. Mayor of Pittsburg*, 41 Penn. 278, 280, 283; *Seibert v. Mayor of Pittsburg*, Sup. Ct. U. S. Dec. Term, 1863.)

H. H. Haight, for Defendants.

The Act of April, 1864, confers upon a municipal corporation a special power, and, like all municipal charters and special powers, must be strictly construed and closely pursued. (Sedgwick on Stat. Cons. 465–7, 321–3, 338–40; 3 Comstock, 433; 21 Penn. 22; 5 Cal. 214; 13 Cal. 540; 20 Cal. 96; *French v. Teschemaker et al.*, 24 Cal. 518.)

The power to compromise and settle is, under the Act of 1864, a special power, and must be confined within the terms employed.

Restrictions upon the powers of municipal corporations are the settled policy of our laws.

The rules of construction applicable to municipal charters are those always applied to grants of special powers where the State confers or delegates a part of its sovereignty.

Much more strict will be the construction when it is sought, under the power, to donate to a private corporation nearly half a million of dollars of public revenue, without reckoning interest on the bonds to be issued.

Applying these rules to the Act of 1864, we claim that the Act authorizes no more than a reduction of the amount of subscription, and a change of the mode of payment to "cash or other security in place of bonds." It does *not authorize a donation of four hundred thousand dollars*, or any other amount; in other words, it authorizes a *subscription* for any amount less than six hundred thousand dollars, payable "in cash, etc., in place of the bonds," etc.

What was the *claim* to be settled? It was not a claim for damages, for money or bonds without equivalent. It was a claim to exchange certificates of stock for bonds. To settle such a claim is to fix the amount of subscription by reducing it, if possible, not by making a donation.

H. & C. McAllister, also for Defendants.

The decision in *French v. Teschemaker* adjudicated the constitutionality of the seventeenth section of the statute of April 22, 1863, and went no further.

The previous *mandamus*, sued out on the relation of "The Central Pacific Railroad of California" against the Board of Supervisors of the City and County of San Francisco, commanded said Supervisors to make the six hundred thousand dollars subscription called for by the Act of April 22d, 1863, and which had been voted at the special election held under the provisions of that statute; but did not dispose of the objections raised to the issuance of the bonds, which was a matter by no means identical with the question of subscription.

The right of the railroad company to demand of the Supervisors the act of subscription, was one thing; but their right to exact the issuance of the bonds was quite another thing.

Besides, the Act of April 4, 1864, *excludes* from the compromise any such bonds as were contemplated by the statute of April 22, 1863. The language is, "*to compromise and settle*

all claims, etc., for cash or other security, in place of bonds claimed by said companies of said city and county, under an Act, etc."

However large and unlimited the powers given by the Act of April 4, 1864, there is one kind of security clearly interdicted, to wit: Such bonds as the statute of 1863 called for; the compromise is to substitute something in their place and stead. How, then, can this statutory power be construed to authorize the issuance of the original bonds? (*Starin v. The Town of Genoa*, 23 N. Y. 9 Smith, 454, 455.)

The Act of April 4, 1864, has been misconstrued; it does not relieve San Francisco from her subscription, but simply authorizes its liquidation "in cash or other security," in lieu of the bonds originally proposed.

The statute of April 22, 1863, is neither expressly nor impliedly repealed by the Act of April 4, 1864. Its existence, validity, and operative force, have been recently recognized by this Court in the decision as to the previous *mandamus*.

"Whenever two Acts can be made to stand together, it is the duty of a Judge to give both of them full effect. Even where they are seemingly repugnant, they must, if possible, have such a construction that one may not be a repeal of the other, unless the latter one contain negative words, or the intention to repeal is made manifest by some *intelligible form of expression*." (*Brown v. County Commissioners*, 21 Penn. 43; *Bowen v. Lease*, 5 Hill, 226.)

The law recognizes interests and rights in the individual corporators of a municipality as beneficiaries, or *cestui que trusts*, separate and distinct from those of the legal entity, called the corporation, which stands merely as the trustee of these corporators, holding the legal title of the corporate property. (*Wetmore v. Story*, 3 Abbott Pr. R. 274-276; *Wood v. Draper*, 4 Abbott Pr. R. 323, 324; *Redfield on Railways*, 415, note.)

The proposition that the State has no power to divest vested rights, or to impair the obligation of contracts, applies

People v. Cron et al.

as well to cases of municipal corporations as to individuals. (*Grogan v. San Francisco*, 18 Cal. 612, 613.)

By the Court, CURRAN, J.

The Legislature of this State, by an Act passed in 1863, authorized the Board of Supervisors of the City and County of San Francisco to take and subscribe one million dollars in the aggregate to the capital stock of "The Western Pacific Railroad Company" and "The Central Pacific Railroad Company of California," and to provide for the payment of the same. (Laws of 1863, p. 380.) By this Act it was made the duty of the Board of Supervisors to order a special election for the purpose of submitting to the electors of the city and county the proposition for the Board to take and subscribe four hundred thousand dollars to the capital stock of "The Western Pacific Railroad Company," and also the proposition for the same Board to take and subscribe six hundred thousand dollars to the capital stock of "The Central Pacific Railroad Company of California." It was provided by this Act that if a majority of the electors voting was in favor of the proposition to subscribe for the stock of said companies, then it should become the duty of the Board to take and subscribe, in the name of the City and County of San Francisco, for its use, benefit and advantage, to the capital stock of each of said companies in the amounts specified, and therefor to pledge the faith of the city and county for the payment of the same, in the manner provided in the Act. The Act also provided that the subscription should be made conditioned to be paid in the bonds of the city and county, which should be issued in the sum of one thousand dollars each, from time to time, as the work should progress on the railroad, by a Board, consisting of the President of the Board of Supervisors, otherwise called the Mayor of the City and County of San Francisco, and the Auditor and Treasurer of said city and county, and styled the "Pacific Railroad Loan Commissioners." The special election was held, and the

result of it was that a majority of the electors was in favor of the proposition submitted.

In April, 1864, an Act was passed by the Legislature by which the same Board of Supervisors was authorized and empowered "To compromise and settle all claims upon the part of the Western Pacific Railroad and the Central Pacific Railroad for cash or other security, in place of bonds claimed by said companies of said city and county, under an Act to authorize the Board of Supervisors of the City and County of San Francisco to take and subscribe one million dollars to the capital stock of the Western Pacific Railroad Company and the Central Pacific Railroad Company of California, and to provide for the payment of the same, and other matters relating thereto, approved April 22d, 1863; *provided*, that the power to make such compromise shall vest in said Board of Supervisors only after and in case said Board of Supervisors shall be compelled by final judgment of the Supreme Court to execute and deliver the bonds specified in said Act." (Laws 1863-4, p. 388.)

The Board of Supervisors having declined, after request to take and subscribe to the capital stock of the Central Pacific Railroad Company, an application was made to this Court for a peremptory writ of mandamus to compel said Board to proceed to make the subscription and issue the bonds therefor as provided in the Act of 1863. The respective parties to that proceeding appeared by counsel and argued the questions involved therein, after which this Court rendered a judgment granting the writ, which was issued in June, 1864, commanding said Board of Supervisors to take and subscribe in the name of the City and County of San Francisco, for its use, benefit and advantage, to the capital stock of the Central Pacific Railroad Company of California to the amount of six hundred thousand dollars, and for the payment of the same to pledge the faith of said city and county in the manner provided in the Act of 1863; and also commanding the Board of Supervisors to make an order directing the Board of Commissioners, styled "The Pacific Railroad Loan Commissioners," to

People v. Coon et al.

issue the bonds of the said city and county to the Central Pacific Railroad Company, upon the conditions as required and specified in and by the provisions of the Act. This writ was served on the Board of Supervisors.

Pending the application for a writ of mandamus, the Board of Supervisors, on behalf of the city and county, and the Central Pacific Railroad Company, by its President, were engaged in an effort to effect a compromise of the matter in difference between them, which resulted, after the writ had been issued and served, in an agreement upon the terms thereof; and to carry the compromise agreed upon into effect the Board of Supervisors, on the 20th of June, 1864, duly passed an ordinance entitled "Providing for issuing bonds to Central Pacific Railroad Company." By this ordinance, after reciting the Act of 1863 and the election under that Act, and the judgment of this Court granting the peremptory writ of mandamus, and the Act of 1864, authorizing and empowering the Board of Supervisors to compromise and settle all claims upon the part of the Central Pacific Railroad Company of California, the people of the City and County of San Francisco ordained as follows:

"SECTION 1. Four hundred bonds of said city and county, each for one thousand dollars, with interest coupons attached, dated July 1st, A. D. 1864, in all other respects, in form, substance, and execution, such as are required by said Act first above mentioned, shall be forthwith made, executed, and delivered to said Central Pacific Railroad Company of California.

"SEC. 2. The payment of said bonds and coupons shall be provided for, and made in all respects as is provided in said Act of April 22, 1863, and for such payment the full faith and credit of said city and county are hereby pledged.

"SEC. 3. Said bonds and coupons shall be delivered to said Central Pacific Railroad Company of California upon the condition that the Board of Trustees or Directors of said company, at a regularly called meeting of the same, shall, by

a vote duly recorded, accept said bonds and coupons in full discharge of all obligations on the part of said city and county to make any subscription to the capital stock of said company, and for all claims, debts, dues, bonds, and coupons whatsoever. Upon the issuing and acceptance of said bonds and coupons, the same shall be deemed to have been so received and accepted, in place of the bonds and coupons mentioned and provided to be given in the Act of April 22, 1863, before mentioned."

This ordinance was duly approved by the Mayor on the 21st of June, and became a law on that day. Immediately thereafter the Central Pacific Railroad Company accepted the proposition contained in said ordinance, in accordance with the terms and conditions thereof, and signified the same to the Board of Supervisors. But the Mayor, Auditor and Treasurer, constituting the "Pacific Railroad Loan Commissioners," refused to issue the bonds, as provided in said ordinance, after demand duly made therefor on behalf of the Central Pacific Railroad Company.

The relator has applied by petition to this Court for a peremptory writ of mandamus commanding and requiring the respondents to issue to the Central Pacific Railroad Company of California the four hundred bonds specified in said ordinance. To the relator's petition setting forth the facts, in substance, as hereinbefore stated, the respondents have demurred. The grounds of the demurrer are in substance as follows:

First—It does not appear in or by said affidavit and petition that the respondents have any legal authority or power to execute or deliver to said Central Pacific Railroad Company the bonds referred to in said petition or any part thereof.

Second—It does not appear in said affidavit and petition that the Board of Supervisors of said City and County of San Francisco, or any officers of said corporation, had any lawful authority to issue or cause to be issued to said Central Pacific Railroad Company bonds to said amount of four hundred

thousand dollars, or any other amount, in the manner or for the causes or considerations alleged in said affidavit and petition.

Third — That said ordinance was passed without any lawful authority, and is wholly illegal and void.

Fourth — That the Act of the Legislature of this State, approved April 4th, 1864, so far as the same authorizes or attempts to authorize, the issuing of bonds by the said city and county to the Central Pacific Railroad Company, or the payment by said Board of Supervisors to said company of cash or other securities, is in conflict with the Constitution of this State, and is null and void.

The respondents for answer to the petition deny that the Board of Supervisors at any time became, or were lawfully bound or obliged, to subscribe six hundred thousand dollars, or any other sum, to the capital stock of the Central Pacific Railroad Company of California, or to make, execute, or deliver to said company bonds to any amount whatever; and they also deny that the judgment of this Court was a final judgment, compelling them to execute or deliver the bonds specified in the Act of eighteen hundred and sixty-three; and they further deny that they ever were or have been bound by law to execute or deliver to the Central Pacific Railroad Company said four hundred bonds; and they insist that said ordinance is wholly illegal and void, on the ground that neither the Board of Supervisors nor the Legislature had any right or power to make the Central Pacific Railroad Company a donation of four hundred thousand dollars, or any other sum of money belonging to the City and County of San Francisco.

The Act of eighteen hundred and sixty-three conferred on the corporate authorities of the City and County of San Francisco certain powers which were not comprehended by the general grant of powers contained in the Act consolidating the government of said city and county, passed by the Legislature in eighteen hundred and fifty-six. By the last section of the Act of eighteen hundred and sixty-three it is declared that this Act shall be in force and take effect from and after

its passage. It provided the mode by which the electors, the incorporators of the city and county, might express their will in respect to the privilege granted by the Act to take and subscribe to the capital stock of the railroad companies. The duty to submit the proposition to the electors of the city and county as to whether or not stock of the railroad companies should be taken and subscribed for the use, benefit and advantage of San Francisco was imposed on the Board of Supervisors, and the electors were provided with the opportunity of expressing their choice on the subject. The creation of this law did not depend on the vote of the electors, and therefore the objection that was interposed to the Act considered in *Barto v. Himrod*, 4 Selden, 483, is without force as authority touching the Act under examination. (*Blanding v. Burr*, 13 Cal. 356; *The Bank of Rome v. The Village of Rome*, 18 N. Y. 41; *Starin v. The Town of Genoa*, 23 N. Y. 446; *Corning v. Greene*, 23 Barb. 50; *Grant v. Courter*, 24 Barb. 242; *Clarke v. Rochester*, 24 Barb. 472; *Moers v. City of Reading*, 21 Penn. 202.)

By the choice of the electors of San Francisco, an obligation onerous in its character was assumed, for the purpose of prospective benefits, which it was supposed would accrue to the city and county from the construction of the railroads mentioned in the Act, and it has been determined by the judgment of this Court that the Board of Supervisors were in duty bound to take and subscribe, in the name of the City and County of San Francisco, for its use, benefit and advantage, to the capital stock of the Central Pacific Railroad Company, as required by the provisions of the Act of eighteen hundred and sixty-three, and also to proceed to direct the Pacific Railroad Loan Commissioners to issue the bonds of the city and county to the Central Pacific Railroad Company, upon the conditions required and specified in and by the provisions of the same Act. The execution of this judgment has been suspended, if not entirely superseded by the joint action of the Board of Supervisors of San Francisco on the one part, and the Central Pacific Railroad Company on the other, under and

in pursuance of the provisions of the Act of April, eighteen hundred and sixty-four. But objections are interposed on the part of the respondents, to the effect, first, that the corporate authorities of San Francisco were not clothed with power to make the compromise agreed upon, and second, that the contingency specified in the proviso of the Act of eighteen hundred and sixty-four, and which stands as a condition precedent to the existence of authority in the Board of Supervisors to effect a compromise with the railroad company, has not transpired.

It is denied on behalf of the respondents that the Act of eighteen hundred and sixty-four conferred upon the Board of Supervisors the authority to compromise and settle the claims which accrued to the Central Pacific Railroad Company in the mode and upon the terms specified in the ordinance set forth. It is said the claim to be compromised and settled was not a claim on the part of the railroad company for money or bonds without a consideration in return, but was a claim to exchange certificates of stock for bonds, and that to settle such a claim is to fix the amount of subscription by reducing it if possible. The Act authorizing a compromise provides for the settlement of the claim of the railroad company for cash or other security in place of bonds claimed by the company, of said city and county, under the previous Act. It can hardly be maintained that a settlement of the claim of the railroad by taking a reduced amount of bonds of the city and county without some corresponding benefit to the company would amount to an adjustment of the difference between the parties by compromise. But be this as it may, the statute is simply a grant of power to the Board of Supervisors to compromise and settle the claim of the company for cash or other security in the place of the bonds to be issued under the first Act, upon the happening of the contingency mentioned in the proviso. No other limitation is placed upon the power whenever it might arise than the words of the Act itself import; that is, that the claim to be compromised and settled should be satisfied by cash or other security, in place of the bonds to which the com-

pany might be entitled under the Act authorizing the subscription.

It is insisted that the Act of 1864 does not authorize San Francisco to withdraw her subscription from either of the railroad companies. There is nothing obscure or ambiguous in the language of this Act. It seems to us apparent that the authority granted by the Act was to the Board of Supervisors to compromise and settle the claims of the respective companies on such terms as in the wisdom of the Board would best conduce to the interests of the City and County of San Francisco, provided such settlement could be made for cash or other security in the place of the bonds specified in the Act of 1863. It is a fact judicially known to us that at the time the Act of 1864 was passed, the case of *French v. Teschemaker*, 24 Cal. 518, was pending in this Court, by which it was sought to overthrow, as unconstitutional, the Act of 1863, and in that case we were advised that the plaintiff was in fact the representative of a considerable portion of the electors of the City and County of San Francisco, who were opposed to subscribing for stock of the railroad companies as authorized by the Act of 1863, and by the election held in pursuance of its provisions; and we may well suppose that the Act of 1864 was passed in deference to the opinions of those opposed, and who, we are not prepared to say, were not reasonably opposed to the corporation of the City and County of San Francisco becoming a member of the railroad companies mentioned in the Act of 1863. So that if the object of the Act authorizing a compromise is to be sought for in the light of concurring circumstances, we might justly conclude it was designed to give the City and County of San Francisco the opportunity to sever its reluctant connection with these railroad companies by a compromise and settlement effecting such object.

It is claimed, however, that the individual corporators of the city and county acquired rights to the capital stock of the railroad companies as beneficiaries, separate and distinct from the municipal corporation as an entity, of which they cannot be deprived, otherwise than by a majority vote therefor by the

electors of the city and county; and, as a consequence, it is maintained that the Legislature had no power to pass an Act conferring on the Board of Supervisors the authority to so compromise and settle the claims of the railroad companies as to divest the individual corporators of these vested rights held in trust for them by the corporate authorities. The answer to all this is, that the corporation of the city and county is the creature of legislative enactment, and in legal contemplation is an entity possessing for many purposes the attributes of individuality; and in the exercise of its legitimate powers can only act by and through its agents, appointed in the mode prescribed by the law of its creation. The Act of incorporation may be altered from time to time or repealed as the Legislature may will it. (Const. Art. 4, Sec. 31.) The powers of the corporation may be enlarged or restricted, and the Legislature may determine by law who, as the representatives of the corporation, shall exercise the powers granted. Hence it is that the rights of the individual corporators can only be enjoyed in subordination to the power of the Legislature over the subject. A contrary doctrine carried to its ultimate consequences would require the affirmative consent of each individual corporator to every act done by the corporate authorities affecting his interests before he could become bound by such act; the result of which would be to render entirely useless and nugatory the corporate government of the city and county.

The Legislature conferred the authority on the Board of Supervisors to compromise and settle the claims of each of the railroad companies mentioned, for cash or other securities in place of bonds specified in the previous Act, provided it should first be determined by the final judgment of this Court that the Board were bound to execute and deliver such bonds. By this Act the Board were permitted, in case the conditional contingency transpired, to enter into any compromise and settlement with the Central Pacific Railroad Company coming within the purview of the Act, which in their judgment would best subserve the interests of the city and county. The terms

People v. Coon et al.

of the compromise and settlement have been agreed to upon the hypothesis that the contingency on which the Board were authorized to act has happened; and the railroad company, as a party to that compromise, has the right to its execution, unless the condition on which the authority of the Board of Supervisors depends remains to arise; and this conducts us to the inquiry as to whether the judgment rendered by this Court in the case of the Central Pacific Railroad Company of California against the Board of Supervisors of the City and County of San Francisco, decided in June last, is a final judgment, compelling the Board to execute and deliver the bonds specified in the Act of 1863.

It is maintained on the part of the relator that the construction given on behalf of the City and County of San Francisco to the judgment rendered by this Court as a final judgment, compelling the Board of Supervisors to execute and deliver the bonds, is conclusive upon the city and county. We think it would be going beyond any just rule of law to so hold, for the reason that the Board of Supervisors have not the power by a construction of the effect of this judgment to assume an authority which depends for its existence upon this precedent condition.

The judgment referred to determined the obligation resting upon the corporation of San Francisco to take and subscribe to the capital stock of the Central Pacific Railroad Company, to be valid and binding, and the Board of Supervisors was required by this judgment to perform the obligation named, and to make an order directing the Pacific Railroad Loan Commissioners to issue the bonds to the Central Pacific Railroad Company upon certain conditions, and in all respects to perform and comply with the provisions and requirements of the Act. The judgment requiring the bonds to be issued was final, though the conditions upon which the duty to issue the same could only arise as the exigencies of the enterprise in contemplation might transpire, rendering the performance of this duty imperative. The judgment of the Supreme Court was a final judgment as to the obligations of the Board of

Supervisors as the corporate authorities of the city and county, and as the conditions on which the bonds required to be issued by the Act of 1863 might become consummate, this judgment could be enforced in case of refusal to issue and deliver the bonds, and therefore to all intents and purposes it was, from the time it was pronounced, a final judgment compelling the Board of Supervisors to execute and deliver the bonds specified in the Act.

It is further objected by the respondents that the Act of 1864 does not confer on the Board of Supervisors the power to compromise with one of the railroad companies without a compromise with the other also, and that therefore the ordinance referred to was passed without authority and is void.

The first section of the Act of 1863 provided for an election for the purpose of submitting to the electors "the proposition for the Board of Supervisors to take and subscribe four hundred thousand dollars to the capital stock of the Western Pacific Railroad Company;" and "a proposition to take and subscribe six hundred thousand dollars to the capital stock of the Central Pacific Railroad Company of California." The elector could not vote for or against taking and subscribing to the stock of one of the companies only. He could only vote for or against the twofold proposition as a unit. The third section of the same Act authorized the Board of Supervisors, in case the election authorized the subscription, to take and subscribe in the name of the city and county, to the capital stock of the companies respectively, in the proportions prescribed in the first section, and therefore to pledge the faith of the city and county for the payment of the same in the manner provided in the Act. There is nothing in the Act requiring the Supervisors to deal with the two companies jointly; nor is it provided that the action of one of the companies should at all be dependent upon or be controlled by that of the other. The two companies in their relations to each other sustained an individual independence from the passing of the election and the rights and obligations of each could not be affected by the action or conduct of the other. There is no

reason why the Act should be construed to require a compromise and settlement with one of these companies to be made in connection with a like compromise and settlement with the other. Such a construction of the Act might be attended with embarrassments that would entirely defeat its execution, however much it might be to the benefit and advantage of the City and County of San Francisco to adjust and settle the claim of one of such companies. A construction that would most probably, if not necessarily, be attended with such consequences cannot be adopted in consistency with the settled rules of construction of statutes.

We might extend this opinion to the consideration of other questions suggested by counsel, but we deem it unnecessary as the conclusion to which we have come would not be changed thereby. After a careful examination of the whole case we are of the opinion that the application should be granted.

It is therefore ordered and adjudged that a peremptory writ of mandamus be issued to the respondents, commanding and requiring them to execute and deliver without delay to the Central Pacific Railroad Company of California the four hundred bonds of said City and County of San Francisco, described in the ordinance hereinbefore referred to, with the interest coupons attached as in said ordinance provided.

By the Court, CURREY, J., on petition for rehearing.

The decision and judgment in this case was rendered early in September, eighteen hundred and sixty-four. About the tenth of that month, a written notice of such decision, as appears by proof before us, was personally served on the attorney for the respondents. On the thirteenth of the same month a petition was filed by new attorneys and counsel on behalf of respondents for a rehearing. Since then, and during the present term of the Court, the relators' attorneys have appeared and objected to the hearing and entertaining of this petition, on the ground that, as the case was originally commenced,

Gregory v. Haworth.

tried and determined in this Court, the judgment rendered cannot be reviewed on petition for a rehearing.

By the amended Constitution, power was granted to the Supreme Court to issue writs of mandamus, certiorari and prohibition, and it was by authority of the constitutional provision referred to that this Court, upon proper proceedings instituted, assumed to act in the premises. Our judgment in the case was that of a Court of original jurisdiction, and for the correction of any error which we may commit in such cases the party aggrieved must pursue the course prescribed by the Practice Act in like cases arising in the District Courts, so far as may be. It is unnecessary to refer to the particular provisions of the Act specifying the course to be pursued in order to obtain a re-examination of a case by the same Court of original jurisdiction, after one decision made therein. The course prescribed by the statute has not been followed by the respondents in this case, and therefore the petition filed cannot be entertained.

It is therefore ordered that the petition for a rehearing be denied.

Mr. Justice Rhoads expressed no opinion.

HENRY GREGORY v. JAMES HAWORTH.

FRAUDULENT ASSIGNOR CANNOT SUE.—One who makes an assignment of property for the sole purpose of hindering, delaying, and defrauding his creditors, cannot maintain an action against the assignee to compel a re-assignment of it or a judgment for its value, if a re-assignment cannot be had, nor can a purchaser from the assignor, who buys with full knowledge of such fraudulent assignment, maintain such action.

SAME.—A party who comes into Court with a fraud upon his lips cannot obtain relief.

ALLEGATIONS OF COMPLAINT AND JUDGMENT.—A recovery, if had, must be grounded upon the facts which are averred in the complaint, and not upon those which are denied.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

Gregory v. Haworth.

Plaintiff recovered judgment in the Court below, and defendant appealed. The other facts are stated in the opinion of the Court.

Sol. A. Sharp, and T. B. Beardon, for Appellant.

The general rule is, that equity will not relieve a party against his own voluntary frauds; nor will it relieve his assignee, or a party standing in his shoes.

We think it scarcely necessary to cite authorities upon this point—the doctrine is so well settled. We refer the Court to *McClure v. Purcell*, 3 A. K. Marshall, 61; *Babcock v. Booth*, 2 Hill, 183; *Osborn v. Moss*, 7 Johns. 161; *Jackson v. Gurnsey*, 16 Johns. 191; *Abbe v. Marr*, 14 Cal. 211; *Valentine v. Stewart*, 15 Cal. 389; *Barton v. Morris*, 15 Ohio, 408.

Bennett, Love & Love, for Respondent.

It is claimed that as the complaint alleges the stock to have been transferred to Haworth to defraud the creditors of Bartol, the plaintiff, claiming by derivation through Bartol, cannot impeach such transfer. We are not aware that the plaintiff has ever sought to impeach the transfer; on the contrary, he, as well as Riddle and Eaton, from whom he claims, have acted throughout on the supposed validity of the transfer, otherwise they would not, probably, have tendered the amount of the notes, with the interest.

This portion of the complaint is not an inference drawn, but the statement of a conclusion of law from facts alleged, and the plaintiff's right to recover must depend on his proving facts, and if the proof of the facts will not warrant the conclusion of fraud, it will sustain any other legal conclusion which is sufficient in law to entitle the plaintiff to recover. If the facts alleged in the complaint and proved at the trial will not sustain the supposition of fraud, but will support any other cause of action, all that is said about fraud may be treated as surplusage. Facts enough are stated in the complaint, which have been proved, to make out a good cause of action. That

Gregory v. Haworth.

is all that is required in any case after verdict and judgment. All the rest of the complaint is surplusage, and should be so regarded.

By the Court, SANDERSON, C. J.

This action was brought to compel the defendant to transfer to the plaintiff twelve shares of the capital stock of the California Stage Company, alleged to have formerly belonged to one Bartol and assigned by him to Riddle and Eaton, and by them to the plaintiff, or in case the said Haworth had in any manner disposed of said stock, or any portion thereof, to compel him to account with and pay to the plaintiff the value thereof. The complaint is most singularly drawn, and seems to proceed upon inconsistent theories, and it is not easy to determine upon which theory the pleader expected to recover. It alleges that the stock in question once belonged to Bartol, who, while the owner thereof, made and delivered to Haworth two promissory notes, amounting in the aggregate to the sum of fifteen hundred dollars, and turned the stock over to him as collateral. That Riddle and Eaton were creditors of Bartol to the amount of thirty thousand dollars, and Bartol gave them an order on Haworth for the stock upon the payment by them of the amount for which it was pledged. That Riddle and Eaton tendered the amount due, and demanded the stock of Haworth, who refused to transfer it. Upon this theory the plaintiff was doubtless entitled to recover. But, as if to prevent such a result, the pleader proceeds to characterize so much of the foregoing facts as relate to the question of pledge as pretended on the part of Haworth, and not true in fact, and to allege that the stock was in fact transferred by Bartol to Haworth "for the fraudulent, sole and only purpose of hindering, delaying, and defrauding the creditors of him, the said Bartol." Thus, in view of the doctrine that a pleading must be construed most strictly against the pleader, the complaint, so far as it proceeds upon the theory that Haworth held the stock as collateral security for the payment of the fifteen hundred dollars due

Gregory v. Haworth.

from Bartol, becomes *felo de se*; and the matter thus far alleged only amounts, in logical effect, to an averment that Bartol was the owner of the stock, and while so the owner assigned it to Haworth in fraud of his creditors; yet the case seems to have been tried upon the theory that a pledge was averred and the plaintiff allowed to recover a judgment upon a finding of facts which at the outset he declared to be pretended and false. This cannot be allowed without a gross violation of the rule which requires that the allegations of the complaint, the evidence and the findings should correspond in legal intent. The averment, the proof and the finding should harmonize and proceed upon the same theory, each pointing with logical distinctness to the same result. A recovery, if had, must be *secundum allegata*, and must be grounded upon the facts which are averred in the complaint, and not upon those which are denied.

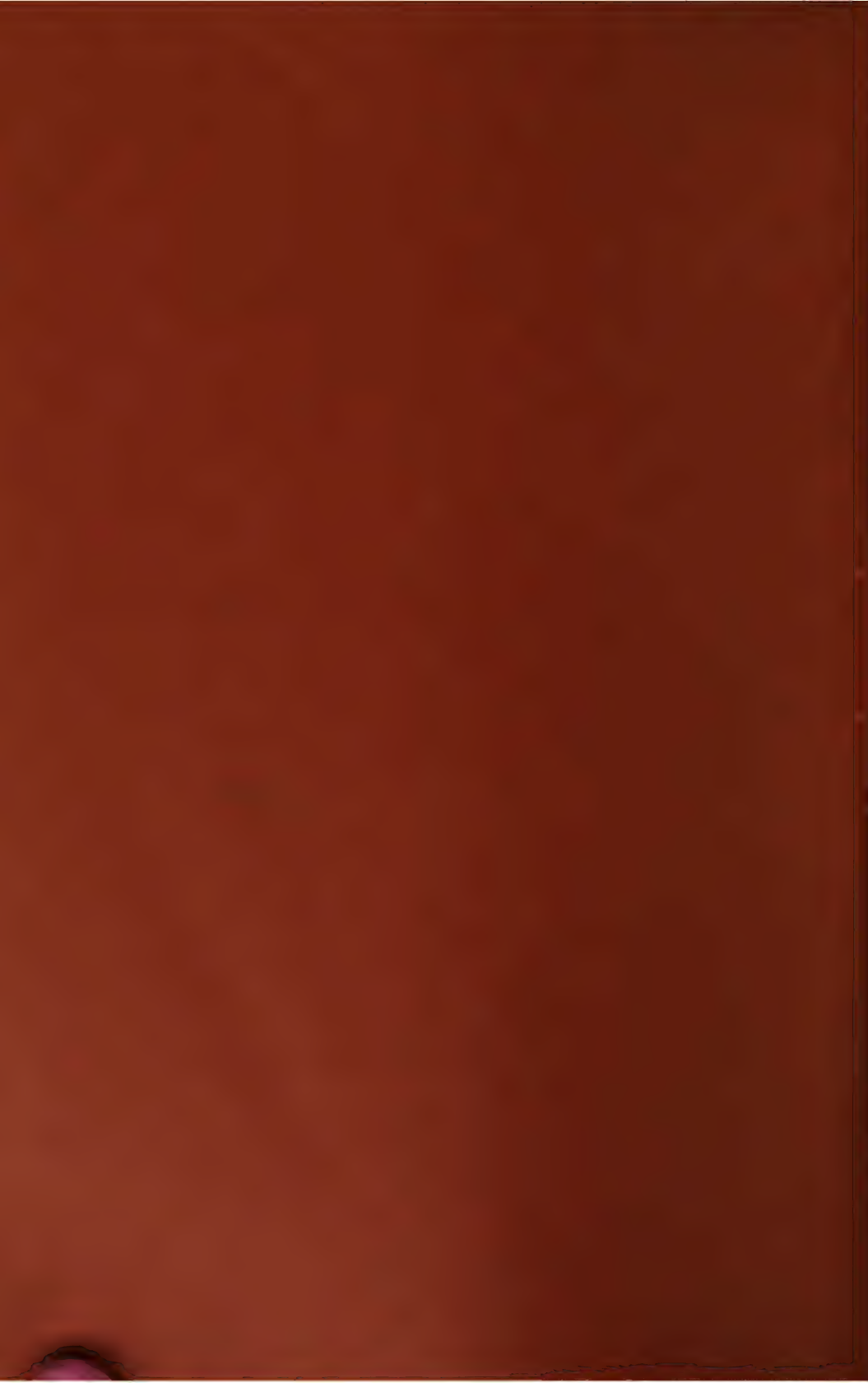
There is another theory, perhaps, deducible from this anomalous complaint, upon which the pleader seems to have relied for a recovery. That theory admits that the stock was transferred by Bartol in fraud of his creditors, but seeks to avoid the consequences of the fraud by showing that Riddle and Eaton were his creditors, and that, inasmuch as they could, by compulsory legal measures, reach the stock in the hands of Haworth, and subject it to the payment of their demand against Bartol, they might, by amicable agreement between them all, accomplish the same result, and that this was done. This theory does not seem to be fully sustained by the allegations of the complaint, for it is not alleged in terms that the stock was transferred by Bartol in payment of any demand which Riddle and Eaton held against him, and that such was the case is wholly left to inference. But admitting that the complaint is sufficient to justify the conclusion that Bartol assigned the stock in part payment of his indebtedness, and therefore sufficient to sustain a recovery had upon the theory under consideration, still the judgment cannot stand, for the reason that the theory cannot be extended beyond the complaint, it being wholly unsustained by either the evidence or

the finding. The averment that Riddle and Eaton were creditors of Bartol is denied by the answer, and no evidence in support of the averment was offered at the trial, or if so, it is not stated in the record; nor did the referee find the fact either way.

Thus the idea that Haworth held the stock as collateral must be discarded, because the fact is expressly denied in the complaint; and the idea that Riddle and Eaton were the creditors of Bartol must be discarded, because it is wholly unsupported by the evidence or the findings. With these two ideas discarded the matters of fact alleged in the complaint, when stated most favorably for the plaintiff, amount to this: "Bartol was the owner of the stock in question, and while so the owner he fraudulently assigned the same to Haworth for the sole and only purpose of hindering, delaying and defrauding his creditors; that subsequently Bartol assigned for a valuable consideration to Riddle and Eaton, who in turn assigned to the plaintiff, both Riddle and Eaton and the plaintiff taking the assignment with full knowledge of Bartol's fraud; and that upon demand made Haworth refused to transfer the stock." Can an action for the stock or its value be maintained upon these facts? We think not. However it might be otherwise, it is clear that the plaintiff, having taken the assignment (if such it can be called) with the full knowledge, as appears from his own averment, of the previous fraudulent transfer of his assignor, occupies no better position than would Bartol. That Bartol could not maintain this action does not admit of a doubt. A party cannot come into Court with a fraud upon his lips and obtain relief. To such the halls of justice are not open.

The judgment must be reversed and a new trial ordered, with leave to both parties to amend their pleadings, and it is so ordered.

EXTRA ANNOTATION
TO
PRECEDING VOLUME



VOLUME XXV.

By ALBERT RAYMOND.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

25 Cal. 11-18. **COPPER HILL ETC. CO. v. SPENCER.** S. C. 25 Cal. 18.

Pendency of Motion for new trial does not operate as stay, so as to prevent vacation of order appointing receiver, pp. 15, 16.

Cited to same effect in *People v. Carpentier*, 28 Cal. 71, holding right to execution not affected by motion. Cited, also, in *Gomer v. Chaffe*, 5 Colo. 383, holding that motion continues jurisdiction beyond term for purpose of ruling thereon and settlement of bill of exceptions.

25 Cal. 18-26. **COPPER HILL ETC. CO. v. SPENCER.**

Verbal Sale of mining claim is valid only when grantor is in possession and can deliver possession, p. 24.

Cited in *Patterson v. Keystone etc. Co.* 30 Cal. 363, discussing effect of act of 1860 (Stats. 1860, p. 175) on such sales.

25 Cal. 26-31. **TYLER v. HOUGHTON.**

Original Jurisdiction of supreme court extends to issuance of mandamus, certiorari, prohibition, and habeas corpus, p. 28.

Cited to same effect in *Miller v. Sacramento Co.*, 25 Cal. 96, as to certiorari against supervisors; *Carpentier v. Loucks*, 28 Cal. 71, as to mandamus against clerk of district court; *Hyatt v. Allen*, 54 Cal. 355 (distinguished in dissenting opinion, p. 372), as to mandamus against assessor under constitution of 1879; and in dissenting opinion in *Chumasco v. Potts*, 2 Mont. 292, denying such jurisdiction however, main opinion affirming it.

Trustee of Express Trust may sue alone for recovery or preservation of trust estate, p. 29.

Cited to same effect in *Kellogg v. King*, 114 Cal. 388, 55 Am. St. Rep. 81, as to injunction against trespassers by trustee of association; *Jenkins v. Jensen*, 24 Utah, 124, where administrator neglected to sue

to recover real property within time prescribed by statute, heir is also barred though he was a minor at accrual of action in favor of administrator; dissenting opinion in *Swenson v. Kleinschmidt*, 10 Mont. 483, main opinion holding plaintiff not such trustee under facts.

Trustee of Express Trust may be compelled by action to sue for recovery or preservation of trust estate, p. 29.

Cited to same effect in *McLeran v. Benton*, 73 Cal. 343, 2 Am. St. Rep. 821, as to executors, holding, further, heirs barred by statute of limitations when executor barred; and in *Meeks v. Vassault*, 3 Sawy. 215, 16 Fed. Cas. 1318, ruling similarly as to bar.

Mandamus.—Application for is in nature of an action, p. 29.

Cited to same effect in *People v. Board*, 27 Cal. 684, applying rule in civil actions as to relief grantable under petition.

Contestant of application for land patent need not be an applicant to purchase the land, p. 30.

Cited to same effect in *Higgins v. Houghton*, 25 Cal. 259, sustaining contest by "dweller" on the land; *Cushing v. Keslar*, 68 Cal. 476, on point that plaintiff in contest must show right to purchase when answer sets up occupancy and improvement by contesting applicant; and in *Garfield v. Wilson*, 74 Cal. 177, where application was void because improperly verified.

Land Patent Contests.—Mandamus will lie to compel surveyor general to allow making of contests in proper cases, p. 30.

Cited to same effect in *Mace v. Merrill*, 119 U. S. 584, discussing rule as to federal question in land contests. Distinguished in *Middleton v. Low*, 30 Cal. 608, denying mandamus to compel governor to sign patent when title of state was in question. Cited, also, in *Thompson v. Trues*, 48 Cal. 609, as to effect of judgment of district court on referred contest.

25 Cal. 31-37. URIDIAS v. MORRELL.

Tenancy by Sufferance by holding over will be destroyed by reentry of owner, p. 35.

Cited to same effect in *Moore v. Morrow*, 28 Cal. 554, on point that landlord may sue in ejectment immediately upon expiration of term. Cited, also, in note to *Blumenberg v. Myres*, 91 Am. Dec. 563, as to implied renewal of leases, and page 564, as to change in nature of tenancy.

Inconsistent Defenses.—Objection to, may be raised by demurrer or motion to strike out, but is waived otherwise, p. 36.

Cited to same effect in *Buhne v. Corbett*, 43 Cal. 269, on point that inconsistent defenses are pleadable even when answer verified; *People v. Lothrop*, 3 Colo. 449, on same point; and in *Conway v. Clinton*, 1

Utah, 222. Denied in *Butler v. Kaulback*, 8 Kan. 671, holding that general denial is deemed admitted as to any admission in special defense.

25 Cal. 37. HOLM v. ROACH.

Briefs.—Failure to file will cause affirmance of judgment, p. 37.

Cited to same effect in *Faris v. Lampson*, 73 Cal. 191, where oral argument also not had.

25 Cal. 38-48. MOSS v. SHEAR. 85 Am. Dec. 94; 30 Cal. 467.

Ejectment—Set Off.—Value of improvements cannot be set off unless specially pleaded, p. 44.

Cited in *Love v. Shartzler*, 31 Cal. 496, denying such setoff unless made during adverse possession in good faith. Cited, also, in note to *Van Alen v. Rogers*, 1 Am. Dec. 116, and to *Jackson v. Loomis*, 15 Am. Dec. 352, on general subject.

Tax Title cannot be purchased by occupant when he was under obligation to pay taxes, p. 44.

Cited to same effect in *McMinn v. Whelan*, 27 Cal. 318, and *Barrett v. Amerein*, 36 Cal. 326, where occupant was adverse claimant; *Coppinger v. Rice*, 33 Cal. 425, when purchaser at void guardian's sale; *Bernal v. Lynch*, 36 Cal. 146, as to purchase by agent of administrator while he or his tenants were in possession; *Garwood v. Hastings*, 38 Cal. 223; *Reily v. Lancaster*, 39 Cal. 356, distinguishing case where claimant not in possession; *Christy v. Fisher*, 58 Cal. 258, as to purchase by adverse claimant through third person; *Barnard v. Wilson*, 74 Cal. 518, as to purchase by mortgagor before foreclosure sale, and *Renshaw v. Stafford*, 30 La. Ann. (pt. 2) 860, by mortgagor's executor or widow; *Emerie v. Alvarado*, 90 Cal. 464, and *Battin v. Woods*, 27 W. Va. 67, as to purchase by tenant in common; *Gates v. Lindley*, 104 Cal. 454, as to purchase of certificates of sale by owner of land whose deed had reserved growing timber; *Wambole v. Foote*, 2 Dak. Ter. 27, as to like purchase by adverse claimant to whom assessment made; *Stears v. Hollenbeck*, 38 Iowa, 551, as to purchase by grantee under warranty deed, under facts stated; *Carithers v. Weaver*, 7 Kan. 122, as to purchase by tenant under covenant to pay taxes as part of rent; *Laton v. Balcom*, 64 N. H. 94, 10 Am. St. Rep. 382, as to purchase by husband of mortgagee on ground of fiduciary relations; *Hall v. Westcott*, 15 R. I. 380, as to purchase by mortgagee whether in or out of possession; *State v. Eddy*, 41 W. Va. 115, on point that purchase by owner under delinquent sale will not waive necessity for payment for previous years omitted by mistake; *Gray v. Larrimore*, 2 Abb. U. S. 558, 4 Sawy. 652, 10 Fed. Cas. 1031, as to purchaser under void decree of sale in partnership dissolution suit; and in *Leroy v. Reeves*, 5 Sawy. 106, 15 Fed. Cas. 385, as to purchase by adverse claimant against infant heir. **Distin-**

guished in *Oswald v. Wolf*, 129 Ill. 217, where purchaser had acquired title to land after tax levy and was under no express obligation to pay; *Curtis v. Smith*, 42 Iowa, 671, as to purchase by grantee under quitclaim deed of property previously conveyed; *Bowman v. Cockrell*, 6 Kan. 332, as to purchase made by person in possession; *Powell v. Lantzy*, 173 Pa. St. 548, as to purchase made by owner of mineral rights under reservation in deed to surface owner; and in *Link v. Docifer*, 42 Wis. 396, 24 Am. Rep. 420, as to purchase by trespasser, not claiming title. Cited, also, in note to *Blake v. Howe*, 15 Am. Dec. 686; *Choteau v. Jones*, 50 Am. Dec. 469; and to *Laton v. Balcom*, 10 Am. St. Rep. 383, on general subject; 15 Am. Dec. 689, on purchase by tenant in common.

Assessment is void unless statute strictly complied with, p. 45.

Cited to same effect in *People v. Sneath*, 28 Cal. 615, as to personal property of partnership, and holding further as to effect of curative act; *Smith v. Davis*, 30 Cal. 538, where tax for street improvements made to person known to be dead; *Blatner v. Davis*, 32 Cal. 332, where like assessment made to one of two co-owners; *Lake County v. S. B. etc. Co.*, 66 Cal. 20, when made in abbreviated name of owner, identity not appearing; *People v. C. P. etc. Co.*, 83 Cal. 400, where property not sufficiently described construing this not included in waiver of informality (*Pol. Code*, 3885); *Huntington v. C. P. etc. Co.*, 2 Sawy. 512, 12 Fed. Cas. 977, as to improper railroad taxation; and in *Tilton v. Or. Cent. etc. Co.*, 3 Sawy. 24, 23 Fed. Cas. 1290, where description uncertain and no dollar sign prefixed to figures. Distinguished in *Brunn v. Murphy*, 29 Cal. 328, holding assessment valid under amendatory statute passed after decision in main case. Cited, also, in note to *Bank v. Mersereau*, 49 Am. Dec. 232, and to *Polk v. Rose*, 89 Am. Dec. 778, on validity of tax sales and deeds.

Taxes.—Changes in county boundaries after assessment does not prohibit collection by officers of original county of site, p. 47.

Cited to same effect in *Hilliard v. Griffin*, 72 Iowa, 333, denying right of sale by officers of new county; and in *Board v. Linscott*, 30 Kan. 261. Distinguished in *Hughes v. Ewing*, 93 Cal. 420, as to change of school district after tax voted but before levy; and on same point in *School Dist. v. School Dist.*, 9 Neb. 337, and 13 Neb. 176; and in *McKay v. Batchellor*, 2 Colo. 594, as to tax on personal property, there being no lien until seizure. Cited in *In re Fremont Co.*, 8 Wyo. 48, construing local statutes as to division of county; note to *State v. Clevenger*, 20 Am. St. Rep. 679, 680, and to *People v. Stokes*, 42 Am. St. Rep. 108, as to effect of change of county boundaries.

Form of Tax Deed is sufficient when sufficient as common-law conveyance, although not containing recitals of proceedings, p. 47.

Cited to same effect in *Riddle v. Messer*, 84 Ala. 242, where owner's name omitted. Distinguished in *Emeric v. Alvarado*, 90 Cal. 465, hold-

ing tax deed not prima facie evidence of proceedings, under Stats. 1857, p. 344, amending Stats. 1854, p. 88. Cited, also, in note to Maguiar v. Henry, 4 Am. St. Rep. 188, discussing statutes making tax deed prima facie evidence; Reber v. Dowling, 7 Am. St. Rep. 652, as to general subject.

General Citation.—State v. Smith, 12 Mont. 392.

25 Cal. 49-54. **DE CASTRO v. RICHARDSON.**

Same Case.—See De Castro v. Clarke, 29 Cal. 13, as to suit on appeal bond in main case.

Term of Court.—Order made after adjournment, amending records, is void, p. 51.

Cited to same effect in Willson v. McEvoy, 25 Cal. 171, as to order vacating order denying new trial; Casement v. Ringgold, 28 Cal. 338, as to order vacating judgment for mistake, etc.; Kaufman v. Shain, 111 Cal. 20, 52 Am. St. Rep. 141, People v. County Court, 9 Colo. App. 47, and Wallace v. Cason, 42 Ga. 442, discussing power to amend records generally; Vantilburg v. Black, 3 Mont. 469, as to erroneous judgment against wife, holding further no relief obtainable in equity under facts; Clark v. Strouse, 11 Nev. 79, as to unsigned order extending time to file statement; Daniels v. Daniels, 12 Nev. 121, as to order setting aside default; and in Darke v. Ireland, 4 Utah, 196, denying right to vacate judgment when motion made after term, although motion for new trial made during term. Distinguished in Willson v. Cleaveland, 30 Cal. 198, as to order vacating clerk's inadvertent entry of default; Estate of Schroeder, 46 Cal. 316, as to amendment of judgment against administrator for clerical error; Wiggin v. Superior Court, 68 Cal. 401, as to vacating of decree discharging administrator, because made inadvertently and ex parte, and holding further provisions as to terms of court abolished; and in Territory v. Clayton, 8 Mont. 15, as to amendment of minutes to show making of plea of "not guilty." Overruled in Spanagel v. Dellinger, 34 Cal. 481, holding record as to new trial proceedings amendable after term. Cited, also, in Kirby v. Superior Court, 68 Cal. 606, denying right to allow amendment after one year from final judgment, where no clerical error shown, and in note to Bramlet v. Pickett, 12 Am. Dec. 353, on evidence necessary to support amendment.

Amendment of Record may be made from the record or other writing made at the time, p. 51.

Cited in Packard v. Kinzie etc. Co., 105 Wis. 336, discussing practice under local statutes as to correction of foreclosure decree.

Statement on motion for new trial may be stricken out on motion, if notice of intention not duly filed, p. 53.

Cited to same effect in dissenting opinion in Quivey v. Gambert, 32 Cal. 312, main opinion holding question properly raised on argument

of motion for new trial. Cited, also, in *Fox v. West*, 1 Idaho, 784, on point that irregular judgment should be corrected by motion in lower court.

Notice of Intention.—Order extending time to file is void if made when jurisdiction of court has ceased, p. 53.

Cited to same effect in *Clark v. Crane*, 57 Cal. 633, when made after ten days after verdict.

25 Cal. 54-59. **POLACK v. McGRATH.** S. C. 32 Cal. 15; 38 Cal. 666.

Forcible Entry Defined.—Mere trespass and ouster, not accompanied with force, etc., is not forcible entry, p. 58.

Cited to same effect in *McMinn v. Bliss*, 31 Cal. 127, holding no such entry shown; *Buel v. Frazier*, 38 Cal. 697; and in *Castro v. Tewksbury*, 69 Cal. 569, each ruling similarly. Cited, also, in note to *Evill v. Conwell*, 18 Am. Dec. 146, on general subject.

25 Cal. 59-67. **WALLS v. PRESTON.**

New Trial.—Failure to specify grounds prevents consideration of motion, p. 61.

Cited to same effect in *Moore v. Murdock*, 26 Cal. 524; *Raymond v. Thexton*, 7 Mont. 305; *Caldwell v. Greely*, 5 Nev. 262; and in *Sanford v. Duluth etc. Co.*, 2 N. Dak. 10.

Exceptions Taken at Trial are reviewable on appeal without necessity of motion for new trial, p. 61.

Cited to same effect in *United States v. Trabing*, 3 Wyo. 147, holding aliter, however, under local statute.

Lease.—Agreement to pay lessor part of crop does not change lease to cropping contract, p. 62.

Cited to same effect in *Smith v. Schultz*, 89 Cal. 534, holding agreement a leasing on shares and not of partnership; *Jones v. Durrer*, 96 Cal. 97, 98, ruling similarly, and holding further that parties remain as lessor and lessee as to land, even if tenants in common as to crop, etc.; *Chicago etc. Co. v. Linard*, 94 Ind. 329, 48 Am. Rep. 162, on point that tenant under such lease can maintain trespass for injury to crops before division even as against lessor's grantee of land; and in *Strain v. Gardner*, 61 Wis. 184, holding further that tenant thereunder cannot dispute landlord's title, in forcible entry proceedings. Distinguished in *Whitney v. Clifford*, 46 Wis. 143, 32 Am. Rep. 707, holding contract one of hiring and not of lease on shares. Cited, also, in note to *Putnam v. Wise*, 37 Am. Dec. 319, 320; and to *Bernal v. Hovins*, 79 Am. Dec. 161, on general subject.

Lease and Cropping Contract.—Question is governed by intention of parties, to be gathered from whole instrument, p. 63.

Cited in *Clarke v. Cobb*, 121 Cal. 597, 598, and *Manchester etc. Co. v. Abrams*, 89 Fed. 939, 61 U. S. App. 287 (noted under *Bernal v. Hovious*, 17 Cal. 544); *Cull v. San Francisco etc. Co.*, 124 Cal. 593, holding agreement to be cropping contract and not one of employment; concurring opinion in *Whithed v. St. Anthony etc. Co.*, 9 N. Dak. 230, discussing right to crops under mortgage foreclosure; *Stockton etc. Soc. v. Purvis*, 112 Cal. 242, 53 Am. St. Rep. 214, applying rule of construction to reservation of secret lien on crop to landlord.

25 Cal. 67-75. *STREETER v. RUSH*.

Liquidated Damages and Penalty.—What stipulation is, is to be determined from intention of parties, p. 70.

Cited to same effect in *Muldoon v. Lynch*, 36 Cal. 539, and in *Brennan v. Clark*, 29 Neb. 393, holding clause for forfeiture by contractor of stated sum per day after contract time, a penalty; *Potter v. Ahrens*, 110 Cal. 681, ruling aliter as to covenant not to engage in like business, etc., on sale of business and goodwill; and on same point in *Holbrook v. Tobey*, 66 Me. 413; 22 Am. Rep. 584; *Goldmen v. Goldmen*, 51 La. Ann. 775, holding covenant to be one for liquidated damages; note to *Graham v. Bickham*, 1 Am. Dec. 338, on general subject.

25 Cal. 76-82. *MIDDLETON v. FINDLA*.

Deed of True Owner Passes Title irrespective of form of Christian name used, p. 80.

Cited to same effect in *Fallon v. Kehoe*, 38 Cal. 49, 99 Am. Dec. 348, as to deed in true name although title acquired by nickname; *Wilson v. White*, 84 Cal. 243, holding title to pass where deed made to and by assumed name; *Zann v. Haller*, 71 Ind. 139, 36 Am. Rep. 195, where wife signed by Christian name alone, full name appearing in body and acknowledgment; *Wakefield v. Brown*, 38 Minn. 365, 8 Am. St. Rep. 675, holding parol evidence admissible for identification; *Wilcoxon v. Osborn*, 77 Mo. 626, on point that blank in certificate of acknowledgment will be aided by name in deed, and distinguishing *Lincoln v. Thompson*, 75 Mo. 630 (where main case distinguished) where names in deed and certificate differed, no evidence of identification being offered; and in *Rupert v. Penner*, 35 Neb. 595, sustaining deed signed by abbreviation of Christian name, full name appearing in body and in acknowledgment. Cited, also, in note to *Fallon v. Kehoe*, 99 Am. Dec. 351, on general subject.

Real Estate Broker earns commissions when sale made, even if purchaser refuses to proceed through defect of title, p. 81.

Cited to same effect in *Blood v. Shannon*, 29 Cal. 305, awarding commissions where sale made in time specified, although principal has previously made sale; *Gonzales v. Broad*, 57 Cal. 226; *Smith v. Schiele*, 93 Cal. 149, 150; and *Roberts v. Kimmons*, 65 Miss. 334, 335, where facts

EXTRA ANNOTATION
TO
PRECEDING VOLUME

further leasehold to be firm property and subject to this rule. Cited, also, in note to Conroy v. Woods, 73 Am. Dec. 610, and to Smith v. Smith, 43 Am. St. Rep. 378, 379, 380, on general subject.

25 Cal. 108-116. BRENNAN v. WALLACE.

Homestead prior to act of 1860 was not joint tenancy, p. 114.

Cited to same effect in McQuade v. Whaley, 31 Cal. 531 (cited in Smith v. Shrieves, 13 Nev. 310), discussing effect of that act on homesteads previously acquired; and in Johnston v. Bush, 49 Cal. 201, holding death of wife made children tenants in common with husband of homestead on common property dedicated under act of 1861. Cited, also, in note to Poole v. Gerrard, 65 Am. Dec. 483, and to Revalk v. Kraemer, 68 Am. Dec. 309, 310, on general nature of homestead estate.

Homestead may be abandoned by act of husband alone, p. 155.

Cited to same effect in Williams v. Moody, 35 Minn. 282, holding wife bound by his intent not to return, on their removal from land.

Declaration of Abandonment of homestead acquired by actual occupancy is admissible to show abandonment, where declaration of homestead under later act was subsequently filed, p. 115.

Cited in Speidel v. Schlosser, 13 W. Va. 699, on point that requirement for filing declaration of homestead is constitutional; note to Taylor v. Hargous, 60 Am. Dec. 608, on general subject.

25 Cal. 117-121. TRINITY COUNTY v. McCAMMON.

County Warrant is Void when drawn without authority, p. 120.

Cited to same effect in Linden v. Case, 46 Cal. 174, denying injunction to restrain supervisors from incurring improper liabilities; Ventura Co. v. Clay, 114 Cal. 246, holding treasurer liable on bond for payment of such warrants; Bingham Co. v. First Nat. Bank, 122 Fed. 22, county warrants void on face because of omission of recitals made essential by statute cannot be validated by ratification of county board; note to Commissioners v. Heaston, 55 Am. St. Rep. 209, on general subject.

Law of Case.—Opinion of supreme court operates only as to facts appearing in the then record, p. 121.

Cited to same effect in McLeran v. Benton, 73 Cal. 337, 2 Am. St. Rep. 817, as to new objections raised on retrial, as to validity of lease; and Dodge v. Gaylord, 53 Ind. 372, discussing subject generally.

25 Cal. 122-147. HICKS v. COLEMAN. 85 Am. Dec. 103.

Description by Reference to another deed is sufficient and latter paper is admissible for this purpose, though otherwise inadmissible, p. 128.

Cited to same effect in *Caldwell v. Center*, 30 Cal. 542, 89 Am. Dec. 132, rejecting map, however, because not one referred to in deed; and in *Neuval v. Cowell*, 36 Cal. 650, as to contract referred to in another contract as containing plan of work, etc.

Certified Copy of recorded deed is admissible in evidence when original not under party's control, p. 129.

Cited to same effect in *Landers v. Bolton*, 26 Cal. 413, admitting such copy of power of attorney, under facts; and in *Mayo v. Mazeaux*, 38 Cal. 449, holding objection as to control waived. Cited also in note to *Colvin v. Land Assn.*, 8 Am. St. Rep. 118; *Lasher v. State*, 28 Am. St. Rep. 926; and to *Kleimann v. Gieselmann*, 35 Am. St. Rep. 767, all on general subject.

Actual Possession of part of land under deed with claim of title to all, extends possession to all not then in adverse possession of another, p. 131.

Cited to same effect in *Hoag v. Pierce*, 28 Cal. 191, an action for forcible entry; *Hess v. Winder*, 30 Cal. 358, distinguishing case, however, when deed under which entry made is indefinite as to boundaries; *Davis v. Perley*, 30 Cal. 639, holding, however constructive possession not sufficient under Van Ness ordinance (and see as to last point, *Judson v. Malloy*, 40 Cal. 308); *McKee v. Greene*, 31 Cal. 420 sustaining ejectment on such possession; *Ayres v. Bensley*, 32 Cal. 631, 632, discussing priority of possession; *Russell v. Harris*, 38 Cal. 428, 99 Am. Dec. 422 (cited in S. C. 44 Cal. 493), as to entry under sheriff's deed; *Walsh v. Hill*, 38 Cal. 487, as to ejectment against trespasser, although plaintiff's grantor had no title nor possession; *Donahue v. Gallavan*, 43 Cal. 575, sustaining ejectment and discussing, further, possession as to Van Ness Ordinance; *Webber v. Clarke*, 74 Cal. 15, 16 (cited in *Gildehaus v. Whiting*, 39 Kan. 713), holding sufficient the pasturage of sheep during grazing season on uninclosed land; *Aldrich v. Griffith*, 66 Vt. 401, on question of adverse possession; and in *North Noonday etc. Co. v. Orient etc. Co.*, 8 Sawy. 507, 11 Fed. Rep. 128, as to ejectment against trespasser. Distinguished in *Cannon v. Union Lumber Co.*, 38 Cal. 676, where entry not made in good faith under deed; and on same point in *Wolfekill v. Majalovich*, 39 Cal. 280, where deed was for public land and could convey no title. Cited also in note to *Greene v. Pettingill*, 93 Am. Dec. 448, on general subject; *Cannon v. Stockmon*, 95 Am. Dec. 209, as to effect of adverse possession in creating title; and to *Heyward v. Farmer's etc. Co.* 46 Am. St. Rep. 719, as to color of title.

Possession of Land is evidence of title in fee, p. 141.

Cited in *Andrus v. Smith*, 133 Cal. 80, noted under *Coryell v. Cain*, 16 Cal. 574; note to *Keane v. Cannovan*, 82 Am. Dec. 747, on general subject.

Boundary Line "parallel with river" must follow all meanderings and not general course, p. 142.

Cited to same effect in *Fratt v. Woodward*, 32 Cal. 226, 91 Am. Dec. 573, construing similar deed. Cited also in *Austrian v. Davidson*, 21 Minn. 120, on point that line is presumed to run at right angles to last line unless contrary intention appears. Cited also in note to *Schurmeier v. St. Paul etc. Co.*, 88 Am. Dec. 66, on river as boundaries.

Description in Deed.—Acreage is to be considered in determining direction of lines, p. 144.

Cited to same effect in *Hall v. Shotwell*, 66 Cal. 381, when land bounded by creek; and in *Hostetter v. Los Angeles etc. Co.*, 108 Cal. 42, as to river boundary.

Exceptions to Form of Verdict cannot be first raised on appeal, p. 146.

Cited to same effect in *Fox v. West*, 1 Idaho, 784, as to joint verdict.

General Exception to Charge will not be considered, p. 146.

Cited to same effect in *Sill v. Reese*, 47 Cal. 348, as to like exceptions to charge; *Robinson v. W. P. etc. Co.*, 48 Cal. 425; *Brown v. Kentfield*, 50 Cal. 132; *Rogers v. Mahoney*, 62 Cal. 612, holding, however, exception sufficiently specific; *Dixon v. Allen*, 69 Cal. 529; *Frost v. Grizzly etc. Co.*, 102 Cal. 527; *Cavallaro v. Texas etc. Co.*, 110 Cal. 358, 52 Am. St. Rep. 101, confining rule to instruction given on Court's own motion and sustaining general exception as to those specially asked by parties; *Marks v. Tomkins*, 7 Utah, 425, holding exceptions insufficient; *Black v. Lewiston*, 2 Idaho, 258; and in *Griswold v. Baley*, 1 Mont. 554 (cited in *McKinstry v. Clark*, 4 Mont. 397).

25 Cal. 147-154. LACKMAN v. WOOD.

Minor may be Emancipated by father, p. 151.

Cited to same effect in *Halliday v. Miller*, 29 W. Va. 434, 6 Am. St. Rep. 658, holding no emancipation shown, but further that minor entitled to bounty paid on enlistment in army; *Flynn v. Baisley*, 35 Or. 273, 76 Am. St. Rep. 499, and *In re Dunavant*, 96 Fed. 548, holding earnings after emancipation not subject to father's debts; *Wambold v. Vick*, 50 Wis. 457, affirming further right to hold and donate property after such emancipation as against father's creditors. Cited also in note to *Wilson v. McMillan*, 35 Am. Rep. 117, 119, 120, 121, on general subject.

Minors.—Doctrine of estoppel has no application to, p. 152.

Cited to same effect in *New Haven etc. Co. v. Chatham*, 42 Conn. 439, on point that minor not bound by contract though representing himself as of full age; and in *Crockett v. Althouse*, 35 Mo. App. 413, applying rule to tenants, of whom one was married and other insane. Cited also in note to *Norris v. Wait*, 44 Am. Dec. 236, on general subject.

25 Cal. 154-169. CARPENTER v. WILLIAMSON.

Statement on New Trial may be used as statement on appeal when so stipulated, p. 158.

Cited to same effect conversely in *Kerr v. Clappitt*, 95 U. S. 190, affirming judgment for want of sufficient statement. *Withers v. Kemper*, 25 Mont. 437, discussing difference between statement and bill of exceptions under local statutes.

Decree of Foreclosure does not affect grantee between mortgage and suit unless made party to suit, p. 161.

Cited to same effect in *Bludworth v. Lake*, 33 Cal. 264; *Davenport v. Turpin*, 43 Cal. 601, holding further as to abandonment by such grantee and acquiescence in decree; *Barrett v. Blackmar*, 47 Iowa, 570, holding further as to grantee's right to redeem. Cited also in note to *Goode-now v. Ewer*, 76 Am. Dec. 550, and to *Boggs v. Fowler*, 76 Am. Dec. 567, on parties to foreclosure suit.

Error will be Presumed Prejudicial unless record shows otherwise, p. 167.

Cited to same effect in *Norwood v. Kenfield*, 30 Cal. 400, as to admission of evidence of illegality of votes in election contest; *Rice v. Heath*, 39 Cal. 612, as to rejection of evidence to explain entry in memorandum book; *Miller v. Durst*, 14 S. Dak. 593, where plaintiff introduces justice of peace to show prior adjudication of claim pleaded by defendant as counterclaim, and justice testifies to filing of claim as counterclaim, error to refuse to allow him to state whether he considered counterclaim in determining case.

Review on Appeal from judgment includes errors as to evidence when ruling made part of record on appeal by bill or statement, p. 167.

Cited to same effect in *Brown v. Willoughby*, 5 Colo. 8, holding aliter as to sufficiency of evidence when order denying new trial not appealed from; *Cooper v. Pacific etc. Co.*, 7 Nev. 121, holding motion for new trial unnecessary to review granting of nonsuit; *Jones etc. Co. v. Faris*, 5 S. Dak. 350, ruling similarly as to errors at law occurring at trial; *United States v. Trahing*, 3 Wyo. 147, ruling aliter, however, under local statute.

Appeals from Judgment and order denying new trial may be prosecuted together or separately, p. 167.

Cited to same effect in *Sharon v. Sharon*, 68 Cal. 336, holding one notice and one undertaking sufficient; and in *Hawkins v. Hubbard*, 2 S. Dak. 634, denying motion to dismiss double appeal. Cited also in *Rayner v. Jones*, 90 Cal. 81, on point that court can pass on motion for new trial even when appeal already taken from judgment; *Brooks v. Syndicate*, 24 Nev. 351, noted under *Towdy v. Ellis*, 22 Cal. 659; *Ex. parte Fuller*, 182 U. S. 573, construing local (Arkansas) statutes as to new trial for newly discovered evidence.

Quitclaim Deed Passes grantor's title so as to enable grantee to maintain ejectment suit if grantor could have done so, p. 168.

Cited to same effect in *Lawrence v. Ballou*, 37 Cal. 521, sustaining ejectment under such deed against grantor, when tenant in common; and in *Rego v. Van Pelt*, 65 Cal. 256, on point that grantee under such deed cannot dispute grantor's title. Cited also in note to *Thorn v. Newsom*, 53 Am. Rep. 750, on general subject.

25 Cal. 169-174. WILLSON v. McEVOY.

Term of Court.—Order denying new trial cannot be set aside after adjournment of term, p. 171.

Distinguished in *Willson v. Cleaveland*, 30 Cal. 198, sustaining setting aside of default after term, when improperly entered; and in *Kaufman v. Shain*, 111 Cal. 20, 52 Am. St. Rep. 141, holding records amendable at any time when untrue; and see *Wallace v. Cason*, 42 Ga. 442, on last point.

Action on Injunction Bond.—Attorney's fees cannot be recovered unless actually paid, p. 171.

Cited in *Pacific etc. Co. v. W. U. Tel. Co.*, 123 Cal. 432, denying damages for nondelivery of telegram when sought on ground of resultant breach of contract between plaintiff and a third person; *Prader v. Grimm*, 28 Cal. 12, including also expenses for testimony; *Roussin v. Stewart*, 33 Cal. 212, applying rule to indemnity bond against attachment, where no allegation of payment of judgment; *Elder v. Kutner*, 97 Cal. 495, holding averment of payment necessary in complaint; and in *California etc. Co. v. Armstrong*, 8 Sawy. 529, 17 Fed. Rep. 220, applying rule to tenant's suit against stranger for injuries to freehold, before having made repairs or compensated landlord. Distinguished in *Lott v. Mitchell*, 32 Cal. 25, as to indemnity bond to sheriff for replevy, holding, however, that action cannot be maintained thereon before payment of judgment recovered against sheriff. Cited also in *Porter v. Hopkins*, 63 Cal. 64, on point that reasonable fee is recoverable in such suit; note to *Gilbert v. Wyman*, 49 Am. Dec. 363, as to accrual of right of action on contract of indemnity; and to *Trapnall v. McAfee*, 77 Am. Dec. 159, 160, upon general subject.

Action on Injunction Bond.—Nominal damages should not be allowed where no actual damage shown, p. 174.

Cited to same effect in *Bustamante v. Stewart*, 55 Cal. 116, holding further attorney's fees recoverable include only those paid for procuring dissolution (as to which see *Porter v. Hopkins*, 63 Cal. 64). Cited also in note to *McConihe v. New York etc. Co.*, 75 Am. Dec. 423, upon plaintiff's right to new trial when judgment should have been for nominal damages.

25 Cal. 175-187. MULLER v. BOGGS.

Deed must be Construed in favor of grantee, when grantor's intention doubtful, p. 182.

Cited to same effect in *Piper v. True*, 36 Cal. 617, as to property conveyed; and in dissenting opinion in *Sheppard v. Thomas*, 26 Ark. 538, as to whether condition is precedent or subsequent, following main opinion in this regard.

Deputy County Recorder may take acknowledgment, whether in principal's name or not, p. 183.

Cited to same effect in *Emmal v. Webb*, 36 Cal. 203, as to deputy county clerk; *People v. Wheatley*, 88 Cal. 119; *Crombie v. Little*, 47 Minn. 586; and in *State v. Devine*, 6 Wash. St. 589, as to affidavit made before deputy county clerk, holding further principal's name need not be signed to jurat; and in *Fredericks v. Davis*, 3 Mont. 257, as to authentication by deputy recorder of official character of justice.

Tenant in Common bringing ejectment against trespasser can recover damages proportionate to his interest only, p. 187.

Cited to same effect in *Lee Chuck v. Quan Wo Chong*, 91 Cal. 599, as to action for unlawful detainer.

Appeal.—Modification of Judgment will be ordered when respondent offers to remit as to erroneous portion, p. 187.

Cited in *Fox v. Hale etc. Co.*, 122 Cal. 223, noted under *DeCosta v. Massachusetts etc. Co.*, 17 Cal. 613.

25 Cal. 189-197. BROWN v. SCOTT.

Pleading.—Argumentative denials in answer are evasive and insufficient, p. 195.

Cited to same effect in *Fish v. Redington*, 31 Cal. 195, and *Seovill v. Barney*, 4 Oreg. 290, holding insufficient answer in conjunctive form; and in dissenting opinion in *Racouillat v. Rene*, 32 Cal. 458, main opinion holding sufficient a denial of allegation of constructive notice. Cited also in note to *Humphreys v. McCall*, 70 Am. Dec. 635, on effect and remedies in case of sham and frivolous answers.

Assignment of Judgment includes debts for which it was obtained, p. 196.

Cited in *Rufe v. Bank*, 99 Fed. 655, extending rule to compromise judgment entered thereafter; note to *Chilstrom v. Eppinger*, 78 Am. St. Rep. 49, on general subject.

Denial on Information and Belief of verified complaint, when knowledge is presumed, must show how lack of knowledge has occurred, p. 196.

Cited in *Weill v. Crittenden*, 139 Cal. 490, noted under *Curtis v. Rich-*

ards, 9 Cal. 34; *Peacock v. United States*, 25 Fed. 587, in action to recover penalty under Revised Statutes, section 4143, for making false oath to secure registry of vessel, averments in answer that defendant was ignorant of law and regarding proceedings for registry as merely formal did not read papers he signed, properly stricken out; *Vassault v. Austin*, 32 Cal. 607, holding sufficient such denial of recovery of judgment; and in *Cowie v. Ahrenstedt*, 1 Wash. 419, ruling similarly as to recording of notice of mechanic's lien; *Davanay v. Eggenhoff*, 43 Cal. 397, on point that general denial of complaint on note prevents judgment on pleadings; in *Walker v. Buffandeau*, 63 Cal. 314, holding insufficient denial for want of information etc., of priority of plaintiff's mortgage; and in *Loveland v. Garner*, 74 Cal. 300, ruling similarly as to directors' denial of corporate acts, holding further judgment on pleadings proper in such case. Cited also in note to *Humphreys v. McCall*, 70 Am. Dec. 631, 632, on general subject.

25 Cal. 197-202. CAHOON v. MARSHALL.

Jury Trial.—Questions of fact when at issue are to be decided by jury alone and court cannot assume fact in instructions, p. 200.

Cited to same effect in dissenting opinion in *Bradley v. Lee*, 38 Cal. 370, main opinion holding assumption of fact by judge not reversible error.

Actual Change of Possession is open, visible change, manifested by such outward signs as to show total ceasing of vendor's possession, p. 201.

Cited in *Georgia v. Pierce*, 123 Cal. 177, noted under *Stevens v. Irwin*, 15 Cal. 503; *Bell v. McClellan*, 67 Cal. 284, holding transfer void as to creditors; *Gould v. Huntley*, 73 Cal. 402, ruling aliter as to sale of mare, although afterward occasionally loaned to vendor; *Bunting v. Saltz*, 84 Cal. 171, and in *Howe v. Johnson*, 107 Cal. 76, holding transfer of farming implements void; and in *Etchepare v. Aguirre*, 91 Cal. 295, 25 Am. St. Rep. 185, discussing instructions as to vendor's employment after sale.

Declarations of vendor after sale when out of possession are inadmissible to show fraud in sale, p. 202.

Cited in *Henderson v. Hart*, 122 Cal. 335, holding certain declarations inadmissible; *Bush v. Helbing*, 134 Cal. 680, but holding declarations admissible when made during possession; *Jones v. Morse*, 36 Cal. 207, holding error in admission to be without prejudice under facts; *Spanagel v. Dellinger*, 38 Cal. 282, 284, when made after grantee had taken possession, and out of his presence; *Murphy v. Mulgrew*, 102 Cal. 552, 41 Am. St. Rep. 203, holding such declarations admissible when vendor in possession after sale; and in *Bowden v. Spellman*, 59 Ark. 266, and *United States v. Griswold*, 7 Sawy. 317, 8 Fed. Rep. 560, ruling similarly as to same point.

25 Cal. 202-212. **LICK v. MADDEN**. S. C. 36 Cal. 208, 95 Am. Dec. 175.

Prepayment of fees of clerk may be waived, in which event obligation to perform duty is perfect without tender, p. 210.

Cited to same effect in *Tregambo v. Comanche etc. Co.* 57 Cal. 506 (cited in *Mutual etc. Co. v. Phinney*, 76 Fed. Rep. 620), setting aside default when demurrer filed, payment of fees not being demanded; *Carbonate etc. Co. v. Ives*, 10 Colo. 83, denying motion to dismiss appeal because justice's fees for appeal not paid in time, where papers had already been transmitted by him; and in *Cunningham v. Quinn*, 12 Colo. 475, granting mandamus against clerk to file appeal papers when prepayment not demanded.

25 Cal. 212-214. **AITKEN v. MENDENHALL**.

Cross-examination must be confined to evidence on direct examination, p. 213.

Cited in *Ruah v. French*, 1 Ariz. Ter. 135, discussing rule as to cross-examination; see conclusions, pp. 139, 140.

Distinguished in *State v. Larkins*, 5 Idaho, 208, defendant in criminal case taking stand on own behalf may be cross-examined as to any facts testified to on direct examination or connected therewith.

25 Cal. 214-225. **IRWIN v. BACKUS**. S. C. 85 Am. Dec. 125.

Sureties on administrator's bond are bound by degree of probate court as to amount of principal's liability, when not fraudulently rendered, although not parties to proceedings there, p. 221.

Cited to same effect in *Fox v. Minor*, 32 Cal. 120, as to guardian's bond (but see dissenting opinion 121, 122, 123, 124, 125, 126, 130); and on same point in *Brodrrib v. Brodrrib*, 56 Cal. 565; *Hathaway v. Davis*, 33 Cal. 170, on point that sureties on appeal bond cannot attack judgment of affirmance on ground that appeal not taken in due time; *Murdock v. Brooks*, 38 Cal. 601, on same point sustaining complaint; *Chaquette v. Ortet*, 60 Cal. 600, applying rule to judgment in suit in equity for accounting on administrator's death; *Moore v. Earl*, 91 Cal. 635, as to objection that probate court had no jurisdiction to issue letters; *Evans v. Gerken*, 105 Cal. 313, as to objection that sale of real estate was made without requiring additional bond; *Treweek v. Howard*, 105 Cal. 445, holding misrepresentations by executor to sureties no defense to action on bond; *Ogden v. Davis*, 116 Cal. 37, on point that sureties on appeal bond for waste are bound by recital therein of order fixing amount; *Meyer v. Barth*, 97 Wis. 355, 65 Am. St. Rep. 124, as to bond of testamentary trustee; *Herren's Estate*, 40 Or. 97, where, in suit by administrator de bonis non against representatives and sureties of deceased administrator, it is shown that certain sum was in such administrator's hands when last report made, burden of proof

is on defendants to show proper administration of fund; *Nevitt v. Woodburn*, 160 Ill. 209, 52 Am. St. Rep. 319, holding further as to effect of statute of limitations and of removal of executor pending settlement of account; *Weber v. Noth*, 51 Iowa, 379, as to claim ordered paid upon administrator's allowance, although then barred; *Pasewalk v. Bollman*, 29 Neb. 526, 26 Am. St. Rep. 404, holding judgment against sheriff conclusive on sureties on indemnity bond on execution; *McNabb v. Wixon*, 7 Nev. 173. Distinguished in dissenting opinion in *Mendocino Co. v. Morris*, 32 Cal. 153, main opinion holding that under Specific Contract Act judgment against sureties on official bond cannot be rendered for coin, when not so stipulated; and in *Rodini v. Lytle*, 17 Mont. 453, holding rule as to conclusiveness of judgment not applicable to constable's bond. Cited, also, in note to *Heard v. Lodge*, 32 Am. Dec. 203; *State v. Holt*, 72 Am. Dec. 276; *Charles v. Hoskins*, 83 Am. Dec. 384; and to *Howell v. Cobb*, 88 Am. Dec. 593, on general subject.

Sureties on administrator's bond are liable for his failure or refusal to pay over moneys ordered by decree of probate court, p. 224.

Cited to same effect in *Deegan v. Deegan*, 22 Nev. 202, 58 Am. St. Rep. 749, holding sureties on guardian's bond liable for his conversion of ward's money; and in *Steel v. Holladay*, 20 Oreg. 77, defining "devastavit" by executor.

General Citation.—*Joy v. Elton*, 9 N. D. 466.

25 Cal. 225-229. HURLBURT v. JONES.

Conveyance to wife by husband when insolvent, is void when made to delay or defraud creditors, p. 229.

Cited to same effect in *Thomas v. Deamond*, 63 Cal. 423, where wife was sole trader as in main case; note to *Morris v. Fletcher*, 77 Am. St. Rep. 103, on general subject.

Defects in Findings of fact cannot be first urged in supreme court, no exception having been taken thereto below, p. 229.

Cited to same effect in *Lyons v. Leimback*, 29 Cal. 142, where findings did not contain all facts necessary for judgment.

25 Cal. 230-242. WISEMAN v. McNULTY.

Tenants in Common not served with summons are not affected by judgment or execution sale thereunder, p. 236.

Cited to same effect in *Iron Works v. Davidson*, 73 Cal. 393, as to action against partners when not brought under section 388 of the Code of Civil Procedure.

Constable's Deed on Execution must recite judgment, p. 236.

Cited in note to *Donahue v. McNulty*, 85 Am. Dec. 84, as to recital in sheriff's deed.

Forfeiture is not Favored and strict proof is necessary, p. 237.

Cited in *Johnson v. McLaughlin*, 1 Ariz. Ter. 502, on point that forfeiture must be specially pleaded, aliter as to abandonment.

25 Cal. 242-252. PEOPLE v. STRATTON.

State Patent is *prima facie* valid and burden is on person attacking it, p. 242.

Cited to same effect in *Hebron v. Graves*, 78 Cal. 381, where no proof offered by patentee that land was of sixteenth or thirty-sixth section, or that state had title; *Peabody v. Prince*, 78 Cal. 517, denying right to attack patent collaterally because judgment in contest fraudulently rendered by default.

Attorney General may file information to annul state patent when rights and interests of state are involved, p. 245.

Cited to same effect in *People v. Gold Run etc. Co.*, 66 Cal. 152, 56 Am. Rep. 88, as to injunction to prevent debris deposits in navigable waters; and in *People v. Truckee etc. Co.*, 116 Cal. 402, 58 Am. St. Rep. 187, as to like action against deposits of sawmill refuse; *People v. Center*, 66 Cal. 566, as to action to cancel patent, holding authority confirmed by Stats. 1877-78, p. 358; *People v. Oakland etc. Co.*, 118 Cal. 239, as to action to quiet title of state to lands on water front; and in *State v. Union etc. Co.*, 7. S. Dak. 53, applying rule to action to vacate corporate charter.

State Patent for swamp lands is void if lands were in fact of different character, p. 250.

Cited in *Fredericks v. Zumwalt*, 134 Cal. 48, as to patent to lands excepted under statutes of 1869-70, p. 875.

State Patent cannot be impeached by one not having title or sufficient interest in subordination thereto, p. 251.

Cited to same effect in *Carder v. Baxter*, 28 Cal. 101, rejecting evidence that lands were not swamp, etc., when offered by stranger to title of state and of United States; *Durfee v. Plaisted*, 38 Cal. 83, as to point that conditions for pre-emption patent were not complied with; *Schiëffery v. Tapia*, 68 Cal. 186, as to point that lands were improperly listed to state; *Davidson v. Cucamonga etc. Co.*, 78 Cal. 7, holding that void certificate of purchase confers no right of action to annul patent. Distinguished as to this point in *Rondell v. Fay*, 32 Cal. 382, holding patent collaterally attackable by any person interested, when void on its face; and see *Laugenour v. Shanklin*, 57 Cal. 75, as to patent for swamp land covering land in five hundred thousand acre grant. Cited, also, in note to *Terry v. Megerle*, 85 Am. Dec. 93, on general subject.

25 Cal. 252-262. HIGGINS v. HOUGHTON.

Mineral Lands are not excepted from grant of sixteenth and thirty-sixth sections, p. 254.

Overruled in *Hermocilla v. Hubbell*, 89 Cal. 8, following United States supreme court.

Grant of sixteenth and thirty-sixth sections created vested interest in state, becoming absolute on location, p. 256.

Cited to same effect in *People v. Crockett*, 33 Cal. 154, on point that Mexican grant of three square leagues, within exterior boundaries of larger tract, is vested estate and taxable; and in *Sanger v. Sargent*, 8 Sawy. 94, construing effect of railroad grant; *Sherman v. Buick*, 45 Cal. 667, 669 (reversed, however, in S. C. 93 U. S. 214), denying right of Congress to extend pre-emption rights over this grant by subsequent act (12 U. S. Stats. 409); but see *Heydenfeldt v. Daney etc. Co.*, 10 Nev. 310, affirming right to change terms of grant with consent of state prior to its disposal of land and to survey); *Wedekind v. Craig*, 56 Cal. 644, holding, further, state entitled to lieu land in case of mineral settlement under section 7 of act; and see on same point as to prior pre-emptioners, *Layton v. Farrell*, 11 Nev. 458, distinguishing main case.

25 Cal. 262-265. **TEWKSBURY v. O'CONNELL.**

Treble Damages in unlawful detainer may be awarded, though not specifically prayed for, p. 264.

Cited to same effect in *Rhemke v. Clinton*, 2 Utah, 235, permitting amendment of prayer of complaint from treble (statutory) damages, to single damages, for wilful destruction of property; *Eccles v. Union etc. Co.*, 15 Utah, 20, directing treble damages on remand where demanded.

25 Cal. 266-283. **GRAY v. DOUGHERTY.**

Former Judgment is bar in action between same parties or their privies, as to every question directly involved, p. 272.

Cited in *Hardin v. Dickey*, 123 Cal. 519, but holding rule inapplicable to judgment in action on claim brought before its maturity; *Garwood v. Garwood*, 29 Cal. 521, as to decree of probate court granting letters, involving question of birth of child alive; *Marshall v. Shafter*, 32 Cal. 189, as to decree in ejectment, involving respective titles or right to possession; *Morenhaut v. Higuera*, 32 Cal. 296, as to decree in partition rendered on default; *Jackson v. Lodge*, 36 Cal. 38, as to purpose and character of deed alleged in answer to suit on note as given in payment; *Barnum v. Reynolds*, 38 Cal. 647, as to judgment in action against sheriff, involving title to personalty seized; *Ryan v. Fitzgerald*, 87 Cal. 348, when property at issue in second action was included in that claimed in first but not awarded to plaintiff therein; *Flynn v. Hite*, 107 Cal. 460, as to decree in ejectment, concerning validity of lease which defendant failed to introduce in evidence; *Hall v. Susskind*, 109 Cal. 206, on point that pendency of prior action of claim and delivery could be pleaded in abatement of action for conversion, but only to extent of property involved in prior action; *Reid v. Cross*, 116 Cal. 484, as to

judgment on counterclaim in prior action in favor of defendant who was plaintiff in second action; *Luttrell v. Reynolds*, 63 Ark. 258, as to judgment on demurrer, involving right to curtesy; *Land v. Keirn*, 52 Miss. 350, as to decree quieting title, involving grant by United States under treaty; *Covington etc. Co. v. Sargent*, 27 Ohio St. 238 (cited in *Freeman v. McAninch*, 87 Tex. 139, 47 Am. St. Rep. 86, and this cited in *Nasworthy v. Draper*, 9 Tex. Civ. App. p. 651), where defendant in prior action had failed to set up defense sought to be litigated in second action; and on same point in *Neil v. Tolman*, 12 Oreg. 293, as to prior default judgment involving right to divert water; and in *Boyle v. Hinds*, 2 Sawy. 530, 3 Fed. Cas. 1111, as to decree of land commission on perfected Mexican grant, although presentation thereof was unnecessary. Distinguished in *Hough v. Waters*, 30 Cal. 311, holding judgment in ejectment no bar to action for specific performance when that not passed on in first action, being pleaded but withdrawn before trial; *Mahoney v. Van Winkle*, 33 Cal. 459, ruling similarly as to judgment in ejectment where defendant has since acquired new rights; *Altschul v. Polack (Doyle)*, 55 Cal. 639, where issue of title was not submitted on merits and actually passed on; and on same point in *Smith v. Auld*, 31 Kan. 268, where issue was tendered as to right to rents, but not passed on by reason of status of parties to action; and in *Dillinger v. Kelly*, 84 Mo. 569, as to judgment in prior action when prematurely brought. Cited, also, in note to *Reynolds v. Harris*, 76 Am. Dec. 468, on point that judgment conclusive till reversed; *Oetgen v. Ross*, 95 Am. Dec. 473, on conclusion of landlord by judgment against tenant; and to *Lea v. Lea*, 96 Am. Dec. 776, 777, as to conclusiveness of judgment; 777, 778, as to effect of judgment not on merits; 779, 782, as to what facts are not res judicata; and 785, 786, as to necessity of proof of identity of question at issue.

Joinder of Legal and Equitable Causes of action in same complaint is allowable when same facts support both, p. 277.

Cited to same effect in *More v. Massini*, 32 Cal. 596, permitting joinder of trespass to land while in hands of plaintiff's grantor, and injunction against future injury. Distinguished in *Ferguson v. Burt*, 2 Utah, 392, as to joinder of specific performance of contract to convey property and action to recover moneys for maintenance of defendant's child.

Demand is Unnecessary before action for specific performance, except that costs are not recoverable, p. 282.

Cited to same effect in *Randolph v. Harris*, 28 Cal. 566, 87 Am. Dec. 141, as to action on lost note without tender of indemnity; *Jones v. Petaluma*, 36 Cal. 233, as to demand in action to compel conveyance in pursuance of trust; *Conlin v. Ryan*, 47 Cal. 73, on point that two demands are unnecessary by grantee to grantor to replace lost deed; *Liebrand v. Otto*, 56 Cal. 247, as to demand for performance of conditions subsequent, in action to set aside deed; *Rose v. Treadway*, 4

Nev. 460, 97 Am. Dec. 549, when specific performance was pleaded by way of defense to complaint in ejectment; and in *Irvine v. Hawkins*, 20 Nev. 388, as to tender of purchase price under like pleadings; and *Clarno v. Grayson*, 30 Oreg. 127, on point that tender of purchase price is unnecessary to specific performance where waived by vendor's rescission or repudiation of contract; but see on same point as to demand for deed, distinguishing main case, *Cooper v. Stockton*, 60 Mo. 84. Cited, also, in note to *Fuller v. Hubbard*, 16 Am. Dec. 428, as to vendee's duty to demand deed; *Tinney v. Ashley*, 26 Am. Dec. 625, as to duty to prepare deed.

Costs in Equity are within discretion of court, p. 282.

Cited in *Sierra etc. Co. v. Wolff*, 144 Cal. 433, but holding party in action to quiet title entitled to costs by virtue of statute; *Williams v. MacDougall*, 39 Cal. 85, denying counsel fees in action by guardian to increase ward's allowance; and in *Abram v. Stuart*, 96 Cal. 239, sustaining award of costs to defendant in injunction suit under facts stated, although injunction granted to plaintiff. Cited, also, in note to *Ela v. Knox*, 88 Am. Dec. 181, on right to costs.

25 Cal. 283-291. **BERTRAM v. CENTRAL TURNPIKE CO.**

Legislative Grant is to be construed strictly and nothing passes by implication thereunder, p. 287.

Cited to same effect in *Welsh v. Plumas Co.*, 94 Cal. 369, as to acceptance of grant of wagon road franchise; and in *Canyonville etc. Co. v. Stephenson*, 8 Oreg. 267, holding road franchise not exclusive.

25 Cal. 291-293. **PORTER v. ELAM.** 85 Am. Dec. 132.

Statute of Limitations—Acknowledgment in Writing.—Pleading held to show signature, p. 292.

Cited in note to *Tynan v. Walker*, 95 Am. Dec. 161, on construction of statute.

25 Cal. 296-300. **BOSWORTH v. DANZIEN.**

Mistake in Description of Property does not vitiate assessment unless misleading, p. 298.

Cited to same effect in *Irrigation Dist. v. De Lappe*, 79 Cal. 356, rejecting false call in petition for formation of irrigation district; dissenting opinion in *People v. Owyhee etc. Co.*, 1 Idaho, 419, discussing separate taxation of real and personal property; and in *Kelly v. Herrall*, 10 Sawy. 175, 20 Fed. Rep. 373, as to description in assessment and tax deed. Cited, also, in *Sharp v. Daugney*, 33 Cal. 513, holding immaterial discrepancies in summons as published.

25 Cal. 300-313. **PEOPLE v. HOLLADAY.**

Complaint in Action for Taxes is insufficient unless alleging conditions precedent prescribed by statute, p. 302.

Cited to same effect in *People v. Ballerino*, 99 Cal. 601, where property not offered for sale (Pol. Code, 3899).

Act Legalizing Assessments extend to every defect during period specified, p. 303.

Cited to same effect in *Wetherbee v. Dunn*, 32 Cal. 108, as to description in tax deed; *People v. McCreary*, 34 Cal. 437, as to errors in details of valuation, but holding, further, absence of valuation not curable. Distinguished on last point in *People v. Hastings*, 34 Cal. 576, as to omission of dollar mark. Cited also in *City v. Norton*, 13 Kan. 588; and in note to *People v. Seymour*, 76 Am. Dec. 529, 533, on general subject of curative acts.

Description of Property in assessment must specify its class, p. 305.

Cited to same effect in *San Francisco v. Flood*, 64 Cal. 505, 508, 511, holding "mining stock" sufficient. Distinguished in *People v. Sneath*, 26 Cal. 614, sustaining assessment in bulk under act 1863, p. 413.

Property in transit is taxable at county of situs on March 1st, p. 306.

Cited in *Rosasco v. Tuolumne Co.*, 143 Cal. 433, construing statutes of 1871-72, page 754, and Political Code, section 3628; *Waggoner v. Whaley*, 21 Tex. Civ. App. 3, sustaining taxation of cattle while at owner's fattening pens; *People v. Niles*, 35 Cal. 288, as to schooner used in coasting trade; *People v. Whartenby*, 38 Cal. 467, on point that money at interest is taxable at creditor's residence, and in *San Francisco v. Lux*, 64 Cal. 484, that money of estate of decedent is taxable at county of decedent's last residence, notwithstanding its deposit in bank in another county; and in note to *New Albany v. Meekin*, 56 Am. Dec. 533, on general subject.

25 Cal. 313-316. CROWELL v. SONOMA COUNTY.

County is not Liable for act of road overseer in performance of duties, p. 315.

Cited to same effect in *Winbigler v. Mayor*, 45 Cal. 38, applying rule to damages caused by neglect of officers to keep streets in repair; *Barnett v. Contra Costa County*, 67 Cal. 78, as to damages for injuries from defective bridges, and holding further rule not changed by Stats. 1875-76, p. 237; *Chope v. Eureka*, 78 Cal. 590, 12 Am. St. Rep. 114, as to injuries caused by falling into sewer excavation (but see dissenting opinion, p. 591); *Sievers v. San Francisco*, 115 Cal. 654, 56 Am. St. Rep. 156, as to overflowing of land through error of city engineer as to grade; *La Clef v. Concordia*, 41 Kan. 324, 13 Am. St. Rep. 236, as to injuries sustained by prisoner through illkept prison; and in *Wehn v. Commissioners*, 5 Neb. 497, 25 Am. Rep. 498, as to damages suffered by adjacent owner through filthy condition of prison; *Watkins v. County Court*, 30 W. Va. 661, as to injuries suffered by falling of dead tree on public road; and in *Stilling v. Thorp*, 54 Wis. 532, discussing relative

liability of town and county under local statute. Distinguished in *Tyler v. Tehama Co.*, 109 Cal. 621, 624, holding county liable for erection of public bridge on private property, although by mistake. Cited also in note to *Gilman v. Contra Costa*, 68 Am. Dec. 295, on general subject.

25 Cal. 317-333. **ROBLES v. CLARKE.**

Resulting Trust is not created when property bought with mixed funds, unless proportion of each is distinctly shown, p. 326.

Cited to same effect in *Woodside v. Hewell*, 109 Cal. 486, holding evidence insufficient on point; and in *O'Donnell v. White*, 18 R. I. 660, ruling similarly. Cited also in note to *Baker v. Vining*, 50 Am. Dec. 624, on general subject.

25 Cal. 337-361. **ENGLUND v. LEWIS.**

Foreclosure.—Judgment in personam may be rendered with provision for enforcement against mortgaged property, p. 348.

Cited to same effect in *Culver v. Rogers*, 28 Cal. 524, on point that no lien arises against general property until docketing of deficiency judgment after sale, and on same point in *Boyd v. Desmond*, 79 Cal. 257, holding sheriff liable for failure to return order of sale; and in *Creighton v. Hershfield*, 2 Mont. 389, holding further as to docketing of deficiency by clerk; *Brereton v. Miller*, 7 Utah, 433, sustaining like foreclosure decree under local statutes. Distinguished in *Thompson v. Dale*, 58 Minn. 369, holding no personal judgment allowable in mechanic's lien or mortgage foreclosure, and denying effect thereof as general lien. Questioned as to effect of such judgment as general lien in *Weil v. Howard*, 4 Nev. 389, 391, discussing conflict with *Culver* case, *supra*, and abrogation by act of 1861.

Judgment Lien is suspended by taking of appeal and does not expire until two years after remittitur, p. 350.

Questioned and distinguished in *Solomon v. Maguire*, 29 Cal. 237, holding time for issuance of execution not extended by intermediate appeal; *Barroilhet v. Hathaway*, 31 Cal. 397, 89 Am. Dec. 194, 195, holding time between judgment and stay to be included in the two years. Doubtful in *Smith v. Schwartz*, 21 Utah, 133, 134, and *Savings etc. Co. v. Bear Valley etc. Co.*, 89 Fed. 39, noted under *Dewey v. Latson*, 6 Cal. 131. Distinguished also in *Christy v. Flanagan*, 14 Mo. App. 257, under local statutes, holding judgment lien not suspended by taking of appeal. Cited also in note to *Isaac v. Swift*, 70 Am. Dec. 703, on general subject.

Undertaking on appeal from foreclosure decree providing for deficiency judgment must provide for payment of such deficiency, p. 354.

Cited to same effect in *Spence v. Scott (Kowalsky)*, 95 Cal. 153, where appellant was not mortgagor nor in possession, and no deficiency

prayed for as against him. Distinguished in *Boob v. Hall*, 105 Cal. 416 (but see dissenting opinion, 418, 419), holding provisions of the Code of Civil Procedure, section 945, exclusive as to bond; *German Loan Soc. v. Kern*, 38 Or. 245, in appealing from decree giving personal judgment against mortgagor for amount of debt and foreclosing mortgage, appellant must give bond conditioned to pay expenses of appeal and any deficiency after sale of premises.

Undertaking on appeal from decree of sale, other than mortgage foreclosure, need not provide for deficiency judgment, p. 354.

Cited to same effect in *Painter v. Painter*, 98 Cal. 627, as to sale in suit for partnership accounting; and in *Arrington v. Wittenberg*, 11 Nev. 287, as to sale in mechanic's lien suit.

Execution Sale will be enjoined when it would create cloud on owner's title, p. 357.

Cited in *Einstein v. Bank*, 137 Cal. 50, noted under *Shattuck v. Carson*, 2 Cal. 589; *Schuyler v. Broughton*, 65 Cal. 253, holding complaint insufficient, however, because not alleging judgment; *Grigsby v. Shwarz*, 82 Cal. 280, holding complaint sufficient; *Talieferro v. Barnett*, 37 Ark. 515, defining "cloud upon title"; *Budd v. Long*, 13 Fla. 309, holding further, however, that judgment will not be enjoined for error correctible by appeal; and in *Huntington v. C. P. etc. Co.*, 2 Sawy. 514, 12 Fed. Cas. 977, applying rule to sale for taxes under void assessment. Cited also in *Crescent City etc. Co. v. New Orleans etc. Co.*, 27 La Ann. 143 (cited in *State v. Dubuclet*, 28 La Ann. 708), affirming power of equity to prohibit interference with plaintiff's exclusive franchise. Cited also in note to *Carlin v. Hudson*, 62 Am. Dec. 524; and to *Guy v. Hermance*, 63 Am. Dec. 86, on general subject.

Lien of Judgment in personam in foreclosure attaches as soon as docketed, aliter of strict decree of foreclosure, p. 357.

Cited as to personal judgment in *Hibberd v. Smith*, 50 Cal. 519, and as overruling *Chapin v. Broder*, 16 Cal. 403, on this point; *Eldridge v. Wright*, 55 Cal. 533, on point that judgment is not lien until docketed; *Bell v. Gilmore*, 25 N. J. Eq. 106; and see *Blum v. Keyser*, 8 Tex. Civ. App. 678.

25 Cal. 361-367. PEOPLE v. FOREN.

Murder.—Degree of crime is to be determined by jury from all circumstances, p. 363.

Cited in *People v. Long*, 39 Cal. 697, holding instructions erroneous because misleading as to difference in degrees; *People v. Doyell*, 48 Cal. 94, 97, defining "malice" and sustaining charge as to murder in second degree; and in *Lovett v. State*, 30 Fla. 154, on same point, sustaining charge as to premeditation; *People v. Olsen*, 80 Cal. 126, 127, holding as murder a homicide committed by one in execution, by a number, of another felony; *People v. Walter*, 1 Idaho, 393, on main point, holding

erroneous a charge that jury must find murder in first degree or acquit of murder; *Bohanan v. State*, 18 Neb. 66, 53 Am. Rep. 797, on point that defendant can be found guilty in first degree on new trial after reversal of verdict in second degree; and in *State v. Thomas*, 118 N. C. 1121, on point that language used did not show premeditated intent. *State v. Foster*, 130 N. C. 672.

25 Cal. 367-384. **MACLAY v. LOVE.** 85 Am. Dec. 133.

Married Woman cannot encumber separate estate except in manner provided by statute, p. 373.

Cited to same effect in *Leonard v. Townsend*, 26 Cal. 446, on point that she may subject herself to judgment for costs by becoming plaintiff in action; *Brown v. Orr*, 29 Cal. 122; *Norton v. Meador*, 4 Sawy. 620, 18 Fed. Cas. 426; and *Pippen v. Wesson*, 74 N. C. 444, holding her not liable on note signed by herself and husband; and in *Smith v. Greer*, 31 Cal. 478, as to like note, even when acknowledged in form prescribed for conveyances; *Dentzel v. Waldie*, 30 Cal. 142, and *Dow v. Gould etc. Co.*, 31 Cal. 654, on point that her sale through attorney was invalid; *Althof v. Conheim*, 38 Cal. 233, 99 Am. Dec. 364, as to money loaned to wife to complete purchase of property, afterward ratified by husband; *Belloc v. Davis*, 38 Cal. 256, as to waiver of Specific Contract Act, where husband and wife were joint makers of notes; *Buford v. Adair*, 43 W. Va. 216, 64 Am. St. Rep. 858, but holding rule aliter at common law on husband's desertion; *Leonis v. Lazzarovich*, 55 Cal. 58 (cited in note to *Gardner v. Moore*, 51 Am. Rep. 460), on point that conveyance is void if acknowledgment not in statutory form; and in dissenting opinion in *Reis v. Lawrence*, 63 Cal. 139, on same point, main opinion holding objection obviated by estoppel from having assumed to act as feme sole (and see note to *Carlton v. Williams*, 11 Am. St. Rep. 244); *Kantrowitz v. Prather*, 31 Ind. 103, 99 Am. Dec. 596, as to purchase of goods, etc.; and in *Angell v. McCullough*, 12 R. I. 50, as to her contract for building house on her land; and in *Norton v. Meador*, 4 Sawy. 620, 18 Fed. Cas. 426, as to joint note and mortgage with husband, where deficiency judgment sought to be collected from her separate estate. Distinguished in *Camden v. Mullen*, 29 Cal. 566, sustaining wife's note and mortgage when sole trader; *Terry v. Hammonds*, 47 Cal. 37, 38, 39, and *Friedberg v. Parker*, 50 Cal. 105, holding rule abrogated as to personalty by statute (Stats. 1862, p. 518). Cited also in note on general subject to *Ewing v. Smith*, 5 Am. Dec. 593; *Yale v. Dederer*, 72 Am. Dec. 513; *Morrison v. Wilson*, 73 Am. Dec. 599 (as to deed); *Yale v. Dederer*, 78 Am. Dec. 226, 228; *Rogers v. Ward*, 85 Am. Dec. 714; *Stephenson v. Osborne*, 90 Am. Dec. 367 (as to invalidity of contracts at common law); *Tillman v. Shackleton*, 93 Am. Dec. 203; *Hartman v. Osborn*, 93 Am. Dec. 682 (collection of prior notes); and to *Kantrowitz v. Prather*, 99 Am. Dec. 598.

Separate Estate of Married Woman was, in equity, subject to her control as if unmarried, p. 379.

Cited to same effect in *Racoullat v. Sansevain*, 32 Cal. 385, sustaining her executory contract through power of attorney as to separate estate acquired under Mexican law. Cited also in *Bodley v. Ferguson*, 30 Cal. 518, on point that capacity to contract as to separate estate under Mexican law not affected by act April 13, 1850; and in *Love v. Watkins*, 40 Cal. 558, 560, 6 Am. Rep. 626, 628, decreeing specific performance of wife's executory contract for sale of her real estate. Cited in note to *Boots v. Gooch*, 10 Am. St. Rep. 288, on general subject; and see notes referred to under preceding syllabus.

Act Will not be Declared unconstitutional where objectionable part can be eliminated without destroying efficacy of remainder, p. 382.

Cited to same effect in *McCready v. Sexton*, 29 Iowa, 399, 4 Am. Rep. 235, construing act as to effect of tax deed. Cited also in *Dow v. Gould etc. Co.*, 31 Cal. 644, as to constitutionality of act requiring husband's concurrence in deed, etc., of wife's separate property.

Act Relating to Husband and Wife of April 17, 1850, applies only to property of women married thereafter, although acquired before act, p. 383.

Cited to same effect in *Bodley v. Ferguson*, 30 Cal. 517, holding act inapplicable where marriage had before its passage.

25 Cal. 384-397. **MCGLYNN v. MOORE.**

Breach of Lease is not waived by acceptance of rent, where covenant violated is continuing, p. 394.

Cited to same effect in *Jones v. Durrer*, 96 Cal. 99, as to covenant to sell, produce, and divide proceeds. Distinguished in *Conger v. Durfee*, 90 N. Y. 599, as to covenant to pay taxes. Cited also in note to *Moses v. Loomis*, 47 Am. St. Rep. 198, 199, on general subject.

25 Cal. 397-404. **TURNER v. TUOLUMNE ETC. CO.**

Verdict Found by Taking Average is not chance verdict and cannot be impeached by juror's affidavit, p. 390.

Cited to same effect in *Boyce v. California Stage Co.*, 25 Cal. 473, 475, 476, holding with main case such verdict vicious when based on precedent agreement to be bound thereby; *Hunt v. Elliott*, 77 Cal. 590, where affidavit met by counter-affidavits of other jurors; and in *Lee v. Clute*, 10 Nev. 153, where jurors did not agree to be absolutely bound by average; *Long v. Collins*, 12 S. Dak. 624, as overruled by *Dixon v. Pluns*, 98 Cal. 386; *Griffith v. Montandon*, 4 Idaho, 379, affidavits of jurors cannot be received for purpose of impeaching verdict unless verdict is obtained by resort to chance. Distinguished in *Flood v. McClure*, 3 Idaho, 590, 591, 592, 593; where jury agree that each mem-

ber shall mark sum which he thinks plaintiff is entitled to recover, and average of total shall be amount of verdict, such verdict is obtained by resort to chance. Overruled in *Dixon v. Pluma*, 98 Cal. 386, 387, 388, 35 Am. St. Rep. 182, 183, 184, holding such verdict one of chance; and denied on same point in *Gordon v. Trevarthan*, 13 Mont. 391, 394; 40 Am. St. Rep. 455, 456, 458; and *Goodman v. Cody*, 1 Wash. Ter. 331, 334; 34 Am. Rep. 809, 813; and see *Knight v. Fisher*, 15 Colo. 182. Cited also in note to *Warner v. Robinson*, 1 Am. Dec. 39; *Hilton v. Southwick*, 35 Am. Dec. 260; and to *Goodman v. Cody*, 34 Am. Rep. 816, on general subject.

Verdict is not Impeachable by juror's affidavits except when rendered by resort to chance, p. 400.

Cited to same effect in *People v. Hughes*, 29 Cal. 202 (cited in *People v. Anoff*, 105 Cal. 633), as to attack for misconduct; *Fredericks v. Judah*, 73 Cal. 607, where jurors consider facts not in evidence; *Teritory v. Taylor*, 1 Dak. Ter. 467, as to irregularity in reading law-books after retiring; and in *Taylor v. Garnett*, 110 Ind. 290, as to statements made by juror during deliberations as to personal acquaintance with witness and his credibility. Distinguished in *Perry v. Bailey*, 12 Kan. 544, admitting affidavits to prove intoxication of juror. Cited also in note to *Crawford v. State*, 24 Am. Dec. 479; and to *Wilson v. Berryman*, 63 Am. Dec. 80, on general subject.

Verdict Will not be Vacated, though vicious, in absence of sufficient evidence, p. 402.

Cited to same effect in *Hoare v. Hindley*, 49 Cal. 277, where only defendant's affidavit offered to show misconduct in juryroom; and in *Hunt v. Elliott*, 77 Cal. 590, where affidavit of juror was denied by those of two others as to "chance verdict."

"Act of God" is not Defense for discharging waters on plaintiff's land where damage would not have been caused but for defendant's agency, p. 403.

Cited to same effect in *Polack v. Pioche*, 35 Cal. 423, 95 Am. Dec. 117, holding breaking of embankment not such act, although unusual rains have occurred.

Ruling as to admission of testimony cannot be reviewed when not excepted to, p. 404.

Cited to same effect in *Keeran v. Griffith*, 34 Cal. 586, as to order admitting testimony; *People v. Knok Wah Choi*, 2 Idaho, 87, as to similar order.

25 Cal. 404-434. LICK v. FAULKNER.

Legal Tender Act of 1862 is constitutional, p. 414.

Cited to same effect in *Curias v. Abadie*, 25 Cal. 504, and *Kieraki*

v. Mathews, 25 Cal. 593, as to tender of payment of note; Galland v. Lewis, 26 Cal. 47, on same point, holding further as to validity of "Specific Contract" Act; People v. Mayhew, 26 Cal. 662, as to redemption from execution sale; Higgins v. Bear River Min. Co., 27 Cal. 161, as to payment of judgment of foreclosure made before act, though order of sale not issued till after act; Belloc v. Davis, 38 Cal. 254, as to payment of note and mortgage, although following main case only on principle of stare decisis, and holding Specific Contract Act applicable through subsequent promise; Hintrager v. Bates, 18 Iowa, 176, as to redemption from tax sale; George v. Concord, 45 N. H. 452, as to payment of note, though executed before passage of act; Milliken v. Sloat, 1 Nev. 585, as to payment of judgment, and holding Specific Contract Act not retrospective, but void if so as in conflict with Legal Tender Act; and in Shollenberger v. Brinton, 52 Pa. St. 82, as to payment of ground rent, though specified in silver dollars. Distinguished in Carpentier v. Atherton, 25 Cal. 569, 570, holding Specific Contract Act applicable to note made payable in gold and executed after its passage.

Constitutional Law.—Necessity and propriety of act are entirely within judgment of legislative department where power to legislate exists, p. 420.

Cited to same effect in People v. Pacheco, 27 Cal. 224, as to state aid to build railroad for military purposes.

25 Cal. 434-436. KRAMER v. MARKET ST. ETC. CO.

Action for Causing Death was not maintainable at common law, p. 435.

Cited to same effect in Gann v. Worman, 69 Ind. 462, holding rule changed by statute, so as to allow father of decedent to sue; Grosso v. Delaware etc. Co., 50 N. J. L. 322, holding statutory change not to extend to husband's action; Thomas v. Union Pac. etc. Co., 1 Utah, 233, denying right of action by father in absence of statute; Insurance Co. v. Brame, 95 U. S. 757, ruling similarly as to action in Louisiana by insuring company against slayer of insured. Cited in note on general subject to Carey v. Berkshire etc. Co., 48 Am. Dec. 633, 635; and to Edgar v. Castello, 37 Am. Rep. 718.

Action for Causing Death can be maintained here only by personal representative of decedent, p. 435.

Overruled in Hartigan v. S. P. Co., 86 Cal. 143, holding action maintainable by heir also under present statute (Code Civ. Proc., sec. 377), but that separate action cannot be brought by each. Cited also in Houston etc. Co. v. Bradley, 45 Tex. 178, allowing suit by guardian of infant child under local statute; and in St. Louis etc. Co. v. Needham, 52 Fed. Rep. 373, ruling similarly as to action by widow and others entitled to share in distribution of decedent's estate, but denying her

right to sue alone. Cited in note to *Carey v. Berkshire etc. Co.*, 48 Am. Dec. 636; note to *Brown v. Railway Co.* 70 Am. St. Rep. 673.

25 Cal. 437-440. **LYLE v. ROLLINS.**

Action to Quiet Title.—Owner cannot bring, unless in possession, personally, or by tenant, p. 437.

Cited to same effect in *Pralus v. Jefferson etc. Co.*, 34 Cal. 559, holding neither actual nor constructive possession of mining claim shown; *Brooks v. Calderwood*, 34 Cal. 565, holding further as to costs in such action on disclaimer; *Nevada etc. Co. v. Kidd*, 37 Cal. 307, holding further as to relief to be granted under prayer; *Sepulveda v. Sepulveda*, 39 Cal. 18 (but see dissenting opinion, 21), holding possession insufficient where land held adversely; and on same point in *North. Pac. etc. Co. v. Amacker*, 49 Fed. Rep. 536; *Wolverton v. Nichols*, 5 Mont. 91, holding action not maintainable when possession held by vendee under executory contract; *Blasdel v. Williams*, 9 Nev. 168, holding further burden on plaintiff to show defendant's adverse claim; *Northern Pac. etc. Co. v. Cannon*, 46 Fed. Rep. 229, holding ejectment maintainable where plaintiff out of possession. Cited also in *Hawkins v. Reichert*, 28 Cal. 536, on point that landlord not proper defendant in ejectment unless an occupant of land.

Verdict will not be set aside where evidence conflicts; aliter where verdict clearly unsustained by evidence, p. 440.

Cited to same effect sustaining verdict in *Tompkins v. Mahoney*, 32 Cal. 235; Appeal of *Piper*, 32 Cal. 537, applying rule to report of commissioners to assess damages, etc., on widening street; *Pralus v. Pacific etc. Co.*, 35 Cal. 37; *Walker v. Popper*, 2 Utah, 282; and reversing verdict, in *Robinson v. W. P. etc. Co.*, 48 Cal. 423.

25 Cal. 440-460. **KIMBALL v. SEMPLER.** S. C. 31 Cal. 657.

Certificate of Acknowledgment must show identity of parties, p. 446.

Cited in note to *Livingston v. Kettelle*, 41 Am. Dec. 176, on general subject.

Deed is to be Construed, as to description, according to intent of parties at time of execution, p. 449.

Cited to same effect in *Pulliam v. Bennett*, 56 Cal. 371, as to property embraced in deed; dissenting opinion in *Crosby v. Dowd*, 61 Cal. 605, main opinion holding description in decree of foreclosure insufficient; *Kirwin v. Pidcock*, 17 Utah, 6, construing reservations in deed; *Chapman v. Railroad Co.*, 26 W. Va. 333, as to land included in mortgage; and in *Starr v. Stark*, 2 Sawy. 625, 22 Fed. Cas. 1124, holding subsequent acts of parties admissible to show intention.

Conveyance of Interest does not pass after-acquired title, even when with covenant against encumbrances, p. 452.

Cited to same effect in *Morrison v. Wilson*, 30 Cal. 348, as to quitclaim deed with similar covenant; *McGarrahan v. New Idria etc. Co.*, 49 Cal. 335, as to deed of "right, title, and interest"; *Emeric v. Alvarado*, 90 Cal. 459, following *Morrison v. Wilson*, supra; *McDonough v. Martin*, 38 Ga. 680, as to quitclaim deed with warranty of title, etc., and as to like deed, in *Young v. Clippinger*, 4 Kan. 151, and *Hull's Admr. v. Hull's Heirs*, 35 W. Va. 165; 29 Am. St. Rep. 808. Distinguished in *Taylor v. Holter*, 1 Mont. 708, holding deed not quitclaim. Cited also in note to *Frink v. Darst*, 58 Am. Dec. 587, on general subject.

Patent to Mexican Grant cannot be attacked collaterally on ground of illegality of grant, p. 454.

Cited to same effect in *Yates v. Smith*, 40 Cal. 667, 668, construing same patent.

Supreme Court cannot make a finding of fact in review on appeal, p. 455.

Cited to same effect in *Wallace v. Sisson*, 114 Cal. 45, holding principle of law of case not to apply to decisions on matters of fact.

25 Cal. 460-478. *BOYCE v. CALIFORNIA STAGE CO.*

Evidence of Actual Negligence is unnecessary when passenger injured by overturning of stage coach, p. 468.

Cited in *McCurrie v. S. P. Co.*, 122 Cal. 562, as to injury to passenger on train from sudden closing of door; *Bosque v. Sutro etc. Co.*, 131 Cal. 400, as to injury from derailment of street-car; *In re Cal. etc. Co.*, 110 Fed. 672, as to bursting of steam drum on vessel; *Agnew v. Steamer Contra Costa*, 27 Cal. 430, 87 Am. Dec. 89, and *Yeomans v. Contra Costa etc. Co.*, 44 Cal. 84 (cited in *Ryan v. Gilmer*, 2 Mont. 525, 25 Am. Rep. 750), as to passenger on steamboat injured by bursting of boiler; *Ficken v. Jones*, 28 Cal. 628, as to pedestrian injured by vicious steers, holding evidence admissible for defendant, however, that driver was skilled, etc; *Lawrence v. Green*, 70 Cal. 420, 59 Am. Rep. 430, as to passenger on stagecoach injured by breaking of wheel; *Treadwell v. Whittier*, 80 Cal. 583, 587, 13 Am. St. Rep. 183, 186, as to passenger injured by its fall (but see dissenting opinion 80 Cal. 604, 13 Am. St. Rep. 199); *Mitchell v. S. P. etc. Co.*, 87 Cal. 72, as to passenger on railroad train injured by its derailment; *Bush v. Barnett*, 96 Cal. 204, as to passenger on stagecoach injured by its overturning; *Ryan v. Gilmer*, 2 Mont. 524, 25 Am. Rep. 749, as to like passenger for hire on sleigh; *Kennon v. Gilmer*, 5 Mont. 272, as to passenger injured by jumping from runaway coach, on question of degree of liability of such carriers; and on same point in *Budd v. United Carr. Co.*, 25 Oreg. 323, as to passenger in hack. Cited also in note on general subject to *Farish v. Reigle*, 62 Am. Dec. 682; *Memphis*

etc. Co. v. McCool, 43 Am. Rep. 74; and to Philadelphia etc. Co. v. Anderson, 20 Am. St. Rep. 492.

Instructions Requested by Parties may be altered or added to by judge, p. 470.

Cited to same effect in *People v. Dodge*, 30 Cal. 450, where instruction added to; *People v. Williams*, 32 Cal. 288, where modified; and on same point in *People v. Hall*, 94 Cal. 600; *Sutton v. Dana*, 15 Colo. 103, on point that instructions requested should be given if correct, or, instead, others in substance like them; and in *Territory v. Pendry*, 9 Mont. 69, where instructions given in substance. Cited also in note to *Strohn v. Detroit etc. Co.*, 99 Am. Dec. 123, 124, on general subject.

Variance is Waived by failure to object to improper evidence when offered, p. 472.

Cited to same effect in *Yik Hon v. Spring Valley W. W.*, 65 Cal. 620, as to location of property injured by escaping water; *Carpenter v. Ewing*, 76 Cal. 488, as to evidence introduced without objection when case tried on theory making it admissible. Distinguished in *Brace v. Doble*, 3 S. Dak. 419, construing local statute, and commenting on conflict with *Johnson v. Moss*, 45 Cal. 518. Cited also in note to *State v. Whit*, 72 Am. Dec. 540, as to propriety of instructions.

Evidence of Care and Skill of Driver is admissible where passenger injured by overturning of stagecoach, p. 468.

Distinguished in *Towle v. Pacific etc. Co.*, 98 Cal. 344, as to general reputation of driver whose team ran over pedestrian; and in *Cunningham v. Los Angeles etc. Co.*, 115 Cal. 564, as to motorman whose electric car injured plaintiff.

Verdict Cannot be Impeached by juror's affidavit, unless it is founded on chance, p. 473.

Cited in *Siemsen v. Oakland etc. Co.*, 134 Cal. 497, 498, applying rule to affidavit as to admissions of juror after verdict on question of misconduct; *Griffiths v. Montandon*, 4 Idaho, 379, following rule. *People v. Hughes*, 29 Cal. 262, where misconduct in conversing with sheriff alleged; *Polhemus v. Heiman*, 50 Cal. 441 (cited in *Murphy v. Murphy*, 1 S. Dak. 322), as to verdict misunderstood by jurors; *People v. Azoff*, 105 Cal. 633, 635, as to misconduct of jurors in reading newspaper reports of trial; *Knight v. Fisher*, 15 Colo. 182, discussing "chance" verdict; *Territory v. Taylor*, 1 Dak. Ter. 488, as to reading of law books by jurors after retiring; *State v. Crutchley*, 19 Nev. 369, as to statement made by juror after retiring; *Ulrick v. Dakota etc. Co.*, 2 S. Dak. 294, holding "quotient verdict" not one of chance; and in *Territory v. Ritchie*, 12 Utah, 194, as to private information acquired by juror and communicated to others. Distinguished in *Flood v. McClure*, 3 Idaho, 593, verdict obtained by adding sum to which each juror thinks plaintiff is entitled and dividing total by twelve is ob-

tained by resort to chance; distinguished in *Goodman v. Cody*, 1 Wash. Ter. 331, 34 Am. Rep. 810, on point that quotient verdict is one of chance. Cited also in note on general subject, to *Crawford v. State*, 24 Am. Dec. 479.

Damages will not be considered excessive unless given under influence of passion or prejudice, p. 473.

Cited to same effect in *Lee v. S. P. etc. Co.*, 101 Cal. 121, affirming order granting new trial for excessive damages (twenty-five thousand dollars); *McMurray v. Basnett*, 18 Fla. 625, sustaining verdict of two hundred and fifteen dollars for injury to mare; *L. & N. R. R. Co. v. Fox*, 11 Bush (Ky.), 512, reversing verdict for thirty-five thousand five hundred dollars for injuries from railroad accident; and in *Solen v. V. & T. etc. Co.*, 13 Nev. 138, affirming verdict of fifteen thousand dollars for injuries from locomotive.

25 Cal. 478-492. HUTTON v. REED.

Statement on Appeal is insufficient, unless containing assignment of errors, except where appeal taken on judgment-roll, p. 482.

Cited in *Estate of Boyd*, 25 Cal. 515, dismissing appeal accordingly; *Harper v. Minor*, 27 Cal. 112, discussing necessary contents of statement; *Abbott v. Douglass*, 28 Cal. 296, refusing to consider interlocutory orders in transcript when not embodied in statement (and see *Thompson v. Patterson*, 54 Cal. 546, 547); dissenting opinion in *Quivey v. Gambert*, 32 Cal. 316, discussing right to statement on appeal; *Wetherbee v. Carroll*, 33 Cal. 554, discussing form of record on appeal from orders; *Solomon v. Reese*, 34 Cal. 34, and *Jones v. Petaluma*, 36 Cal. 232, as to case within exception stated; *Treadwell v. Davis*, 34 Cal. 605, 94 Am. Dec. 772, holding questions of law reviewable in statement on appeal without resort to motion for new trial; *Wilson v. Wilson*, 45 Cal. 405; *Willoughby v. Brown*, 4 Colo. 122, on point that errors outside of judgment-roll cannot be considered where no statement filed; *Rose v. Richmond etc. Co.*, 17 Nev. 51, holding statement sufficient; *Wood v. Nasseu*, 2 N. Dak. 30, holding stenographer's transcript insufficient where statutory method of settlement not followed; and in *Bankhead v. U. P. etc. Co.*, 2 Utah, 511, holding statement improper for want of assignment of errors.

Failure of appellant to file brief will cause affirmance of judgment, p. 488.

Cited to same effect in *Hickinbotham v. Monroe*, 28 Cal. 489; *Lake v. Lake*, 17 Nev. 242, discussing right of supreme court on divorce appeal to allow counsel fees; and in *Tucker v. Constable*, 16 Ore. 239.

Statement on Motion for new trial must contain grounds relied on by moving party, p. 488.

Cited to same effect in *Moore v. Murdock*, 26 Cal. 524; *Burnett v. Notes Cal. Rep.—82*

Pacheco, 27 Cal. 410; Jones v. W. F. & Co., 28 Cal. 261; and Zeigler v. W. F. & Co., 28 Cal. 265; Vilhac v. Biven, 28 Cal. 413; Beans v. Emanuelli, 36 Cal. 120, holding further as to necessity of particulars wherein evidence insufficient to justify findings; and on same point in Butterfield v. C. P. etc. Co., 37 Cal. 385; and Spanagel v. Dellinger, 38 Cal. 280; Thompson v. Patterson, 54 Cal. 546, 547, holding errors in judgment-roll not reviewable on appeal from order denying new trial when not embodied in statement; Thorp v. Freed, 1 Mont. 663; Caldwell v. Greely, 5 Nev. 262.

Verdict in Ejectment Suit held to be substantially a general one, p. 491.

Cited in Osborne v. Altschul, 93 Fed. 383, discussing power of federal court to amend verdict under section 954, Revised Statutes.

25 Cal. 492-502. LENT v. MORRILL.

Mortgagor cannot renew lien as to his grantee by acknowledgment of note after his conveyance, p. 498.

Cited in dissenting opinion, S. P. Co. v. Prosser, 122 Cal. 420, discussing rule before code provisions; Newhall v. Hatch, 134 Cal. 275, as to effect with reference to third parties dealing with the land as that of the mortgagor; Wilson v. Pickering, 28 Mont. 440, maker of note secured by mortgage who renews note has burden of proving that it was intention of parties that renewal should extend mortgage; Raymond v. Bales, 26 Wash. 499, partial payment by mortgagor on mortgage indebtedness does not extend limitations as against judgment creditor of mortgagor who has bought in mortgaged premises at execution sale; George v. Butler, 26 Wash. 463, absence of mortgagor from state will not suspend limitations as to mortgage where he has parted with interest in mortgaged premises to resident; Barber v. Babel, 36 Cal. 20 (cited in Jenkins v. Simmons, 37 Kan. 508), as to renewal of mortgage note by husband alone after declaration of homestead; Wood v. Goodfellow, 43 Cal. 188, as to waiver of statute by absence from state; Jordan v. Sayre, 24 Fla. 11, 12, discussing running of statute of limitations; and in Ballard v. Williams, 95 N. C. 130, as to stipulations for higher interest or larger debt, applying rule to vendor and vendee where part of price unpaid.

After-acquired Title passes under mortgage by conveyance in fee, p. 500.

Cited to same effect in Sherman v. McCarthy, 57 Cal. 515, as to title acquired by United States patent to Mexican grant; Barnard v. Wilson, 74 Cal. 517, as to tax title where mortgagor allowed property to be sold and bought in at sale. Cited also in note to Frink v. Darst, 58 Am. Dec. 588, and to Clark v. Baker, 76 Am. Dec. 458, on general subject.

25 Cal. 502-504. **CURIAC v. ABADIE.** S. C. Curia v. Packard, 29 Cal. 194.

Legal Tender Act is constitutional, p. 503.

Cited to same effect in *Belloc v. Davis*, 38 Cal. 254, where followed through stare decisis, but holding Specific Contract Act operative by reason of subsequent promise. Cited also in *Howe v. Nickerson*, 14 Allen (Mass.), 405, denying specific performance of award to pay in gold.

Tender Before Suit, if originally sufficient, and continued good and pleaded, entitles plaintiff to judgment for amount tendered, and defendant to judgment for costs, p. 503.

Cited to same effect in dissenting opinion in *Orth v. Zion's etc. Inst.*, 5 Utah, 425, discussing acceptance of offer to allow judgment.

Appeal.—Judgment made payable in wrong kind of money may be corrected on appeal without remand for new trial, p. 504.

Cited to same effect in *Betts v. Butler*, 1 Idaho, 189.

25 Cal. 504-511. (**YANKEE JIM'S**) **UNION WATER CO. v. CRARY.** 85 Am. Dec. 145.

Doctrine of Adverse Possession applies to water rights on public lands, though first appropriated by another, p. 508.

Cited to same effect in *American Co. v. Bradford*, 27 Cal. 366, holding further as to pleading and proof of such possession; *Davis v. Gale*, 32 Cal. 35, 91 Am. Dec. 559, holding possession not affected by allowing part of water to be used by others; *Cox v. Clough*, 70 Cal. 347, and *Gallagher v. Montecito etc. Co.*, 101 Cal. 244, holding adverse possession shown under facts; *Alta etc. Co. v. Hancock*, 85 Cal. 226, 20 Am. St. Rep. 221, *Faulkner v. Rondoni*, 104 Cal. 146, and *Union etc. Co. v. Dangberg*, 81 Fed. Rep. 92, holding contra; *New Mercer etc. Co. v. Armstrong*, 21 Colo. 365, and *Hewitt v. Story*, 64 Fed. Rep. 516, applying rule to abandonment by original appropriator and legal appropriation by others; and on question of abandonment in *Wimer v. Simmons*, 27 Oreg. 7, 50 Am. St. Rep. 689 (and see note 700), holding, however, no abandonment shown. Distinguished in *Woolman v. Garringer*, 1 Mont. 544, as to change of use or direction of water, where no adverse possession claimed or pleaded. Cited also in *Junkans v. Bergin*, 67 Cal. 269, as to right of subsequent appropriator to divert waters not used by prior appropriator; and in *Lux v. Haggin*, 69 Cal. 358, as to rights of prior appropriators of waters upon public lands. Cited also in note to *Isaacs v. Barber*, 45 Am. St. Rep. 780, as to appropriation of water on public lands.

Plaintiff's Evidence in rebuttal cannot include such as should have been proved in original case, p. 509.

Cited to same effect in *Young v. Brady*, 94 Cal. 130, where court not asked to allow plaintiff to reopen case. Distinguished in *Kerr v. Lunsford*, 31 W. Va. 667, holding such evidence admissible for proponents in will contest, as not being abuse of discretion.

Error in admitting evidence is cured by instruction to jury to disregard it, p. 510.

Distinguished in *Juergens v. Thorn*, 39 Minn. 460, holding error not cured where evidence objected to and no want of injury shown.

25 Cal. 511-515. ESTATE OF BOYD.

Transcript on Appeal should not contain unnecessary matter, p. 512.

Cited to same effect in *Harper v. Minor*, 27 Cal. 112, criticising statement on appeal.

Statement on Appeal must show grounds of appeal, p. 514.

Cited in *Treadwell v. Davis*, 34 Cal. 605, 94 Am. Dec. 772, on point that such statement is proper and most expeditious method for review of questions of law.

25 Cal. 515-520. TEVIS v. ELLIS.

Writ of Restitution will not be issued against strangers to judgment or persons who did not enter under defendant pending suit, p. 518.

Cited to same effect in *Watson v. Dowling*, 26 Cal. 127, as to tenants in common; *Le Roy v. Rogers*, 30 Cal. 234, 89 Am. Dec. 90, as to one neither party nor privy; *Long v. Neville*, 36 Cal. 459, 460, 95 Am. Dec. 202, on point that sheriff may demand indemnity before dispossessing stranger to judgment; *Ford v. Doyle*, 37 Cal. 348, sustaining refusal to direct execution of writ to persons in possession when suit brought, but not made parties thereto; and in *Irving v. Cunningham*, 77 Cal. 54, as to persons in adverse possession to all parties to suit when entry was not under or in collusion with defendant. Distinguished in *Huerstal v. Muir*, 64 Cal. 451, granting writ against defendant's wife, whose possession presumed to be in privy with husband. Cited also in note to *Howard v. Kennedy's Exrs.*, 39 Am. Dec. 313, and to *Lee Chuck v. Quan etc. Co.*, 15 Am. St. Rep. 61, on general subject.

Injunction will not lie against writ of restitution when plaintiff, owner of land, is stranger to judgment, and has adequate, etc., remedy at law, p. 518.

Cited to same effect in *Le Roy v. Rogers*, 30 Cal. 234, 89 Am. Dec. 90, where neither party nor privy; *Nevada County etc. Co. v. Kidd*, 37 Cal. 307, denying injunction to restrain diversion of water when plaintiff is in no condition to use it; and in *Archbishop v. Shipman*, 69 Cal. 593, ruling similarly as to enjoining execution sale which would not cloud plaintiff's title. Distinguished in *Williamson v. Russell*, 18 W.

Va. 622, granting injunction against writ of *habere facias possessionem*, where relief at law not adequate. Cited, also, in note to *Jerome v. Ross*, 11 Am. Dec. 506, as to plaintiff's necessary proof in injunction suit.

25 Cal. 520-531. PEOPLE v. LOVE.

Misjoinder.—Parties severally liable on bond need not all be joined in suit thereon, p. 526.

Cited to same effect in *People v. Evans*, 29 Cal. 436, sustaining judgment against some defendants where no service made on others or action dismissed as to others; *Thomas v. Anderson*, 58 Cal. 100, holding, however, that suit cannot be brought in superior court where no defendant is liable for more than three hundred dollars; *Hurlbutt v. Saw Co.*, 93 Cal. 58, as to action on joint and several contract, where severally liable; and in *Heppe v. Johnson*, 73 Cal. 270, as to like action on official bond; *Kurtz v. Forquer*, 94 Cal. 93, holding sureties on joint and several bond liable, though bond not signed by principals; *Irwine v. Wood*, 7 Colo. 479, as to several contract to furnish provisions; *State v. Roberts*, 40 Ind. 466, as to action on official bond, holding further as to form of judgment (see 3d Syllabus *infra*); and in *Decker v. Trilbing*, 24 Wis. 613, as to action on joint and several note, holding further as to form of judgment.

Ex-officio Officer is not merged with original office, although sureties on original bond as latter, are liable for acts as former, p. 528.

Cited in *Lathrop v. Brittain*, 30 Cal. 684, on point that under-sheriff cannot act as *ex-officio* under tax collector; *People v. Ross*, 38 Cal. 77, on point that unless authorized by statute, official bond as sheriff does not cover acts as *ex-officio* sheriff; to same effect in *Territory v. Ritter*, 1 Wyo. 333 (cited in *Ex parte Bergman*, 3 Wyo. 405), as to probate judge when *ex-officio* treasurer; *State v. McDonald*, 4 Idaho, 472, recital in sheriff's bond that principal was elected when it was given in pursuance of appointment of governor is not sufficient to release sureties; distinguished on this point in *Redwood City v. Grimmenstein*, 68 Cal. 516, holding sureties on marshal's bond liable for acts as *ex-officio* tax collector, under statute; *State v. Laughton*, 19 Nev. 206, on point that main office does not become vacant for failure to file bond required in *ex-officio* office.

Judgment on joint and several official bond where sureties sign for different sums, may be separate as to each surety, with provision that total recovery shall not exceed amount due on bond, head note, p. 531.

Cited to same effect in *People v. Rooney*, 29 Cal. 643, ordering judgment modified accordingly; and in *Heppe v. Johnson*, 73 Cal. 270, making same order; *Butte v. Cohen*, 9 Mont. 442, holding modification proper, so that judgment against each surety should not exceed respective liability; and in *Custer County v. Albien*, 7 S. Dak. 487, sustaining judg-

ment on several bond for full amount as against principal and for respective liability as against each surety.

25 Cal. 531-535. PEOPLE v. GARCIA.

Charge of Court in writing will be presumed unless oral charge affirmatively appears in record, p. 535.

Cited to same effect in *People v. Shuler*, 28 Cal. 496; and in dissenting opinion in *Territory v. Duffield*, 1 Ariz. Ter. 74, holding oral charge erroneous, although subsequently reduced to writing and filed.

Indictment in language of statute is sufficient where circumstances of act are alleged, p. 533.

Cited to same effect in *People v. English*, 30 Cal. 216, as to assault with intent to kill; *People v. Shaber*, 32 Cal. 38, as to breaking and entering; *People v. Burke*, 34 Cal. 663, as to rape; *People v. Dalton*, 58 Cal. 228, as to violating sepulture; and in *State v. Noland*, 111 Mo. 487, as to embezzlement by state treasurer.

25 Cal. 535-538. BURSON v. COWLES.

Street Railroads—Overcharge.—Appeal lies to county court from judgment of justice in action for penalty, p. 537.

Explained in *Reed v. Omnibus etc. Co.*, 33 Cal. 219, holding constitutional the grant of jurisdiction in such case to justice's court.

25 Cal. 538-545. MITCHELL v. HOCKETT. 85 Am. Dec. 151.

Giving of note is not payment unless by special agreement, p. 542.

Cited to same effect in *Comptoir v. Dresbach*, 78 Cal. 20, as to payment by check, holding no such agreement shown; and in *Herman v. Williams*, 36 Fla. 151, holding, however, acceptance of note effects extension of time of payment of debt and releases surety. Cited, also, in note on general subject to *Hanold v. Kays*, 8 Am. St. Rep. 841; and to *Kilpatrick v. Kansas City etc. Co.*, 41 Am. St. Rep. 761, as to waiver of mechanic's liens thereby.

Sheriff's Return on execution is inadmissible to show satisfaction of judgment by acceptance of notes, p. 542.

Cited in *Hihn v. Peck*, 30 Cal. 288, on point that sale may be shown by recital in deed, when official duty was to make such recital; and in *Barr v. Combs*, 29 Oreg. 402, holding return inadmissible to prove agreement between parties on execution, there being no official act or duty.

Judicial Sale.—Caveat emptor applies to execution sale of judgment, whether purchaser has notice or not, p. 544.

Cited to same effect in *Curtin v. Kowalsky*, 145 Cal. 435, assignment of judgment need not be filed or notice thereof given to others who might be about to take second assignment; *Southard v. McBrown*, 63 Cal. 547,

where assignment of judgment not filed, and no notice thereof given; *Harris v. Harris*, 64 Cal. 110, applying rule to purchase of personalty from one who bought from insane person; and in *Cox v. Palmer*, 60 Miss. 798, as to purchase from assignee for creditors. Distinguished in *Western Bank v. Maverick Bank*, 90 Ga. 342, 35 Am. St. Rep. 212 (and see note, 215), as to assignee of decree of foreclosure, under local statute. Cited, also, in note to *Schoolfield v. Hirsh*, 42 Am. St. Rep. 454, as to rights of purchaser of judgment.

Assignment of Judgment need not be under seal, p. 544.

Cited to same effect in *Stoddard v. Benton*, 6 Colo. 513, as to pleading assignment; notes to *Bank v. Loomis*, 62 Am. St. Rep. 577; *Chilstrom v. Eppinger*, 78 Am. St. Rep. 51; *Duncan v. Bloomstock*, 13 Am. Dec. 731.

25 Cal. 545-555. LAY v. NEVILLE.

Pleading.—Denial in conjunctive that seizure was wrongful and unlawful is argumentative and admission of fact of seizure, p. 549.

Cited to same effect in *Salmon v. Olds*, 9 Oreg. 489, as to conversion by sheriff.

Estoppel.—Sheriff's sale without authority passes title if execution debtor is present and does not object thereto, p. 550.

Cited to same effect in *Turner v. Watkins*, 31 Ark. 450, where defendant waived advertisement and sought to redeem after sale. Distinguished in *Black v. Vermont etc. Co.*, 137 Cal. 685, holding owner not estopped under facts stated.

Fraudulent Conveyance.—Questions of delivery and possession depend on circumstances of particular case, p. 552.

Cited in *Ruggles v. Cannedy*, 127 Cal. 295, quoting *Woods v. Bugby*, 28 Cal. 472; *Israel v. Day*, 17 Colo. App. 210, holding erroneous an instruction in contest of title of personalty, relative to change of possession, as against creditors of seller, which failed to require sale to be accompanied by immediate delivery; *Woods v. Bugby*, 29 Cal. 472, holding sale of kiln of bricks fraudulent for want of change of possession; and in *Bassinger v. Spangler*, 9 Colo. 189, ruling similarly as to sale of household furniture; and in *Shauer v. Alterton*, 151 U. S. 624, as to sale of stock of merchandise in storehouse; and, ruling aliter, in *Williams v. Leech*, 56 Cal. 334, as to sale of horses; *O'Gara v. Lowry*, 5 Mont. 433, as to sale of horse and wagon; *Tognini v. Kyle*, 17 Nev. 213, 45 Am. Rep. 443, as to sale of charcoal in pits. Cited, also, in note to *Claffin v. Rosenberg*, 97 Am. Dec. 346, as to sufficiency of delivery.

General Citations.—*Walters v. Ratliff*, 10 Okla. 273; *Ctate v. Chosen Freeholders*, 43 N. J. L. 395.

25 Cal. 555-563. HERRON v. HUGHES.

Conspiracy is not actionable unless damage suffered from act done pursuant thereto, p. 558.

Cited in *Davitt v. American Bakers' Union*, 124 Cal. 101, holding no cause of action stated in complaint; *More v. Finger*, 128 Cal. 319, holding averment of conspiracy unnecessary in action against several defendants uniting or co-operating in damage alleged; *Dowdell v. Carpey*, 129 Cal. 170, as to malicious prosecution alleged to have been committed pursuant to conspiracy; *Taylor v. Bidwell*, 65 Cal. 490, as to conspiracy for malicious prosecution; *Severinghaus v. Beckman*, 9 Ind. App. 391, holding conspiracy to commit tort not gravamen of action when it is not by law a crime; *Hamilton v. Smith*, 39 Mich. 231, holding averment of conspiracy surplusage in action for malicious prosecution; and in *Continental etc. Co. v. Board*, 67 Fed. Rep. 322, denying injunction to prevent combination of fire underwriters when not illegal conspiracy nor accomplishing purposes by unlawful means.

Wrongful Sale on execution creates no cause of action, when void and passing no title, p. 562.

Cited to same effect in *Minter v. Swain*, 52 Miss. 176.

25 Cal. 564-583. CARPENTIER v. ATHERTON.

"Specific Contract" Act is not unconstitutional as opposed to Legal Tender Act, p. 568.

Cited to same effect in *Galland v. Lewis*, 26 Cal. 48, holding, further, act operative as to note payable in coin made before passage where suit brought thereafter; *Wallace v. Eldredge*, 27 Cal. 499, holding judgments included by act; *Lane v. Gluckauf*, 28 Cal. 292, 87 Am. Dec. 122, ruling similarly as to optional contract to pay in gold or in sum equal to difference between gold and currency. Denied in *Haas v. Misner*, 1 Idaho, 183, holding act unconstitutional providing for payment of taxes in gold; *Milliken v. Sloat*, 1 Nev. 584, as to local Specific Contract Act, but this case overruled in *Linn v. Minor*, 4 Nev. 462, citing main case at 465, 468. Cited, also, in *Carpentier v. Small*, 35 Cal. 357, on point that judgment may be made for currency valuation where both valuations found; note to *Adams v. Howe*, 7 Am. Dec. 223, among its citations as to constitutionality of statutes; and to *Lane v. Gluckauf*, 87 Am. Dec. 127, on general subject. Distinguished in *Howe v. Nickerson*, 14 Allen (Mass.), 405, denying specific performance of award to pay in gold.

Money as Legal Tender.—Evidence is inadmissible of difference in value of two kinds of money made legal tender, p. 575.

Cited to same effect in *Poett v. Sterns*, 31 Cal. 80, reversing judgment of foreclosure directing sale for money generally when note as changed provided gold payment.

25 Cal. 584-585. BODLEY v. FERGUSON. S. C. 30 Cal. 511.

Record on Appeal must contain papers used in court below on hearing, p. 584.

Cited to same effect in *People v. Center*, 61 Cal. 195, dismissing appeal from order subsequent to judgment when presented on record on appeal from judgment, this case being modified, however, in *Sharon v. Sharon*, 68 Cal. 338.

25 Cal. 585-587. IN RE ESTATE OF CARR.

Revocation of Letters can be had only by persons named in statute, p. 587.

Cited to same effect in *Estate of Shiels*, 120 Cal. 349, denying right to nominee of wife, under code.

Administration.—Nominee can be appointed only in case of vacancy in administration, p. 587.

Cited in *Estate of Healy*, 122 Cal. 164, holding section 1379, Code of Civil Procedure, to have same construction as section 66, Practice Act, construed in main decision.

25 Cal. 587-591. FOX v. FOX.

Divorce.—Proof of marriage is not necessary where alleged and not denied, p. 589.

Cited to same effect in *Williams v. Williams*, 63 Wis. 71, 53 Am. Rep. 261, as to default judgment; *Clopton v. Clopton*, 11 N. Dak. 217, when, in divorce complaint, fact of marriage was alleged, admitted in answer and testified to by plaintiff, corroboration unnecessary. Distinguished in *Bennett v. Bennett*, 28 Cal. 602, as to proof of residence.

Finding is Unnecessary as to fact not in issue, p. 590.

Cited in *In re Cook*, 77 Cal. 230, 11 Am. St. Rep. 274, on point that findings unnecessary in case of default; *McCormick v. Largely*, 1 Mont. 162, on point that reference or accounting unnecessary in suit to recover share of profits, when amount of profits alleged and not denied; and in *Anderson v. Alseeth*, 8 S. Dak. 243, as to material allegations of complaint admitted in answer.

25 Cal. 591-593. KIERSKI v. MATHEWS.

Legal Tender Act is constitutional, p. 592.

Cited to same effect in *Belloc v. Davis*, 38 Cal. 254, as to note and mortgage, following main case on principle of *stare decisis*.

25 Cal. 593-596. CLARKE v. HUBER.

Adverse Possession does not create vested title when statute of limi-

tations amended pending holding, until expiration of period fixed by new act, p. 596.

Cited to same effect in dissenting opinion in *C. P. etc. Co. v. Shackelford*, 63 Cal. 268, main opinion holding amendment not retroactive; and in *Huffman v. Hall*, 102 Cal. 31, construing amendment to Political Code, section 2619, as to creation of highway by user.

General Denial.—Equitable estoppel cannot be pleaded under, p. 597.

Cited to same effect in *Davis v. Davis*, 26 Cal. 39, 85 Am. Dec. 165; *Carpy v. Dowdell*, 115 Cal. 687; and *Parliman v. Young*, 2 Dak. 184, holding, further, objection to pleading waived by failure to object to evidence offered thereunder; *McKeen v. Naughton*, 88 Cal. 467, as to estoppel to deny jurisdiction of court; and in *De Votre v. McGerry*, 15 Colo. 472, 22 Am. St. Rep. 430, as to estoppel in regard to title to property; *Muldoon v. Brown*, 21 Utah, 126, applying rule to proof of fraud; note to *Tyler v. Hall*, 27 Am. St. Rep. 344, on general subject.

Rulings upon Admission of Evidence may be justified by respondent upon any ground on appeal, whether specially urged at trial or not; *aliter* as to appellant's objections, p. 598.

Cited to same effect in *Davey v. S. P. Co.*, 116 Cal. 330, 331, holding reasons for ruling immaterial; *Frank v. Pennie*, 117 Cal. 256, as to appellant's objections; and in *Fisk v. Cuthbert*, 2 Mont. 599, applying last principle to argument on appeal inconsistent with answer below.

General Citation.—*Butte etc. Min. Co. v. Montana etc. Co.*, 25 Mont. 45.

25 Cal. 598-601. **HAGAR v. MEAD.**

Appeal Dismissed for failure to file transcript will not be restored unless for good cause shown, p. 600.

Cited to same effect in *Dorland v. McGlynn*, 45 Cal. 18, denying restoration where affidavit does not show substantial errors below; and in *Lightle v. Ivancovich*, 10 Nev. 42, 43, ruling similarly where no reasonable diligence shown; *Jacobs v. Shenon*, 4 Idaho, 343, on motion to reinstate cause upon calendar once dismissed for failure to file and serve transcript and briefs in time, affidavits tending to excuse laches are too late; *Corinne etc. Co. v. Johnston*, 5 Utah, 149, dismissing appeal for failure to file transcript in time.

25 Cal. 601-604. **PEOPLE v. EASTMAN.**

Judgment for Debt and foreclosure of securing mortgage is taxable in county of creditor's residence, p. 603.

Cited in *Germania etc. Co. v. San Francisco*, 128 Cal. 593, and *Estate of Fair*, 128 Cal. 613, on point that mortgage securing bond issue evidences no debt until the bonds are put into circulation; *Comptoir v. Board*, 52 La. Ann. 1329, noted under *Falkner v. Hunt*, 16 Cal. 167;

Ruckgaber v. Moore, 104 Fed. 950, quoting *In re State Tax*, 82 U. S. 300; note to *Buck v. Miller*, 62 Am. St. Rep. 457, 458, on general subject; *People v. Whartenby*, 38 Cal. 467, and *Holland v. Board*, 15 Mont. 462, as to debt secured by mortgage, not foreclosed; *San Francisco v. Lux*, 64 Cal. 484, holding money of estate of decedent taxable in county of last residence, though deposited elsewhere; *Commissioners v. Cutter*, 3 Colo. 351, holding note to California creditor not taxable in Colorado, thought secured by trust deed of property there; and on same point conversely in *Darcy v. Darcy*, 51 N. J. L. 143; *Kingman Co. v. Leonard*, 57 Kan. 536, 57 Am. St. Rep. 350, as to judgment recovered in Kansas courts in favor of nonresident; *Dykes v. Mortgage Co.*, 2 Kan. App. 226, upon facts similar to those of main case; *Klein v. French*, 57 Miss. 670, discussing respective rights of principal and ancillary administrator over debts due decedent; *Street Railroad Co. v. Morrow*, 87 Tenn. 437, holding unconstitutional an act compelling corporations to reserve from dividends due bondholders, amount of taxes imposed on such bonds, though secured by mortgage of local property; *State Tax on Foreign-held Bonds*, 15 Wall. 324, on similar facts; *San Francisco v. Mackey*, 10 Sawy. 440, 22 Fed. Rep. 608, as to solvent credits of local corporation due nonresidents, when not secured by mortgage or trust deed; and in *Jack v. Walker*, 79 Fed. Rep. 142, as to debt due nonresident, though secured by local mortgage and in hands of local agent (but see as to last point *Finch v. York County*, 19 Neb. 52, 56 Am. Rep. 742, distinguishing main case). Distinguished, also, in *People v. Home etc. Co.*, 20 Cal. 546 (cited in *San Francisco v. Lux*, 64 Cal. 483), holding state bonds owned and deposited locally by foreign insurance company taxable locally; and *City v. Lewis*, 109 Mich. 160, holding credits vested in local trustees taxable locally, although held in trust for nonresidents. Cited, also, in note to *New Albany v. Meekin*, 56 Am. Dec. 529, as to taxation of mortgage debts.

25 Cal. 604-619. GREELY v. TOWNSEND.

Federal Courts cannot be regulated by state, either as to jurisdiction or manner of its exercise, p. 613.

Cited to same effect in *Lincoln etc. Co. v. District Court*, 7 N. Mex. 505, holding unconstitutional act for removal of causes from federal to territorial court.

Pueblo Lands of San Francisco cannot be alienated in any manner other than that prescribed by legislature, p. 616.

Cited to same effect in *San Francisco v. Canavan*, 42 Cal. 556, sustaining act for sale of city hall lots; and see, also, *Carleton v. Townsend*, 28 Cal. 224.

25 Cal. 619-631. SNEED v. OSBORN. S. C. Sneed v. Woodward, 30 Cal. 433.

Boundary Line agreed upon by adjoining owners binds both when

acquiesced in for at least period established for adverse possession, p. 625.

Cited in *Western Union Oil Co. v. Newlove*, 145 Cal. 774; *Nathan v. Dierssen*, 134 Cal. 285, but holding rule inapplicable to parol agreement to transfer without consideration on strip of land not in dispute; *Dierssen v. Nelson*, 138 Cal. 398, 400, holding possession thereafter not held under parol transfer; *Columbet v. Pacheco*, 48 Cal. 397, where division fence established sixteen years; *Biggins v. Champlin*, 59 Cal. 117, where line agreed upon between plaintiff's grantor and defendant acquiesced in for eighteen years; *Cooper v. Vierra*, 59 Cal. 283, where established by plaintiff and defendant's grantor and acquiesced in for twelve years; *Johnson v. Brown*, 63 Cal. 393, where acquiesced in by parties to action for eight years; *White v. Spreckels*, 75 Cal. 616, as to like acquiescence for ten years; *Hughes v. Wheeler*, 76 Cal. 234, holding estoppel in pais established by facts; *Burris v. Fitch*, 76 Cal. 398, where acquiescence for sixteen years by parties now complaining, although no avowed consent to establishment of line shown; *O'Donnell v. Penney*, 17 R. L. 166, 167, upon similar facts, where acquiescence by grantors of both parties for twenty-five years; *Gwynn v. Schwartz*, 32 W. Va. 500, as to like acquiescence for fourteen years; and in *Brown v. Leete*, 6 Sawy. 338, 2 Fed. Rep. 446, as to acquiescence by plaintiff's grantor for six years, coupled with acts in pais. Distinguished in *Irvine v. Adler*, 44 Cal. 562, where line was intended to be merely temporary; and in *Quinn v. Windmiller*, 67 Cal. 464, on similar facts. Cited, also, in *Truett v. Adams*, 66 Cal. 223, holding agreement as to division line admissible as to construction of deed between parties; and in note to *Smith v. Dudley*, 13 Am. Dec. 224, as to parol agreements for fixing boundaries.

Adverse Possession will create title although party dispossessed acted under ignorance or mistake as to his rights, p. 626.

Cited to same effect in *McCormick v. Silsby*, 82 Cal. 76, where dis-possession of homestead property made on request of disseisor and without objection, through ignorance of both as to title.

General Objection to Evidence is bad, if evidence admissible for any purpose, p. 627.

Cited to same effect in *Rush v. French*, 1 Ariz. Ter. 126, where no specific objection offered; *City v. Albertose*, 8 Mont. 504, as to general objection of incompetency; *State v. Soule*, 14 Nev. 455, holding general objection good where evidence inadmissible for any purpose; and in *Kent v. State*, 42 Ohio St. 430, holding admission under general objection not reversible error unless no material part of evidence admissible for any purpose.

Rule of "Law of Case" does not apply to facts found by supreme court, p. 628.

Cited to same effect in *People v. Hamilton*, 103 Cal. 496, applying rule

to new points of law raised on retrial; *Wallace v. Sisson*, 114 Cal. 43, as to insufficiency of evidence to support decision.

General Citation.—*Miller v. Mills County*, 111 Iowa, 659.

25 Cal. 631-634. ATHEARN v. POPPE.

State School Land Warrants cannot be located on public land occupied by pre-emptioners, p. 634.

Cited in note to *Terry v. Megerle*, 85 Am. Dec. 93, on location of state warrants.

25 Cal. 635-653. PEOPLE v. COON.

Mandamus will lie to compel supervisors to carry out compromise as to subscription to railroad bonds, p. 644.

Cited to same effect in *People v. San Francisco*, 36 Cal. 604, awarding writ to compel street work, although some matters of detail left to discretion of board; *People v. Board*, 27 Cal. 674, 678, construing acts referred to in main opinion; *Talcott v. Pine Grove*, 1 Flipp. 136, Fed. Cas. No. 13,735, noted under *Pattison v. Board*, 13 Cal. 175; *Leavenworth Co. v. Miller*, 7 Kan. 506, 12 Am. Rep. 440, and *Harcourt v. Good*, 39 Tex. 472, discussing constitutionality of "Railroad Aid" Acts; and in *Davidson Co. v. Olwill*, 4 Lea (Tenn.), 35, as to power of municipality to compromise claims against it.

Members of Municipal Corporation have no vested rights in its property distinct from those of corporation itself, p. 648.

Cited to same effect in *Wells v. Cole*, 27 Ark. 612, discussing deviation of funds raised by tax for specific purpose.

Powers of Municipal Corporation are derived entirely from legislative enactment, p. 649.

Cited to same effect in *San Francisco v. Canavan*, 42 Cal. 557, as to tenure of pueblo lands held in trust; and in *State v. Rosenstock*, 11 Nev. 140, as to act making certain county officers ex officio officers of city also. Distinguished in *New Orleans etc. Co. v. New Orleans*, 30 La. Ann. (pt. 2) 1376, discussing tax for drainage districts and holding alteration of charter by legislature invalid when prejudicial to vested rights of others.

Rehearing in Supreme Court of matter within original jurisdiction can be had only on motion for new trial, p. 652.

Distinguished in *In re Philbrook*, 108 Cal. 15, holding motion not proper as to disbarment proceedings, under new constitution; and denied in *People v. George*, 2 Idaho, 849, in mandamus proceedings, holding new trials confined to questions of fact.

25 Cal. 653-657. GREGORY v. HAWORTH.

Pleadings and proofs must agree, p. 656.

Cited to same effect in *Miller v. Halleck*, 9 Colo. 554, denying relief to plaintiff other than as alleged; and in *Bender v. Bender*, 14 Oreg. 355, 3 Am. St. Rep. 737, as to decree in equity not sustained by theory alleged in bill.

Assignor in fraud of creditors cannot recover property from assignee, p. 656.

Cited to same effect in *Davis v. Mitchell*, 34 Cal. 90, denying right of maker of note given in fraud of payee's creditors, to show such fraud as against purchaser thereof on execution against payee. Distinguished in *Vitoreno v. Corea*, 92 Cal. 72 (cited from argument of counsel), holding parties not in pari delicto.

Assignment taken with knowledge of fraud is invalid as to assignor's creditors, p. 657.

Cited to same effect in *Keeling v. Hoyt*, 81 Neb. 456, holding voluntary unrecorded deed valid as to subsequent mortgagees with notice.



Stanford Law Library



3 6105 063 374 982

